REPORT OF THE

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

Proposed Rule Amendments

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INTRODUCTORY STATEMENT

The Professional Responsibility Rules Committee (PRRC) proposes several rule amendments, some of a general "housekeeping" nature and others that are more substantive. This report explains each of the proposed amendments followed by the proposed rules in amended form. Double underscoring indicates changes to the captions of rules. Single underscored areas in the bodies of the rules reflect new language. Brackets indicate deletions.

Comment to Proposed R. 1:11-1 Changes

Rule 1:11-1 addresses situations in which an attorney who is representing a client becomes unable to practice law as a result of death, disbarment, suspension, resignation, and other situations. If such a situation occurs, the rule currently permits any party to a pending action to notify the attorney's client that he or she must obtain new counsel. If the client fails to do so within 20 days of the notice, the action may proceed. The rule currently does not address attorneys placed on disability-inactive status.

The PRRC received a request to review this rule from an attorney representing a client whose litigation was dismissed with prejudice after his then-counsel became disabled. The attorney recommended an automatic appointment of attorney-trustees in all disability-inactive cases and an automatic stay of litigation for 120 days. The PRRC disagreed that an attorney-trustee should be appointed automatically in every such case, but it agreed that a stay of pending actions is appropriate in all situations in which a client is deprived of counsel as a result of death, disbarment, suspension, resignation, or disability or because he or she ceased to be authorized to practice. A majority of the PRRC members recommended that the Court adopt a rule amendment automatically staying litigation in those situations for an indefinite period. Recognizing that 120 days might not be necessary, the PRRC determined that the automatic stay would stay in place "until further order of the appropriate court on application by any interested party with appropriate notice to all other parties." A minority of the PRRC members agreed in principle, but would have addressed this issue by recommending that the Court advise judges through an Administrative Directive of the need to exercise their discretion to stay litigation to avoid harm to clients.

The PRRC's proposed amendment also adds disability-inactive status to the situations triggering the rule.

1:11-1. Death, Removal or Disbarment of Attorney

In the event an attorney dies, or ceases to be authorized by R. 1:21-1 to practice in this State, or is disbarred, suspended, placed on disability-inactive status, or resigns, [any party to a pending action may notify the client in the manner prescribed by R. 1:5-2 to appoint another attorney and, if the client fails to do so within 20 days after the notice, any party may proceed with the action.] there shall be an automatic stay of all pending actions until further order of the appropriate court on application by any interested party with appropriate notice to all other parties. A new attorney retained by the client shall file an appearance promptly.

Note: Source-R.R. 1:12-7; amended July 13, 1994 to be effective September 1, 1994; amended , 2003 to be effective , 2004.

Rule 1:20, Discipline of Members of the Bar

Rule 1:20 and its parts address the disciplinary system for members of the Bar. In an attempt to clarify the various 1:20 rules, the OAE proposed and the PRRC approved certain amendments that include revisions to terminology and adding definitions for the Disciplinary Review Board, Director, Ethics Committees, Fee Committees, Disciplinary Oversight Committee, and Respondent.

The following are the OAE's explanations of these amendments.

General Comments Applicable To Proposed Changes In All Rules

In all rules, the following changes have been made for uniformity:

- "Ethical misconduct" and "misconduct" are changed to "unethical conduct;"
- "Disability Inactive" status is changed to "Disability-Inactive" status; and
- The number's "ten" and below are spelled out, while numbers over ten are shown as numbers.

Comments to Proposed Glossary Changes

The glossary sentences defining the terms "Complaint," "Discipline By Consent," "Ethics Counsel", "Grievance," "Minor Misconduct," "Misconduct" and "Presenter" are reworded slightly for clarity.

The rule reference following "Ethics Counsel" is amended in light of the change deleting this term in R. 1:20-4(g)(1).

Definitions for the terms "Board or Disciplinary Review Board," "Director," "Disciplinary Oversight Committee," "Ethics Committee(s)," "Fee Committee(s)," and "Respondent" are added.

Throughout the Glossary, the term "misconduct" is reworded as "unethical conduct" and minor punctuation errors are corrected.

RULE 1:20. DISCIPLINE OF MEMBERS OF THE BAR

Glossary of Attorney Discipline Terms

Agreement in Lieu of Discipline – the vehicle used to accomplish diversion of "minor" unethical conduct[misconduct] matters where an attorney admits "minor" unethical conduct[misconduct] has been committed and that attorney qualifies for diversionary treatment. See R. 1:20-3(i)(2)(B).

Board or Disciplinary Review Board – the intermediate appellate tribunal in disciplinary matters.

Complaint – the written document formally charging the respondent with specific violations of unethical [mis]conduct. A complaint is issued after completion of an investigation [which] if it meets the standard of R. 1:20-4(a).

Consent Matter –the appellate process before the Disciplinary Review Board and the Supreme Court by which the extent of discipline to be imposed as the result of discipline by consent is reviewed, without oral argument. See R. 1:20-15(g) and R. 1:20-16(e).

Director – the Director of the Office of Attorney Ethics who administers the Office of Attorney Ethics, Ethics Committees, Fee Committees, the Random Audit Program, the Annual Attorney Registration Statement and the Trust Overdraft Notification Program.

Disciplinary Oversight Committee – the Disciplinary Oversight Committee reviews the annual disciplinary system budget and makes recommendations to the Supreme Court concerning the disciplinary system.

Discipline by Consent – a procedure whereby a respondent may agree with an investigator, presenter or ethics counsel to admit facts constituting unethical [mis]conduct [in exchange for a] and recommend[ation for] specific discipline or a range of specific discipline, subject to review by the Disciplinary Review Board. See R. 1:20-10(b).

Diversion – a non-disciplinary treatment by consent for attorneys who admit they have committed "minor" unethical conduct [misconduct] and who otherwise qualify for diversionary treatment. Diversion is accomplished through an "Agreement In Lieu of Discipline". See R. 1:20-3(i)(2)(A) and (B).

Ethics Committee(s) – one or more district ethics committees throughout the state that screen, investigate, prosecute, and hear disciplinary and disability-inactive matters.

Ethics Counsel – [is] an attorney of the Office of Attorney Ethics. See R. 1:20-2(a) [4(g)(1)].

Fee Committee(s) – one or more district fee arbitration committees throughout the state that screen, hear and decide disputes by clients over legal fees.

Grievance – any allegation of unethical [mis]conduct made against an attorney. A grievance, if docketed, is assigned for investigation by the Director or by an Ethics Committee.

Minor Unethical Conduct [Misconduct] – [refers to those] minor types of unethical conduct[misconduct] which, if proved would not warrant discipline greater than an [public] admonition. Minor unethical conduct[misconduct] matters are eligible for diversionary treatment. R. 1:20-3(i)(2).

Presenter – [is] the [volunteer] attorney [member of a District Ethics Committee] who is appointed to prosecute a [formal] complaint. R. 1:20-4(g)(1).

Respondent – the attorney who is the subject of disciplinary charges.

Trier of Fact – refers to an ethics committee hearing panel or single member adjudicator or special ethics master.

Unethical Conduct[Misconduct] – all [ethical]ethics violations that would subject an attorney to discipline are referred to as unethical conduct[misconduct]. R. 1:20-3(i)(1).

Note: Adopted January 31, 1995 to be effective March 1, 1995; "Agreement In Lieu of Discipline," "Complaint," "Discipline By Consent," "Diversion," "Ethics Counsel," "Grievance," "Minor Misconduct," "Misconduct," and "Presenter" modified, and "Board or Disciplinary Review Board," "Director," "Disciplinary Oversight Committee," "Ethics Committee(s)," "Fee Committee(s)," and "Respondent" added , 2003 to be effective , 2004.

Comments to Proposed R. 1:20-1 Changes

This rule governs "Disciplinary Jurisdiction; Annual Fee and Registration." The PRRC agrees with the following proposed changes requested by the OAE, which include an increase in the late fee for filing annual registration statements. This fee increase was recommended to the Court by the Disciplinary Oversight Committee. As explained in a separate section of this report, however, the PRRC does not recommend a two-tiered fee structure suggested also by the Disciplinary Oversight Committee that included a lower fee for second-year attorneys.

The following are the OAE's Comments explaining the proposed amendments:

In the second paragraph of paragraph (a), the initial capitalization of the terms "District Ethics Committee" and "District Fee Arbitration Committee" is removed.

Paragraph (c) deals with the "Annual Attorney Registration Statement." It is amended to state that each lawyer must "pay" the annual fee and "file" the annual registration statement. This paragraph is also amended to conform the rule to the existing practice for handling the registration statement. The Office of Attorney Ethics has had responsibility for receiving and maintaining all Annual Attorney Registration Statement information for over 15 years. The information on the statement provides the primary database from which law firms are randomly selected for the Court's Random Audit Compliance Program, which is administered by the Office of Attorney Ethics. In practice, the Lawyers' Fund For Client Protection (the Fund) is the first entity that receives what is a three-part annual form. The Fund retains its Billing Card, together with any annual payment submitted by the attorney and then forwards to the Office of Attorney Ethics the Annual Attorney Registration Statement and also sends to the Administrative Office of the Courts the Pro Bono card. In practice, therefore, the reference to the "Administrative Office of the Courts" as the repository of the Annual Attorney Registration Statement is not accurate and is replaced by the "Office of Attorney Ethics."

Finally, paragraph (c) is amended to provide that changes of address be filed both with the Fund and with the Office of Attorney Ethics. Indeed, only the Office of Attorney Ethics collects the attorney's "home address," "bona fide law office address" and the "main law office telephone number," all of which are contained in the existing rule and are required by the rule to be updated within 30 days of any change. The Fund collects only the attorney's billing address. The proposed modification conforms to longstanding practice and makes this distinction clear.

Paragraph (d) deals with "Remedies for Failure to Pay or File." The first change conforms the title of the "Ineligible to Practice Law List" to that title as used in paragraph (b). Paragraph (d) is also amended to increase the late charge from $25 to $40 for attorneys who make their annual payment after the due date but before being declared ineligible to practice law by the Supreme Court. The current fee for all attorneys has been $25 for many years. This late fee represented 17% of the total amount of the 2002 annual billing amount of $170 for the largest category of attorneys admitted between three and 49 years. The 2003 annual billing amount is $190. Thus, an increase in the late fee to $40 for 2003 would represent just 21% of that total annual payment covering the largest group of attorneys who must make the annual fee payment. The increase is modest and serves the further purpose of acting as an incentive to make timely payment to avoid imposition of the late charge entirely.

The phrase “Oversight Committee” is added to paragraph (d) to clarify the entity with which the late fees are stated to be “shared equally.”

Finally, the PRRC has added to the OAE's recommendations a reference in paragraph (d) to the Court's recommended change to Rule 1:28-2 regarding the ramifications of failing to file the annual registration statement for five consecutive years.

1:20-1. Disciplinary Jurisdiction; Annual Fee and Registration

(a) Generally. Every attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3. Attorneys who have resigned without prejudice pursuant to Rule 1:20-22 shall also be subject to such jurisdiction in respect of conduct undertaken prior to the acceptance of the resignation by the Court.

To assist in the administration of its disciplinary function, the Supreme Court shall establish, in accordance with these Rules, [D]district [E]ethics [C]committees (hereinafter referred to as the Ethics Committees or the Ethics Committee), [D]district [F]fee [A]arbitration [C]committees (hereinafter referred to as the Fee Committee or the Fee Committees), a Disciplinary Review Board (hereinafter referred to as the Board or Disciplinary Review Board), a Disciplinary Oversight Committee (hereinafter referred to as the Oversight Committee), and an Office of Attorney Ethics and a Director thereof (hereinafter referred to as the Director).

(b) Annual Fee. [...no change].

(c) Annual Registration Statement. To facilitate the collection of the annual fee provided for in paragraph (b), every attorney admitted to practice law in this state shall, on or before February 1 of every year, or such other date as the Court may determine, pay [file] the annual fee and file a registration statement with the New Jersey Lawyers' Fund for Client Protection (hereinafter referred to as the Fund). The registration statement shall be in a form prescribed by the Administrative Director of the Courts with the approval of the Supreme Court. As part of the annual registration process, each attorney shall certify compliance with Rule 1:28A. All registration statements shall be filed by the Fund with the Office of Attorney Ethics [Administrative Office of the Courts], which may destroy the registration statements after one year. Each lawyer shall file with the Fund a supplemental statement of any change in the attorney's billing address and shall file with the Office of Attorney Ethics a supplemental statement of any change in the home and primary bona fide law office addresses, as well as the main law office telephone number previously submitted, either prior to such change or within thirty days thereafter. All lawyers first becoming subject to these Rules by admission to the practice of law before the courts of this state shall file the statement required by this rule prior to or within thirty days of the date of admission.

The information provided by attorneys on the registration statement shall be confidential except as otherwise directed by the Supreme Court.

(d) Remedies for Failure to Pay or File. Any lawyer who fails to complete and file the annual registration statement required by paragraph (c) on or before February 1 of each year or such other date as the Court may determine, or to make payment as required by paragraph (b) within 30 days after the due date each year shall be declared to be ineligible

to practice law and shall be included on the Ineligible To Practice Law List of the Supreme Court. An attorney who makes payment after February 1 of the billing year, or such other due date as the Court may establish, but before being placed on the Ineligible List, shall be subject to a late fee of $40 [25, which]. These late fees shall be shared equally [with] between the Oversight Committee and the Fund. An attorney shall be reinstated automatically to the practice of law without further order of the Court on filing with the Fund the completed annual registration statement for the current year together with the annual payment, the late fee, any arrears due from prior years, and full compliance with the Rule 1:28-2 requirements of the Fund. Pursuant to Rule 1:28-2(c), failure to complete and file the annual registration statement for five consecutive years shall result in the administrative revocation of the attorney's license to practice in this State.

Note: Adopted February 23, 1978, to be effective April 1, 1978. Any matter pending unheard before a County Ethics Committee as of April 1, 1978 shall be transferred, as appropriate, to the District Ethics Committee or the District Fee Arbitration Committee having jurisdiction. Any matter heard or partially heard by a County Ethics Committee by April 1, 1978 shall be concluded by such Ethics Committee and shall be reported on in accordance with these rules; amended July 16, 1981 to be effective September 14, 1981. Caption amended and first two paragraphs amended and redesignated as paragraph (a); new paragraphs (b), (c) and (d) adopted January 31, 1984 to be effective February 15, 1984; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended September 15, 1992, to be effective January 1, 1993; caption added to all paragraphs and paragraphs (a), (b), (c), and (d) amended February 8, 1993 to be effective immediately; paragraphs (a), (b) and (c) amended January 31, 1995, to be effective March 1, 1995; paragraph (a) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (c) and (d) amended _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-2 Changes

Rule 1:20-2 establishes the Office of Attorney Ethics. The OAE proposes minor changes to the rule to codify the existing discretionary authority of the Director. The PRRC agrees with the OAE's recommendations.

The following are the OAE's Comments explaining the proposed amendments:

Subparagraph (b)(1)(E) includes a sentence that entitles the Director to exercise investigative and prosecutorial authority. That sentence has been deleted from this provision and reinserted as a separate, indented, but unnumbered subparagraph at the end of paragraph (b). The reason for the change is that the provisions of this sentence actually relate to all grants of authority given to the Director under paragraph (b) and not just to (1)(E) or (1)(A) to (E). Therefore, it should be relocated at the end of the several specific grants of authority.

New subparagraph (b)(2) codifies the longstanding right and discretion of the Director to investigate not only specific grievances filed, but also any information coming to attention that warrants review. This broad investigative authority can be traced back even earlier than the creation of the Office of Attorney Ethics in 1983, or its predecessor agency, the Central Ethics Unit, created in 1973. In fact, the 1972 Manual For Ethics Committees Appointed by the Supreme Court, which was issued by the Administrative Office of the Courts under the direction of the Supreme Court of New Jersey, states that "In the event an ethics committee has either knowledge or a belief of a condition or situation in the county which involves the character, integrity, professional standing, or conduct of any attorney, it should investigate the matter on its own initiative." Such information ranges from reported court opinions to newspaper articles, judicial referrals (by Supreme Court policy, judges are not considered grievants), referrals from other state and federal agencies, as well as any other information that is brought to the Director's attention. As a result of the addition of this new subparagraph (b)(2), former subparagraphs (b)(2) to (17) are renumbered from (3) to (18). In subparagraph (b)(3) the word "misconduct" is changed to "unethical conduct." In subparagraph (b)(11) reference to the "Board" is changed to "Disciplinary Review Board" for clarity. In subparagraph (b)(12), for grammatical correctness, the word "recommended" is changed to "recommend."

1:20-2. Office of Attorney Ethics

(a) Appointment. [... no change].

(b) Authority. The Director shall have the discretion and the authority to:

(1) exercise exclusive jurisdiction over the investigation and prosecution of the following category of cases:

(A) any case in which the Director determines the matter involves serious or complex issues that must be immediately addressed or one that requires emergent action;

(B) all cases in which an attorney is a defendant in any criminal proceedings;

(C) any case in which the Ethics Committee requests intervention;

(D) any case in which an Ethics Committee has not resolved a matter within one year of the filing of a grievance;

(E) any case in which the Board or the Supreme Court determines the matter should be assigned to the Director. [In all actions the Director shall exercise all of the investigative and prosecutorial authority of an Ethics Committee in addition to any inherent authority invested in the Director by virtue of these rules;]

(2) investigate any information coming to the Director's attention, whether by grievance or otherwise, which, in the Director's judgment, may be grounds for discipline or transfer to disability-inactive status;

(3) [(2)] dispose of, by investigation or dismissal, all matters involving alleged unethical conduct[misconduct], by transfer to disability-inactive status, by agreement in lieu of discipline in minor unethical conduct[misconduct] cases, or by the prosecution of formal charges before a duly constituted hearing panel or special ethics master, all in accordance with these Rules;

(4) [(3)] prosecute ethics proceedings before the Board;

(5) [(4)] prosecute all ethics proceedings before the Supreme Court, unless the Court or the Director requests the assistance of Board Counsel to do so;

(6) [(5)] seek from the Supreme Court judicial review of any final determination of the Board within the time and in the manner prescribed by the Rules of the Court;

(7) [(6)] transfer any matter pending before an Ethics Committee or Fee Committee to another district;

(8) [(7)] maintain records of all ethics and fee arbitration matters;

(9) [(8)] administer the programs of the Fee Committees in accordance with R. 1:20A-1 et seq., of the Ethics Committees in accordance with R. 1:20-3 et seq., and to render to both of them appropriate legal and administrative advice;

(10) [(9)]administer the Random Audit Compliance Program in accordance with R. 1:21-6(c);

(11) [(10)] prepare annually, jointly with Counsel for the Disciplinary Review Board, a proposed budget for the attorney disciplinary system of the state;

(12) [(11)] hire and discharge secretaries of Ethics Committees and Fee Committees and recommend[ed] and pay their compensation;

(13) [(12)] recommend to the Supreme Court the appointment and replacement of members of Ethics Committees and Fee Committees;

(14) [(13)] recommend the creation of new Ethics Committees and Fee Committees and the reorganization and termination of existing ethics and fee committees;

(15) [(14)] recommend to the Supreme Court rules and guidelines governing the procedures to be followed in all ethics and fee arbitration proceedings in this state;

(16) [(15)] hire and discharge all staff of the Office of Attorney Ethics consistent with personnel policies of the judiciary and subject to the approval of the Chief Justice, and to recommend the hiring of all ethics counsel to the Supreme Court; and

(17) [(16)] select attorneys and non-attorneys from among former Ethics Committee members to act as hearing panel members; and

(18) [(17)] approve additional volunteer attorneys who are not members of an Ethics Committee to act as investigators or presenters[.];

In all actions the Director shall exercise all of the investigative and prosecutorial authority of an Ethics Committee in addition to any authority invested in the Director under these rules.

(c) Advisory Opinions Prohibited. [...no change].

(d) Exemption From Costs. [...no change].

Note: Former rule redesignated R. 1:20-3 and new rule adopted January 31, 1984 to be effective February 15, 1984; paragraph (b)(15) amended and new paragraph (16) adopted November 5, 1986 to be effective January 1, 1987; paragraph (b)(8) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a) and (b) amended, subparagraphs (b)(1) (i) (ii) (iii) (iv) (v) amended and redesignated (b)(1) (A) (B) (C) (D) and (E), new subparagraph (b)(17) added, paragraphs (c) and (d) adopted January 31, 1995 to become effective March 1, 1995; paragraph (b)(1)(E) amended, new subparagraph (b)(2) added, former subparagraph (b)(2) renumbered (b)(3) and amended, former subparagraphs (b)(3) to (b)(17) renumbered (b)(4) to (b)(18), new last sentence of subparagraph (b) added, and former subparagraphs (b)(10), (b)(11) and (b)(17) amended 2003 to be effective , 2004.

Comments to Proposed R. 1:20-3 Changes

This rule governs District Ethics Committees. The OAE offers the following proposed amendments, with which the PRRC agrees. Many of the proposed changes are housekeeping in nature. However, amendments are proposed by the OAE that clarify the duties of the secretaries to these committees.

The following are the OAE's Comments explaining the proposed amendments:

In paragraph (a), titled "Disciplinary Districts," the numbers "8" and "2" are changed to "eight" and "two." In subparagraphs (a) and (b), the number "4" is changed to the word "four."

The second paragraph of (c), titled "Officers; Organization," is amended to permit ethics committees to meet less frequently than monthly when approved by the Director, rather than insisting on monthly meetings as previously required by the rule. This change accords with existing practice as it has developed over the years in several districts that are current in their caseloads. The existing phrase "except when there is no business to be conducted" has been eliminated as anachronistic to modern disciplinary systems. The third paragraph of (c) is also changed to include both "inquiries" (i.e., written communications of all kinds) as well as "grievances" (i.e., attorney grievance forms and letters specifically setting forth facts and stating a desire to file a disciplinary charge) as to which the secretary must maintain adequate records. Inquiries are already mentioned in existing subparagraph (e)(1) of this rule. Also added to the third paragraph is language intended to underline the fact that the annual emolument paid to secretaries is to reimburse for "costs and expenses." The payment is not intended as compensation. The same change is proposed to R.1:20A-1(c) governing fee arbitration secretaries.

The word "misconduct" is changed to "unethical conduct" in paragraphs (e), (f), (g), (h) and (i).

Paragraph (e) deals with "Screening; Docketing." A new introductory paragraph has been added to (e) that applies to all subsections. This change formalizes existing administrative policy against undue delay by secretaries in reviewing filings. It also addresses a recent failure by a district secretary who had to be replaced. This failure disclosed a number of grievances that were being investigated by the secretary over a lengthy period of time. The proposed rule makes clear that a secretary may not investigate a grievance prior to docketing. Investigations are the function of the members of the committee who complete a report which is then appealable to the Disciplinary Review Board if the matter is dismissed. The secretary's job is not to investigate inquiries and grievances, but rather to understand and evaluate the allegations. If the grievance is understandable, the secretary will apply the standard articulated in the rule and act accordingly. This screening period should be concluded within a 45-day window from receipt of the grievance. The spelling of the word "caselaw" in subparagraph (e)(1) is changed to "case law." Subparagraph (e)(2)(d) deals with a secretary's declination of a grievance that "involves aspects of both a fee dispute and a charge of ethical misconduct." That subparagraph has been modified. In addition to replacing the term "ethical misconduct" with "unethical conduct," as recommended throughout the rule, this provision is modified to clarify that declinations are not automatic. Rather, the secretary must evaluate the matter to determine whether or not, in the secretary's judgment, the fee aspect of the matter is "substantial." Only then should the matter be declined. Otherwise, the grievance should be docketed and investigated. It is inappropriate to

decline ethics grievances where only an insubstantial, or secondary, part of the case relates to the fee charged. The primary purpose of any disciplinary system is to investigate proper claims of unethical conduct. A blanket deferral does not further that primary goal. Of course, clients are always free to pursue fee arbitration on their own, irrespective of whether an ethics grievance is filed.

Subparagraph (e)(4) is changed to conform to the practice of having the secretary select the public member(s) of the committee to assist him/her in reviewing certain grievances before they are declined. The current rule, requiring the chair to make that designation, is not workable in practice. The work of designated public members is directly involved with the secretary, not the chair, and requires a close working relationship between the secretary and the public member. Therefore, the secretary is the appropriate person to make the selection. The secretary is best able to know those public members who are willing to devote the time necessary for the task. Moreover, that task has become increasingly burdensome in recent years. As a practical matter it is no longer possible in many committees to expect a single public member to commit the time required to review all necessary materials. The time commitment involved, coupled with the logistics and costs (especially postage incurred) in promptly reviewing these materials and promptly returning them to the secretary, often requires that the job be divided among several public committee members. This change accommodates those needs.

In the first sentence of subparagraph (f), titled "Related Pending Litigation," the term "allegations" is deleted in favor of the more exact term "facts." This subparagraph is also modified for uniformity to change references to the "Office of Attorney Ethics" to the "Director" and to make minor grammatical changes. Additionally, the rule is amended to refer to the "secretary" instead of the "chair" as the one, in addition to the Director, who may make the decision as to whether the "facts alleged clearly demonstrate provable ethical violations or if the facts alleged present a substantial threat of imminent harm to the public." This change codifies the practice statewide, since it is the secretary, and not the chair, who receives and must review all grievances to determine whether or not they will be docketed in the first instance.

Paragraph (g), titled "Investigation," is amended at (g)(1) to include the attorney's disability to practice law as an investigative focus, as well as the attorney's commission of unethical conduct. The word "misconduct" is changed to "unethical conduct." The caption of subparagraph (g)(3) is amended to conform to the text of the rule.

The caption of paragraph (i) is amended for uniformity from "Determination of Misconduct" to "Determination of Unethical Conduct." Subparagraph (i)(2) deals with "Minor Misconduct." This caption is changed for uniformity to "Minor Unethical Conduct." This change is carried through to subparagraph (i)(1), (2) and (3).

Several of the criteria for classifying a matter as "minor" unethical conduct under subparagraph (i)(2) are modified. The first change in subparagraph (i)(2)(A)(i) limits disqualification only to cases of knowing misappropriation. An admonition has been determined to be the appropriate discipline in many instances of negligent misappropriation, so that such conduct should not be a blanket disqualifier. Second, the word "public" has been deleted from disqualifier (iii), which is that the attorney has been disciplined in the previous five years. When the rule was first created, private discipline had just been eliminated. Almost eight years later, the distinction between "public" and private discipline is no longer necessary, as no private discipline has been imposed in the last five years. Third, minor conduct disqualifier (iv) is unnecessary and is deleted, since disqualifier (iii) now covers it. As a result of these changes,

disqualifiers (v) and (vi) are renumbered as (iv) and (v).

Subparagraph (i)(2)(B)(iii) deals with “Agreements In Lieu of Discipline.” It is amended to state that usually diversionary conditions are expected to be completed within a six-month time period. This change conforms to present standards that have been used since diversion was first permitted in 1995. Diversion does not contemplate a long-term relationship with the disciplinary system. Also, a procedural change has been made to eliminate the requirement that the Director place the matter on untriable status. Instead, the matter is now simply monitored and dismissed when the conditions have been successfully met. Also, for uniformity, the term "Office of Attorney Ethics" has been changed to "Director." Likewise, for uniformity, the number “10” is changed to the word “ten.”

Paragraph (j), titled “Incapacity,” is amended to add a reference to the “Director,” in addition to the “chair,” as the only two persons who may make a decision to file a complaint for incapacity.

1:20-3. District Ethics Committees; Investigations

(a) Disciplinary Districts. The Supreme Court shall establish, and may from time to time alter, disciplinary districts consisting of defined geographical areas and shall appoint in each such district a District Ethics Committee which shall consist of such number of members, not fewer than [8] eight, as the Court may determine, at least [4] four of whom shall be attorneys of this state, at least [2] two of whom shall not be attorneys, all of whom shall either reside or work in the district or county in which the district is located.

(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of [4] four years. A member who has served a full term shall not be eligible for reappointment to a successive term, except that a member appointed to fill an unexpired term shall be eligible for reappointment to a full successive term. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than [4] four years and members so appointed shall be eligible for reappointment to a full successive term.

(c) Officers; Organization. The Supreme Court shall annually designate a member of each Ethics Committee to serve at its pleasure as chair and another member to serve as vice-chair. Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice-chair shall perform the duties of the chair. The chair shall be responsible for administering the Ethics Committee. Under the chair's direction, the vice-chair, or another Ethics Committee member designated by the chair, shall be responsible for administering all matters where a complaint has been filed.

Each Ethics Committee shall hold an organization meeting in September of each year and shall meet thereafter at least monthly except [when there is no business to be conducted] that, with the approval of the Director, an Ethics Committee may meet less frequently. The Ethics Committee shall also meet at the call of the Supreme Court, the chair, the Board or the Director.

The Director shall, after consultation with the chair, appoint a secretary who shall not be a member of the Ethics Committee but who shall be a member of the bar maintaining an office within the district or county in which the district is located. The secretary shall continue to serve at the pleasure of the Director and shall be paid an amount annually set by the Supreme Court to reimburse the secretary for costs and expenses. The secretary shall keep full and complete records of all Ethics Committee proceedings, shall maintain files with respect to all inquiries and grievances received and investigations undertaken, shall transmit copies of all documents filed immediately on receipt thereof to the Director and shall promptly notify the latter of each final disposition. Reports with respect to the

work of the Ethics Committee shall be filed by the secretary with the Director as instructed by the Director.

(d) Office. Each Ethics Committee shall receive grievances at the office of its secretary and at such additional places as shall be designated by the Director.

(e) Screening; Docketing.

The secretary shall evaluate inquiries and grievances in accordance with this rule and shall docket, decline, or dismiss the matters within 45 days of their receipt. The secretary shall not conduct an investigation of a grievance.

(1) The secretary shall evaluate all information received by inquiry, grievance or from other sources alleging attorney unethical[mis]conduct or incapacity by an attorney maintaining an office in that district. If the attorney is subject to the jurisdiction of the Court and the grievance alleges facts which, if true, would constitute unethical [mis]conduct as defined by the Rules of Professional Conduct, [caselaw] case law or other authority, or incapacity, the matter shall be docketed and investigated.

(2) The secretary shall decline jurisdiction if:

(A) the attorney is not subject to the jurisdiction of the Supreme Court of New Jersey, in which case the matter shall be declined and referred to the appropriate entity in any jurisdiction in which the attorney is admitted;

(B) the matter involves an inquiry or grievance regarding advertising or other related communications within the jurisdiction of the Committee on Attorney Advertising (R. 1:19A-2(a)), in which case the matter shall be sent to that committee unless the matter has been referred by the Advertising Committee in accordance with R. 1:19A-4(e) or (h);

(C) the facts stated in the inquiry or grievance involve circumstances which the Supreme Court has determined through the adoption of court rules or administrative guidelines will not be entertained, in which case the matter shall be declined;

(D) the grievance involves aspects of [both] a substantial fee dispute and a charge of unethical [mis]conduct, unless so directed by the Director or unless the matter is referred by the Fee Committee in accordance with Rule 1:20A-4.

(3) The secretary, with concurrence by a designated public member, shall decline jurisdiction if the facts stated in the inquiry or grievance, if true, would not constitute unethical [mis]conduct or incapacity.

(4) If a grievance is not in writing and if the secretary concludes that the grievance must be declined under subsection (e)(2) or that the grievant alleges facts that, even if true, would not constitute unethical [mis]conduct or incapacity, the secretary shall so advise the grievant and that if the grievant wishes further consideration the secretary will

provide a written attorney grievance form for completion. Unless declination is mandatory under subparagraph (e)(2), on receipt of a properly completed attorney grievance form the secretary will have the grievance reviewed by [a] one or more public members of the Ethics Committee designated [annually] by the [chair] secretary. If [that] a designated public member agrees with the secretary, the matter shall be declined. Otherwise, the matter shall be docketed and assigned for investigation.

(5) If a matter is declined, the secretary shall furnish a concise written statement to the grievant of the reasons therefor and shall enclose a copy of the court rule or written guideline for declination approved by the Supreme Court.

(6) There shall be no appeal from a decision to decline a grievance made in accordance with this rule. An appeal may be taken from dismissal of a grievance after docketing in accordance with R. 1:20-3(h).

(f) Related Pending Litigation. If a grievance alleges facts that, if true, would constitute unethical [mis]conduct and if those facts [allegations] are substantially similar to the material allegations of pending civil or criminal litigation, the grievance shall be docketed and investigated if, in the opinion of the [chair] secretary or Director, [Office of Attorney Ethics,] the facts alleged clearly demonstrate provable ethical violations or if the facts alleged present a substantial threat of imminent harm to the public. All other grievances involving such related pending civil and criminal litigation may be declined and not docketed. If the matter has already been docketed when the related pending litigation is discovered, the matter may be administratively dismissed, provided the matter is still in the investigative stage. The grievant shall be informed in writing of any decision, together with a brief statement of the reasons therefor and a copy of any Court Rule or written guideline supporting declination. Once a formal complaint has been filed, the matter shall not be dismissed nor held in abeyance pending completion of the related litigation, unless so authorized by the Director. Whenever an attorney is a defendant in any criminal proceeding, the Director [Office of Attorney Ethics] shall docket the matter and may, in his [its] discretion, investigate and prosecute the disciplinary case.

(g) Investigation.

(1) Generally. Except in those districts in which the Director assigns investigators, the chair of the Ethics Committee shall assign an attorney member to each docketed case to conduct such investigation as may be necessary in order to determine whether unethical [mis]conduct has occurred or whether the respondent is disabled or incapacitated from practicing law.

(2) Notice to Respondent. [...no change].

(3) [Respondent's] Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of

any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided.

(4) Failure to Cooperate. [...no change].

(5) Notice to Grievant. [...no change].

(6) Investigative Subpoena. [...no change].

(h) Dismissal and Appeal; Administrative Dismissal. The investigator shall report in writing to the chair, providing a copy to the secretary. The report shall set forth the facts, together with a recommendation for action. If the chair concludes that there is no reasonable prospect of proving unethical [mis]conduct or incapacity by clear and convincing evidence, the matter shall be dismissed. Written notice of the facts and reasons for dismissal shall be provided to the respondent, the Director, and the grievant, who shall be advised of the right of appeal to the Board within 21 days as provided by Rule 1:20-15(e)(2).

The Director may authorize that a grievance be declined or administratively dismissed where either the attorney has been disciplined and the Director determines that the processing of additional matters against the respondent would not likely result in the imposition of substantially different discipline, or the attorney, although not yet disciplined, is already the subject of disciplinary proceedings and the nature or time periods covered by the additional grievances are similar to other unethical [mis]conduct already being pursued, so that the results would be likely to be merely cumulative. If so approved, the secretary shall give notice of declination or administrative dismissal to any grievant, together with an explanation of the reasons supporting the action.

(i) Determination of Unethical [Misc]Conduct.

(1) Generally. If the chair determines that there is a reasonable prospect of a finding of unethical[mis]conduct by clear or convincing evidence, a further determination shall be made as to whether such conduct is either unethical [mis]conduct or minor unethical [mis]conduct.

(2) Minor Unethical [Misc]Conduct.

(A) Defined. Minor unethical [mis]conduct is [mis]conduct, which, if proved, would not warrant a sanction greater than a public admonition. Unethical [Mis]conduct shall not be considered minor if any of the following considerations apply: (i) the unethical [mis]conduct involves the knowing misappropriation of funds; (ii) the unethical [mis]conduct resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made; (iii) the respondent has been [publicly]

disciplined in the previous five years; [(iv) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five years;] [(v)] (iv) the unethical [mis]conduct involves dishonesty, fraud or deceit; [(vi)] (v) or the unethical [mis]conduct constitutes a crime as defined by the New Jersey Code of Criminal Justice (N.J.S.A. 2C:1-1, et seq.). Classification of unethical [mis]conduct as minor unethical[mis]conduct shall be in the sole discretion of the Director.

(B) Agreements in Lieu of Discipline.

(i) If, as a result of investigation, the chair concludes that minor unethical [mis]conduct has occurred, the chair may request that the Director, or his designee, divert the matter and approve an agreement in lieu of discipline. Such request shall be accompanied by any initial grievance, the respondent's response, an investigative report, the written agreement signed by the respondent, and a letter to any grievant enclosing a copy of the agreement. The letter shall give [10] ten days notice to the grievant that the Director is being asked to approve the disposition and that any comments must be sent to the Director within that time. Diversion shall not be available subsequent to the filing of a complaint.

(ii) There shall be no appeal from the Director's decision.

(iii) An agreement in lieu of discipline may contain an agreement to meet, within a specified period (usually no more than six months), stated conditions addressed, to the extent practicable, to the remediation of the cause of the unethical [mis]conduct. Such conditions may include, but are not limited to, reimbursement of fees or costs, completion of legal work, participation in alcohol or drug rehabilitation program, psychological counseling or satisfactory completion of a course of study and such other programs as are developed. If approved, the Director [Office of Attorney Ethics] shall [place the matter on untriable status and] monitor the terms of agreement. If the respondent fulfills the terms, the matter shall be dismissed.

(C) Other Process. If an attorney declines to agree to divert a matter to administrative disposition under subparagraph (B), or if the Director determines, as a matter of exclusive discretion, that the attorney does not qualify for diversion or has failed to comply with the terms of the diversion agreement, the matter shall proceed in accordance with subparagraph (i)(3)(A) of these rules.

(3) Unethical [Misc]Conduct.

(A) Defined. All ethical violations of the Rules of Professional Conduct, caselaw or other authority not determined in accordance with these rules to be minor unethical [mis]conduct shall be processed as unethical [mis]conduct.

(B) Process. Unethical [Mis]conduct may be prosecuted by the filing of a complaint under R. 1:20-4 or through Discipline by Consent under R. 1:20-10.

(j) Incapacity. If the Director or the chair conclude[s] that there is a reasonable prospect of proving incapacity by clear and convincing evidence, the matter shall proceed as provided under R. 1:20-12.

Note: Former Rule redesignated as Rule 1:20-4 January 31, 1984 to be effective February 15, 1984. Source-Former Rule 1:20-2 adopted February 23, 1978, to be effective April 1, 1978; paragraphs (a), (h), (l) and (m) amended January 17, 1979, which were superseded on March 2, 1979, to be effective April 1, 1979; and paragraphs (n) and (o) restored on March 22, 1979, to be effective April 1, 1979; subparagraph (l)(3) deleted and new paragraph (p) adopted June 19, 1981, to be effective immediately; paragraphs (c), (h), (j) and (l)(1)(i) amended July 16, 1981, to be effective September 14, 1981; Rule redesignated as Rule 1:20-3; paragraphs (a) through (e) amended; paragraphs (f), (g) and part of (k) deleted; paragraphs (h), (i), (j), (k), (l), (m), (n), (o) and (p) amended and redesignated (f), (h), (i), (j), (k), (l), (m), (n) and (o) and new paragraphs (g)and (p) adopted January 31, 1984, to be effective February 15, 1984; paragraphs (f), (g), (h), (i), (l), (n), (o) and (p) amended November 5, 1986, to be effective January 1, 1987; paragraphs (e) and (m) amended June 26, 1987 to be effective July 1, 1987; paragraphs (i), (j) and (o) amended November 7, 1988 to be effective January 2, 1989; paragraphs (f) and (i) amended, and paragraph (n)(3) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (g) and (n)(2) captions and text amended August 8, 1994 to be effective immediately; paragraphs (a), (b), (c) and (d) amended, paragraphs (e) through (p) deleted and new paragraphs (e) through (j) adopted January 31, 1995 to be effective March 1, 1995; paragraphs (f), (g)(5), and (h) amended July 5, 2000 to be effective September 5, 2000; paragraph (g)(1) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (c), (e), (e)(1), (e)(2)(D), (e)(3) and (4), (f), (g)(1) and (3), (h), (i)(1) - (3) and (j) amended , 2003 to be effective , 2004.

Comments to Proposed R. 1:20-4 Changes

The OAE proposes amendments to Rule 1:20-4, Formal Pleadings, to emphasize the necessity of respondents filing "verified" answers to ethics complaints and to clarify existing procedures. The PRRC agrees with the OAE's proposed amendments.

The following are the OAE's Comments explaining the proposed amendments:

Paragraph 1:20-4(a), titled “Complaint Determination,” is amended to underline that the decision to file a formal complaint is made solely by the chair of a district ethics committee or the Director.

Paragraph (b) is amended to change “misconduct” to “unethical conduct.” It is also amended to delete reference to “ethics counsel” and simply retain the reference to “presenter.” The term “Presenter” is now defined in the Glossary to R. 1:20 as an attorney appointed to prosecute a complaint. The term “presenter,” therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to “ethics counsel” unnecessary.

Paragraph (d), concerning the filing and service of the complaint, is amended to add to the notice that is provided to the respondent the address of the Director as an alternative to the secretary for those situations in which the Office of Attorney Ethics handles cases. The paragraph is amended also for uniformity to change the reference from the “Office of Attorney Ethics” to the “Director.”

Paragraph (e) deals with the subject of a respondent’s answer. The paragraph is reworded for greater clarity and the number of copies of the answer to be filed is changed. Additionally, the presenter is added as an individual on whom service of the answer is required. The major change proposed to this paragraph is the specification of the exact wording of the existing verification requirement. The experience of the attorney disciplinary system is that a number of respondents either fail to verify their answers or take liberties with the wording of the required verification so that it becomes ineffective. Indeed, some respondents simply do not know what a verification is and do not research the issue to find out. The proposed change avoids any misunderstandings in this regard and the consequent delays that occur in order to have the problem corrected. The specification of the required language thus makes it easier for a respondent to comply. The wording for the disciplinary verification was taken from the language used by several well-known respondents’ counsel who were complying with the existing rule.

Verification of an answer is a long-standing requirement that was imposed by the Court effective January 1, 1989. This requirement is extremely important in order to give the disciplinary presenter and the trier of fact fair notice of the respondent’s factual contentions. The experience prior to adopting the requirement was that answers were often repudiated after they were filed, sometimes for the first time when the respondent took the stand in defense. These respondents would sometimes have their counsel sign the answer and sometimes would sign them themselves. However, on the stand they simply decided to change strategies and the facts to support the new strategy, claiming either that their counsel signed the answer and they never read it or that they signed the answer, which was prepared by their counsel, again without their reading the document. Verification eliminated this duplicity. As a result, hearings are no longer

Perry Mason surprise events made for television, but an orderly exploration of the merits of the cases for and against discipline.

In order to make reading the very long existing paragraph (e) easier, the current single paragraph has been divided into two subparagraphs. Further, the second proposed subparagraph under (e) is amended to explain to respondents the need to file an answer even if their intent is not to contest the charges, an allegation occasionally offered to the Board as a reason for failing to answer, after the record of the matter has already been certified to the Board by default.

The last sentence of the existing rule, beginning "An answer that has not been verified within 10 days…." has been relocated and is now placed after the verification language in the first subparagraph in (e). Since this language deals with the consequences of failing to verify the answer, it is now located right after the wording of the required verification. Finally, subparagraph (e) is also amended for uniformity to change reference to the "Office of Attorney Ethics" to the "Director."

Subparagraphs (f)(1) and (2) are amended to clarify that it is the failure to file a timely "verified" answer that triggers the sanctions and certification of the record spelled out in this rule. Subparagraph (f)(1) eliminates the entire last sentence of the existing rule, which refers to an attorney's possible temporary suspension and reinstatement, as well as the current practice of certifying the record in the matter to the Board, which then treats the matter as a default. In practice, the Director has not sought to use the temporary suspension provisions of this rule as a routine remedy for failing to answer a complaint. Instead, the almost invariable practice is to certify the record to the Board for imposition of sanction. Consequently, subparagraph (f)(2) has been retitled from "Immediate Temporary Suspension" to "Certification To Disciplinary Review Board." The text of that subparagraph now deals exclusively with that process. Under R. 1:20-11 the Director always has the right to file a motion for temporary suspension in any case where the attorney's unethical conduct poses "a substantial threat of serious harm." Consistent with the change in subparagraph (f)(1), the last four sentences of (f)(2) regarding temporary suspensions are eliminated. This subparagraph is also amended for uniformity to change reference from the "Office of Attorney Ethics" to the "Director."

The caption of subparagraph (g)(1) is amended to delete reference to "Ethics Counsel" and to retain the reference to "Presenter." The term "Presenter" is now defined in the Glossary as an attorney appointed to prosecute a complaint. The term "presenter," therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to "ethics counsel" unnecessary in this subparagraph. Unnecessary text in this subparagraph is also appropriately deleted.

Subparagraphs (g)(2) and (3) are amended to delete the references to "ethics counsel," since that phrase was deleted in (g)(1). The term "presenter" now encompasses both an Ethics Committee attorney and an ethics counsel of the Office of Attorney Ethics.

1:20-4. Formal Pleadings

(a) Complaint Determination. Where the chair or Director, in his or her sole discretion, determines that there is a reasonable prospect of a finding of unethical [mis]conduct by clear and convincing evidence and where the matter is not diverted pursuant to R. 1:20-3(i)(2), a complaint shall issue.

(b) Contents of Complaint. Every complaint shall be in writing, designated as such in the caption, and brought against the respondent in the name of either the District Ethics Committee or the Office of Attorney Ethics. The complaint shall be signed by the chair, secretary or any Ethics Committee member, the Director, or the Director's designee. The caption shall indicate if the complaint concerns unethical [mis]conduct or minor unethical [mis]conduct. The complaint shall state the name of the grievant, if any, and the name, year of admission, law office or other address, and county of practice of the respondent, and shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical [mis]conduct, specifying the ethical rules alleged to have been violated. It shall also state above the caption the name, address and phone number of the presenter [or ethics counsel] assigned to handle the matter.

(c) Consolidation of Charges and Respondents. [...no change].

(d) Filing and Service. The original complaint shall be filed with the secretary of the Ethics Committee or the designated special ethics master to whom the case is assigned. If the matter will be determined by an Ethics Committee, service of the complaint shall be made by the secretary; otherwise service shall be made by the Director [Office of Attorney Ethics]. A copy of the complaint shall be served on the respondent and respondent's attorney, if known, in accordance with R. 1:20-7(h), together with written notice advising the respondent of the requirements of R. 1:20-4(e) and (f), the name and address of the secretary or the Director as appropriate, as well as the address and telephone number of the vice chair of the Ethics Committee or special ethics master to whom all questions and requests for extension of time to file answers shall be directed. In appropriate circumstances, the secretary or the Director [Office of Attorney Ethics] shall forward a copy of every complaint to the respondent's law firm or public agency employer in accordance with R. 1:20-9(j).

(e) Answer. Within twenty-one days after service of the complaint, the respondent shall file with and serve on [the original and two copies of a written, verified answer, designated as such in the caption, with] the secretary the original and one copy of a written, verified answer designated as such in the caption. [and shall file one copy with] The respondent shall also file a copy with the presenter, the vice chair or special ethics master and, in cases prosecuted by the Director, two copies with that office [filed with the Office of Attorney Ethics]. The verification shall be made in the following form:

"Verification of Answer

I, (insert respondent's name), am the respondent in the within disciplinary action and hereby certify as follows:

(1) I have read every paragraph of the foregoing Answer to the Complaint and verify that the statements therein are true and based on my personal knowledge.
(2) I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

An answer that has not been verified within ten days after the respondent is given notice of the defect shall be deemed a failure to answer as defined within these Rules.

For good cause shown, the vice chair or the special ethics master, if one has been appointed, may, on written application made within twenty-one days after service of the complaint, extend the time to answer. The Director [Office of Attorney Ethics] shall be notified of any extension granted in cases prosecuted by that office. The secretary shall forward one copy of all answers to the Director [Office of Attorney Ethics]. The respondent's answer shall set forth (1) a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint; (2) all affirmative defenses, including any claim of mental or physical disability and whether it is alleged to be causally related to the offenses charged; (3) any mitigating circumstances; (4) a request for a hearing either on the charges or in mitigation, and (5) any constitutional challenges to the proceedings. All constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board. Interlocutory relief may be sought only in accordance with R. 1:20-16(f)(1). Failure to request a hearing shall be deemed a waiver thereof. A respondent is required to file an answer even if the respondent does not wish to contest the complaint. [An answer that has not been verified within 10 days after the respondent is given notice of the defect shall be deemed a failure to answer as defined within these Rules.]

(f) Failure to Answer.

(1) Admission. The failure of a respondent to file a[n] verified answer within the prescribed time shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. No further proof hearing shall be required. [Unless respondent is suspended and files an application seeking reinstatement within 30 days of suspension under paragraph (f)(2) and that reinstatement is granted by the Supreme Court, the record in the matter shall be certified by the vice chair, secretary or special ethics master directly to the Disciplinary Review Board for imposition of sanction.]

(2) [Immediate Temporary Suspension] Certification to Disciplinary Review Board. If a respondent has been duly served with a complaint, but has failed to file a[n] verified answer within the prescribed time, a certification detailing that failure may be filed with the Director by the secretary or special ethics master, or, in cases prosecuted by the Director [Office of Attorney Ethics], by ethics counsel. The Director may thereafter file that certification with the Board, which shall treat the matter as a default. A copy of the

certification shall be mailed to the respondent. [Supreme Court, which may enter an order temporarily suspending the respondent from the practice of law until further order of the Court.]

[A copy of the certification and the Court's order shall be served on the respondent and the Office of Attorney Ethics. On proof of compliance with R. 1:20-3(e), an attorney suspended under this rule may apply to the Court for reinstatement within 30 days of suspension, on notice to the secretary, the vice chair, or any special ethics master and the presenter or ethics counsel. Reinstatement by the Supreme Court shall revoke any admission of charges due to failure to file an answer.]

(g) Counsel.

(1) Presenter[; Ethics Counsel]. All disciplinary and disability proceedings shall be prosecuted by an attorney presenter designated by the Director or chair. [The Director shall designate an ethics counsel in cases that are prosecuted by the Office of Attorney Ethics. In special cases the Director may designate an attorney other than a member of the Office of Attorney Ethics to serve as ethics counsel.]

(2) Respondent's Counsel; Assignment for Indigents. A respondent may be represented by counsel admitted to practice law in New Jersey or admitted pro hac vice by the Board, or may appear pro se. A respondent desiring representation but claiming inability to retain counsel by reason of indigency, shall promptly so notify the vice chair and special ethics master, if one is appointed, and shall, within 14 days after service of the complaint, make written application to the Assignment Judge of the vicinage in which respondent practices or formerly practiced, simultaneously serving the application on the vice chair and special ethics master, if one has been assigned, and on the presenter [or ethics counsel]. The application shall be supported by a certification complying with R. 1:4-4(b), which shall contain a current statement of all assets and liabilities, any bankruptcy petition and orders, and copies of the respondent's state and federal income and business tax returns for the prior three-year period. For good cause shown, the Assignment Judge shall assign an attorney to represent the respondent without compensation, so notifying the respondent, the secretary, the vice chair and special ethics master, if one has been assigned, and the Office of Attorney Ethics of any decision.

(3) Grievant's Counsel. A grievant may be represented by a retained attorney. Such attorney shall be limited to consulting with the grievant and may not be designated as the presenter [or ethics counsel] in the matter.

Note: Text and former R. 1:20-4 redesignated R. 1:20-15. New text to R. 1:20-4, adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended July 5, 2000 to be effective September 5, 2000; paragraphs (e) and (f)(2) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (d) , (e), (f)(1) (f)(2) amended, and caption to (f)(2) amended, (g)(1), (2) and (3) amended, and caption to (g)(1) amended ,2003 to be effective , 2004.

Comments to Proposed R. 1:20-5 Changes

This rule establishes prehearing procedures. The PRRC agrees with the OAE's proposed changes to this rule. In addition to housekeeping matters, the changes permit the presenter to move to dismiss a complaint in whole or in part if an essential witness is unavailable or new evidence reveals that the complaint cannot be proven by clear and convincing evidence.

The following are the OAE's Comments explaining the proposed amendments:

Subparagraph (a)(1) regarding "Discovery," states that, in order to entitle a respondent to discovery, the respondent must first file an answer. This requirement is amended to specify that the answer must be a "verified" answer "in compliance with R. 1:20-4(e)." The term "ethics counsel" is deleted. The term "presenter" is now defined in the Glossary to R. 1:20 as an attorney appointed to prosecute a complaint. The term "presenter," therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to "ethics counsel" unnecessary.

For the same reason, the words "ethics counsel" are deleted in subparagraph (a)(2), dealing with "Scope." This subparagraph is amended also to add a new subparagraph (G). This addition makes clear that any investigative report generated by the disciplinary system is discoverable. In fact, the current practice is to routinely turn over any such report to respondents. Under R. 1:20-3(h), respondents are also provided with a copy of the investigative report when a case is dismissed following investigation. Subparagraph (a)(2)(E), which authorizes discovery of "police reports and any investigation reports" covers only police investigation reports. Therefore, for clarity, a new subparagraph (G) is necessary.

Subparagraph (a)(4) deals with "Types of Discovery Not Permitted." It is amended to add "requests for admissions" to the list of other types of discovery that is not permitted. The current rule was intended and has been construed to prohibit such admission requests. The amendment explicitly so states. Subparagraph (a)(5) is modified to delete the last sentence of the current rule. That sentence is moved and inserted almost verbatim in subparagraph (b)(4) of this rule titled "Case Management Order," as the more appropriate location for that provision. In the first sentence of subparagraph (a)(6), the word "which" is changed to "that." Also the term "ethics counsel" is deleted for the reasons already stated in (a)(1).

The first sentence of subparagraph (b)(1), dealing with "Prehearing Conference," is modified. Originally, as a result of the 1995 rule changes, disciplinary cases were classified into three tracks: minor, standard and complex. At that time, the time goals (R. 1:20-8) were different for each category. Thereafter, through experience, it was established that "minor" track cases could not meet a three-month time goal and that goal was changed to six months, the same as standard cases. As changed, the first sentence of (b)(1), dealing with "minor cases" is now deleted, since the distinction is no longer relevant. While there are still "minor" unethical conduct cases that are eligible for diversion under R. 1:20-3(i), if diversion is not acceptable to a respondent, the case proceeds on the standard track. Relevant changes to former R. 1:20-6(d) titled "Hearings Involving Minor Misconduct," deleting same, and R. 1:20-8(a), titled "Time Goals; Accountability; Priority," regarding investigations, have also been made to confirm that the "minor" track of cases no longer is useful or appropriate and is therefore eliminated.

Additionally, a new sentence is added to this subparagraph to permit the trier of fact, in his/her discretion, to hold a prehearing conference in cases of standard unethical conduct.

Experience has shown that a prehearing conference may be of help in specific cases, even though categorized as standard. Such is the case with difficult respondents, especially those not represented by counsel, for example. The proposed rule now vests that determination in the sound discretion of the trier of fact. As to complex unethical conduct, the existing rule requires a prehearing conference in all complex matters at the request of a party or the trier of fact. The last sentence of this subparagraph is modified to make transcripts of the prehearing conference permissive in unusual cases.

Subparagraph (b)(2) concerning the filing of the "Prehearing Report" by counsel is amended to provide for filing and service of that report on counsel and the trier of fact "at least five business days before" the prehearing conference. Experience has shown that some counsel wait until the end of the day prior to the conference to file their memoranda. In order to make the prehearing conference productive, it is important that all parties to the conference receive and have time to digest the memoranda in advance. Additionally, the phrase "or designated ethics counsel" is deleted as unnecessary, since the term "presenter" is now defined in the Glossary to include both a district ethics committee attorney and an attorney from the Office of Attorney Ethics. The subparagraph is also modified by deleting the last sentence. That provision is duplicative and unnecessary as it is already covered adequately in subparagraph (a)(5) titled "Timeliness of Discovery; Continuing Duty."

Subparagraph (b)(3)(H) under the heading "Objectives," is modified to add the phrase "into evidence" to state unequivocally the purpose for which exhibits are premarked. These premarked documents need not be moved into evidence one by one at the hearing, as their admissibility has already been agreed to.

Subparagraph (b)(3)(I) is new. The language specifically addresses a troublesome issue that interferes with the scheduling of a number of disciplinary hearings – trial dates assigned to the presenter, respondent and respondent's counsel in their other cases, some of which trial dates are set subsequent to the date of the prehearing conference. The rule makes this a specific item of discussion and places a continuing burden on all three persons to "promptly" advise the trier of fact of any such subsequent trial commitments. Adequate advance notice of such dates will permit the disciplinary system to notify judges promptly so that they may make reasonable accommodations and give disciplinary hearings the priority required by R. 1:20-8(g). As a result of this change, former subparagraph (b)(3)(I) is renumbered (b)(3)(J).

In subparagraph (b)(4), the number "7" is replaced by the word "seven." The term "ethics counsel" is deleted for the reasons already stated in subparagraph (a)(1). The sentence that was deleted from subparagraph (a)(5) is added to this subparagraph almost verbatim. This is the more appropriate location for the sentence, since it deals with the case management order. Also, the words "hearing dates" are added to the final phrase of the first sentence of subparagraph (b)(5) to clarify that it is the hearing dates that should be reported to the vice chair and the Director.

Existing subparagraph (b)(6), titled "Sanctions," is redesignated as paragraph (c). The language of new paragraph (c) remains identical to former subparagraph (b)(6). The purpose of the redesignation is to clarify the fact that the "Sanctions" provisions are not limited to situations governing the "Prehearing Conference" in paragraph (b). Rather, by its express terms, the language of the paragraph on "Sanctions" applies equally to situations involving "Discovery" in

paragraph (a).

Existing paragraph (c), titled “Motion to Dismiss,” has been redesignated as (d). Redesignated subparagraph (d) is amended to add a provision to address the situation in which a presenter is unable to proceed due to the unavailability of an essential witness. The amendment also covers the unusual situation in which, in the interest of justice, the presenter becomes aware of newly discovered or newly disclosed evidence that makes it impossible to prove the original allegations by clear and convincing evidence. In both situations, a certification by the presenter setting forth the relevant facts and exhibits will be presented to the trier of fact for an independent determination. The presenter may be allowed an additional time to investigate such new evidence before deciding whether to accept it as the basis for such motion.

1:20-5. Prehearing Procedures

(a) Discovery.

(1) Generally. Discovery shall be available to the presenter [or ethics counsel]. Discovery shall also be available to the respondent, provided that a[n] verified answer in compliance with R. 1:20-4(e) has been filed. All such requests shall be in writing.

(2) Scope. On written request the following information, if relevant to the investigation, prosecution, or defense of a matter, and if within the possession, custody or control of the presenter, [ethics counsel], the respondent or counsel, is subject to discovery and shall be made available for inspection and copying as set forth in this rule:

(A) a writing as defined by N.J.R.E. 801(e) or any other tangible object, including those obtained from or belonging to the respondent;

(B) written statements, if any, including any memoranda reporting or summarizing oral statements, made by any witness, including the respondent;

(C) results or reports of mental or physical examinations and of scientific tests or experiments made in connection with the matter;

(D) names, addresses and telephone numbers of all persons known to have relevant knowledge or information about the matter, including a designation by the presenter [or ethics counsel] and respondent as to which of those persons will be called as witnesses;

(E) police reports and any investigation reports; [and]

(F) name and address of each person expected to be called as an expert witness, the expert's qualifications, the subject matter on which the expert will testify, a copy of all written reports submitted by the expert or, if none, a statement of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion[.]; and

(G) any final disciplinary investigative report.

(3) Documents Not Subject to Discovery. [...no change].

(4) Type of Discovery Not Permitted. Neither written interrogatories, nor requests for admissions, nor oral depositions shall be permitted in any matter, except that depositions to preserve the testimony of a witness likely to be unavailable for hearing due to death, incapacity or otherwise, may be taken in accordance with the procedure (modified as appropriate to disciplinary proceedings) set forth in R. 3:13-2.

(5) Timeliness of Discovery; Continuing Duty. Initial discovery shall be made available within 20 days after receipt of a written request therefor. A party's obligation to provide discovery is a continuing one. If, subsequent to compliance with a request for discovery, a party discovers additional names or statements of witnesses or other information reasonably encompassed by the initial request for discovery, the original discovery response shall be promptly supplemented accordingly. [Any case management order shall set forth the time period within which all discovery shall be completed.]

(6) Failure to Make Discovery. Any discoverable information that [which] is not timely furnished either by original or supplemental response to a discovery request may, on application of the aggrieved party, be excluded from evidence at hearing. The failure of the presenter [, ethics counsel] or respondent to disclose the name and provide the report or summary of any expert who will be called to testify at least 20 days prior to the hearing date shall result in the exclusion of the witness, except on good cause shown.

(7) Discovery Applications. [...no change].

(b) Prehearing Conference.

(1) Attendance. [In cases of minor or standard misconduct, no prehearing conference shall be held.] A prehearing conference may be held in standard unethical conduct cases in the discretion of the trier of fact if requested by the presenter, the respondent, or the trier of fact. A prehearing conference shall be held in all complex cases alleging unethical [mis]conduct at the request of the presenter, the respondent [any party] or the trier of fact. The prehearing conference shall be held by the hearing panel chair, sitting alone or, if assigned, a special ethics master, within 45 days after the time within which an answer to a complaint is due. At least 14 days written notice of the date of the conference shall be given. Attendance at the conference is mandatory by all parties [at the conference]. A prehearing conference may be held by telephone call where appropriate. No transcript shall be made of the prehearing conference, except in unusual circumstances.

(2) Prehearing Report. [On or before] At least five business days before the date scheduled for the prehearing conference, both the presenter [or designated ethics counsel] and the respondent shall file a report with the hearing panel chair or special ethics master, and with the adversary, disclosing the name, address and telephone numbers of each person expected to be called at hearing, including any person who will testify as to the character or reputation of the respondent, and all experts. With respect to an expert witness, the report shall state the person's name, address, qualifications, and the subject matter on which the expert is expected to testify. A copy of the expert's report, if any, or, if no written report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, shall be attached. [On becoming aware of the identity of additional witnesses, including additional experts, the presenter or ethics counsel and the respondent shall file and serve a further report indicating the required information.]

(3) Objectives. At the prehearing conference, the hearing panel chair or special ethics master shall address the following matters:

(A) the formulation and simplification of issues;

(B) admissions and stipulations of the parties with respect to allegations, defenses and any aggravation or mitigation;

(C) the factual and legal contentions of the parties;

(D) the identification and limitation of witnesses, including character and expert witnesses;

(E) deadlines for the completion of discovery, including the timely exchange of expert reports;

(F) the hearing date and its estimated length;

(G) issuance of any subpoenas necessary to presentation of the case;

(H) premarking of all exhibits into evidence to which the parties consent; [and]

(I) the priority of disciplinary proceedings under R. 1:20-8 and any known trial commitments by the presenter, respondent and respondent's counsel that could conflict with the scheduling of the matter. Counsel shall be under a continuing duty to promptly notify the hearing panel chair or the special ethics master of any such trial dates assigned as soon as known; and

[(I)] (J) any other matters which may aid in the disposition of the case.

(4) Case Management Order. Within [7] seven days following the prehearing conference, the hearing panel chair or special ethics master shall issue a case management order, designated as such in the caption, memorializing any agreements by the parties and any determinations made respecting any matters considered at the conference. That order shall set forth the time period within which all discovery shall be completed. The case management order, which constitutes part of the record, shall be served on the presenter [or ethics counsel] and the respondent and filed with the vice chair and the Director.

(5) Setting Hearing Date and Conclusion. At the prehearing conference the hearing panel chair or special ethics master shall schedule [a] dates for the hearing of the case within 60 days after the date of the conference, except in extraordinary circumstances, which hearing dates shall be promptly reported to the vice chair and Director. The hearing shall be concluded within 45 days after its commencement and a hearing report shall be filed with the Board and served on the parties within 60 days after the hearing's conclusion, except in extraordinary circumstances.

[(6)] (c) Sanctions. The hearing panel chair or special ethics master shall make and enforce all rules and orders necessary to compel compliance with this rule and may suppress an answer, bar defenses, or bar the admissibility of any evidence offered that is in substantial violation of the case management order, discovery obligations, or any other order.

[(c)] (d) Motion to Dismiss. No motion to dismiss a complaint shall be entertained except:

(1) a prehearing motion addressed either to the legal sufficiency of a complaint to state a cause of action as a matter of law or to jurisdiction; [and]

(2) a motion to dismiss at the conclusion of the presenter's [or ethics counsel's] case in chief[.]; and

(3) a motion by the presenter to dismiss the complaint, in whole or in part, when

(A) an essential witness becomes unavailable or

(B) as a result of newly discovered or newly disclosed evidence, one or more counts of the complaint cannot be proven by clear and convincing evidence. Such motion shall be supported by the presenter's certification of the facts supporting the motion and any relevant exhibits, and shall be decided by the trier of fact.

Note: Former R. 1:20-5 redesignated R. 1:20-16 adopted January 31, 1995 to be effective March 1, 1995; paragraph (b)(6) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(7) amended July 12, 2002 to be effective September 3, 2002;subparagraphs (a)(1)-(2) amended and new subparagraph (a)(2)(G) added; subparagraphs (a)(4)-(6), (b)(1)-(2), (b)(3)(H) and (b)(4)-(5) amended, and new subparagraph (b)(3)(I) added and existing (b)(3)(I) redesignated (b)(3)(J); subparagraph (b)(6) redesignated (c) and former subparagraph (c) redesignated (d) and amended , 2003, to be effective , 2004.

Comments to Proposed R. 1:20-6 Changes

The PRRC agrees with the OAE's proposed revisions to this rule addressing ethics hearings. The OAE's proposed amendments are largely housekeeping in nature, but also include a new provision dealing with disqualification of triers-of-fact.

The following are the OAE's comments explaining the proposed amendments.

In subparagraph (a)(1), reference to "ethics counsel" is deleted. The term "presenter" is now defined in the Glossary to R. 1:20 as an attorney appointed to prosecute a complaint. The term "presenter," therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to "ethics counsel" unnecessary. Minor grammar corrections are also made in this subparagraph.

Subparagraph (a)(2) is amended to delete the introductory phrase of the first sentence, since "minor misconduct" hearings are no longer necessary for the reasons detailed in the comment to paragraph (d) below.

Throughout subparagraph (a)(3), the word "misconduct" is changed to "unethical conduct." Subparagraphs (a)(3)(A) and (C) are modified to delete references to "disability inactive" or "incapacity" proceedings as these are now handled by special masters under R.1:20-12(b) and (c).

Subparagraph (b)(1) regarding "Special Ethics Masters" is amended to clarify that both retired and recalled judges may serve in this capacity. Subparagraph (b)(2) is amended to correct an inaccurate rule citation. Subparagraph (b)(3) is amended to modify one standard for securing a special master from "more than three days" of hearing to "three days or more" of hearing. District committee members, especially public members, have complained to the Director about the increasing length of disciplinary hearings and their inability to reasonably serve on lengthy hearings. This subparagraph has also been reworded to consolidate the three criteria for appointment of a special ethics master in one sentence, rather than through separate sentences as at present. Minor grammar changes have also been made.

Minor changes have been made to the caption of paragraph (c) regarding "Hearings Involving Unethical [Misc]Conduct." Similarly, in subparagraphs (c)(2)(B), (C) and each subparagraph of (E), the word "misconduct" is changed to "unethical conduct." In subparagraph (c)(1) and throughout subparagraph (c)(2), the term "ethics counsel" is deleted for the reasons noted above. Subparagraph (c)(2)(A) regarding "Notice and Conduct of Hearings" is amended to clarify that it is only the "initial" scheduled hearing that requires 25 days advance notice. The date, time and place of subsequent days of hearing may be set orally (usually at the conclusion of a prior day of hearing) or in writing. Also, the current requirement calls for the respondent to be notified in writing of certain rights in the notice scheduling the hearing. In fact, respondents are routinely advised of these items much earlier in the process -- at the time they are served with a formal complaint. Moreover, if a prehearing conference has been held, these items will also be

discussed in connection with that event and the initial trial date will usually be set in the prehearing case management order or by separate letter. Consequently, the notice that sets the initial day of hearing need not be further encumbered by repeating advice already given. Instead, the rule is modified to simply read that prior to the initial day of hearing, the respondent will be advised of the right to counsel and the right to cross-examine and present witnesses.

Subparagraphs (c)(2)(B) and (C), titled "Standard of Proof" and “Burden of Proof; Burden of Going Forward,” are amended. References to “disability-inactive status” are deleted, as that topic is specifically dealt with in proposed R.1:20-12 dealing exclusively with disability-inactive proceedings.

Relevant language from R. 1:20-7(l) is inserted in subparagraph (c)(2)(D) to clarify that, while the respondent’s presence is mandatory at the hearing, his absence will not delay the orderly completion of the hearing. District hearing panels have raised questions in the past about the effect of a respondent’s absence on their ability to conclude the proceeding. This change resolves that question.

Minor grammar changes have also been made in subparagraphs (c)(2)(E)(i) and (ii) and sentences have been rearranged in (i) and (ii) that deal with ordering transcripts in the case of dismissal or admonition. Subparagraph (c)(2)(E)(iii) and its caption are changed to add the sanction of censure in accordance with recently enacted R. 1:20-15A.

Paragraph (d) titled “Hearings Involving Minor Misconduct,” is deleted. As explained in the comment to R. 1:20-5(b), titled “Prehearing Conference” and R. 1:20-8(a), there is no longer any reason for distinguishing minor from standard track cases. Minor unethical conduct cases are eligible for diversion. However, if the respondent declines diversion, these cases are subject to the same time goals as standard cases. They are, therefore, standard cases. When paragraph (d) was originally adopted in 1995, the thinking was, also, that if a respondent declined diversion and a hearing was necessary, a speedier hearing could be held. In this connection, paragraph (d) contemplated that no prehearing conference would be held, that a single member could hear the case, that the hearing would be expedited and that the sanction would be limited to no more than an admonition. In practice, this has not worked and this paragraph should therefore be eliminated. First, there have been very, very few of these paragraph (d) hearings held. Second, the Board, on review of such hearings has not felt bound to limit the sanction to an admonition as set forth in this paragraph. In fact, the Board has, on several occasions, reversed the single-member’s decision and directed that the matter be remanded to a traditional three-member panel for hearing so that a higher sanction can ultimately be imposed. The result is that this rule simply has not worked in practice to speed up the imposition of discipline for these cases. Consequently, paragraph (d) should be deleted.

A new subparagraph (d) is added. It is titled “Abstention and Request For Disqualification.” This provision accords with current practice and specifically applies the judicial standard for disqualification set out in R. 1:12-1. It applies to hearing panel members and special ethics masters, collectively referred to as “trier of fact.” The rule also makes clear that the fact that a trier of fact may have heard or decided other cases involving the same respondent is not a basis for disqualification. While occasionally raised by respondents, this reason is not

sound and disqualification is not granted in these instances. It is common and accepted practice for a judge to hear criminal matters involving the same defendant over time. Ethics matters are not different in this regard. A request for disqualification is initially addressed to the trier of fact in advance of a prehearing conference. Otherwise, it will be made prior to the initial day of hearing, where possible. The decision may be superceded through an appeal to the vice chair who oversees the administration of all hearings within the district. If the vice chair has a conflict, the chair shall act. In cases that are handled by the Office of Attorney Ethics, an appeal may be made to the Director.

1:20-6. Hearings

(a) Hearing Panels.

(1) Hearing Panel Designations; Oversight. The chair shall annually determine the composition of hearing panels which shall be administered and advised by the vice chair. Each hearing panel shall consist of only three members, one of whom shall be a public member. The chair shall designate an attorney member as the chair of each panel. An additional attorney member and an additional public member may be designated as alternates to remain available but not to sit and hear the matter unless one of the attorney members or the public member is unable to do so. An attorney member involved in the investigation of a matter shall not serve as a hearing panel member on that matter.

The vice chair shall designate a hearing panel to hear the matter [when an answer has been filed]after the time prescribed for the filing of an answer and shall notify the presenter [or ethics counsel] and respondent of the designation.

(2) Quorum. [Except in matters of minor misconduct as set forth in paragraph (d)(3), a] A quorum shall consist of two attorney members and one public member. The hearing panel shall act only with the concurrence of two. When by reason of absence, disability or disqualification the number of members of the hearing panel able to act is fewer than a quorum, the following procedures will apply:

(A) if the hearing has not commenced, the attorney alternate or another attorney member shall be substituted for the absent attorney or the public member alternate or another public member shall be substituted for the absent public member;

(B) if the hearing has commenced but all evidence has not been received, the vice chair shall designate the attorney alternate or another attorney member or the public member alternate or another public member to permit the orderly conclusion of the proceedings, provided that the member so designated shall have the opportunity to review the entire record including the transcript of the proceedings to date;

(C) if all the evidence has been received, the matter may be determined by the remaining two hearing panel members, provided their decision is unanimous. In the event of disagreement, the vice chair shall designate the attorney alternate or another attorney member or the public member alternate or another public member who, on review of the entire record including the transcript of the proceedings, shall be eligible to vote thereon.

(3) Powers and Duties. Hearing panels shall have the following powers and duties:

(A) to conduct hearings on formal charges of unethical [mis]conduct[,] and petitions for reinstatement where requested by the Board or the Court[, and petitions for transfer to and from disability inactive status];

(B) to submit to the Board written findings or fact, conclusions of law and recommendations, together with the record of the hearing; and

(C) to determine issues of unethical [mis]conduct [or incapacity] by majority vote, provided a quorum is present.

(4) Powers and Duties of Hearing Panel Chair. [...no change].

(b) Special Ethics Masters.

(1) Qualifications. A retired or recalled judge of this [S]state, a former member of the Disciplinary Review Board, a former officer of a district ethics committee, or a former chair of a hearing panel may be appointed, with his or her consent, to serve as a special ethics master.

(2) Appointment; Compensation. Special ethics masters shall be appointed by, and shall serve at the pleasure of, the Supreme Court under the administration of the Director. Attorneys shall be paid the per diem rate in effect for single arbitrators under R. 4:21A-[5](2)(d)(1). The full per diem rate shall be paid for each day of a prehearing conference or hearing, or part thereof, but shall not be paid for separate days for opinion preparation. A reasonable additional amount may be paid for actual typing expenses. Retired judges may serve pro bono or with compensation or, if they are on recall, shall be paid at the rate in effect for judges on recall service.

(3) Designation; Oversight. When, in the judgment of the Director, a hearing [of an ethics complaint alleging misconduct] may reasonably be expected to take [more than] three days or more, or where the case should be heard continuously from day to day until conclusion, or when the Director believes it is in the interest of justice to do so, the Director may request designation of a special ethics master to try the case. [The Director may also request appointment of a special ethics master whenever it appears in the interest of justice to do so.] An Ethics Committee chair may request [of] the Director to appoint[ment of] a special ethics master. The Director shall determine the appropriateness of such an appointment pursuant to the above criteria and other relevant considerations. The Director shall render appropriate administrative and legal services to special ethics masters.

(4) Powers and Authority. A special ethics master shall have the full power and authority of a hearing panel.

(c) Hearings Involving Unethical [Misc]Conduct; When Required.

(1) When Required. A hearing shall be held only if the pleadings raise genuine disputes of material fact, if the respondent's answer requests an opportunity to be heard in mitigation, or if the presenter [or ethics counsel] requests to be heard in aggravation. In all other cases the pleadings, together with a statement of procedural history, shall be

filed by the trier of fact directly with the Board for its consideration in determining the appropriate sanction to be imposed.

(2) Notice and Conduct of Hearings.

(A) Generally. At least 25 days prior to the initial scheduled hearing date, a written notice of hearing shall be served on the presenter [or ethics counsel], the respondent, and any counsel of record, stating the date, time and place of hearing. Subsequent days of hearing may be scheduled orally or in writing. Prior to [T]the [notice of] hearing [shall also advise] the respondent will be advised of the right to be represented by counsel, to cross-examine witnesses and to present evidence. Arrangements for the hearing, including location of hearing, recording, interpreters and transcripts, shall be made by the Ethics Committee or special ethics master, if one has been appointed. A complete stenographic record of the hearing shall be made by an official court reporter or by a court reporter designated by the Director. Each trier of fact shall be obligated to inform every court reporter, witness and party of any protective order that has been issued and the effect thereof. All witnesses shall be duly sworn. If special circumstances dictate, the trier of fact may accept testimony of a witness by telephone and/or videotape.

(B) Standard of Proof. Formal charges of unethical [mis]conduct, medical defenses, and reinstatement proceedings [, and charges involving transfer to and from disability inactive status] shall be established by clear and convincing evidence.

(C) Burden of Proof; Burden of Going Forward. The burden of proof in proceedings seeking discipline [or transfer to disability-inactive status] or demonstrating aggravating factors relevant to unethical [mis]conduct charges is on the presenter [or ethics counsel]. The burden of going forward regarding defenses or demonstrating mitigating factors relevant to charges of unethical [mis]conduct shall be on the respondent. The burden of proof in proceedings seeking reinstatement [or transfer from disability-inactive status] shall be on the petitioner.

(D) Respondent's Presence and Testimony; Presence and Sequestration of Witnesses. Respondent's appearance at all hearings is mandatory. In accordance with R. 1:20-7(l), however, a respondent’s absence shall not delay the orderly processing of the case. The grievant, if any, the grievant's attorney, if any, and respondent's attorney, if any, and administrative staff assisting in the prosecution of the matter shall have the right to be present at all times during the hearing. Any other witnesses may be sequestered during their testimony on reasonable terms on timely application and a showing of good cause.

(E) Findings and Report. The trier of fact shall submit to the Board written findings of fact and conclusions of law on each issue presented, together with the record of the hearing, and shall take one of the following actions:

(i) Dismissal. If the trier of fact finds that there has been no unethical [mis]conduct, the secretary or special ethics master shall send to the presenter [or ethics counsel], the respondent, the grievant, if any, the Director[,] and the vice chair, a letter of dismissal in

a form approved by the Director, together with a copy of the hearing panel's report. The original report and record shall be filed with the Director. [No transcript shall be ordered by] T[t]he hearing panel or special ethics master shall not order any transcript without the prior approval of the Director or the Board. Appeals may be taken in accordance with R. 1:20-15(e)(2).

(ii) Admonition Recommendation. If the hearing panel or [S]special [E]ethics [M]master finds that there has been unethical [mis]conduct for which an admonition constitutes adequate discipline, the panel chair or special ethics master shall submit the original hearing panel report stating the specific discipline recommended and the record of all proceedings before it to the Director for transmittal to the Board. [No transcript shall be ordered by] T[t]he hearing panel or special ethics master shall not order any transcript without the prior approval of either the Director or the Board. A copy of the hearing panel's report shall be served on the presenter [or ethics counsel], the respondent, the grievant, if any, the vice chair and secretary. The Board shall proceed pursuant to R. 1:20-15(f).

(iii) Reprimand, Censure, Suspension or Disbarment Recommendations. If the hearing panel or special ethics master finds that there has been unethical [mis]conduct that requires the imposition of a reprimand, censure, suspension or disbarment, the panel chair or special ethics master shall submit the original hearing panel report stating the specific nature of the discipline recommended and the record of all proceedings, including the original transcript, to the Director for transmittal to the Board. A copy of the hearing panel's report shall be served on the presenter [or ethics counsel], the respondent, the grievant, if any, the vice chair and secretary. The Board shall proceed pursuant to R. 1:20-15(f).

(F) Public Hearings. [...no change].

[(d) Hearings Involving Minor Misconduct. Hearings to adjudicate formal complaints alleging minor misconduct shall proceed in accordance with paragraph (c) except as follows:

(1) No prehearing conference shall be held.

(2) The hearing shall commence within 30 days after the time prescribed for filing of an answer and a report shall be filed with the Board within 90 days thereafter.

(3) A hearing shall be held by a single attorney member of an Ethics Committee designated by the vice chair or another Ethics Committee member designated by the chair. When so designated, the member shall serve as a single adjudicator for purposes of that proceeding and shall exercise the same power, duties and authority as a hearing panel. The single attorney member shall make written findings of fact and conclusions of law but shall either dismiss the case or recommend the imposition of an admonition. The sanction imposed shall include costs and may include restitution, monitoring not to exceed 1 year, return of legal fees, or a combination thereof.]

(d) Abstention and Request For Disqualification. A trier of fact shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain under R. 1:12-1. It shall not be cause for disqualification that the trier of fact has heard or decided other cases involving the same respondent. Requests to disqualify a trier of fact shall, where possible, be made in advance of any prehearing conference; otherwise, it shall be made in advance of the initial day of hearing. The request shall be decided initially by the trier of fact, whose decision may be superseded by the vice chair or, in the event of a conflict, the chair, or, in matters handled by the Office of Attorney Ethics, by the Director.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraph (c) amended July 25,1995[,] to be effective immediately; paragraph (b)(2) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(1), (a)(2), and (c)(2)(E)(i) amended July 12, 2002 to be effective September 3,2002; paragraphs (a)(1) - (3), (b)(1) – (3), (c)(1), (c)(2)(A) – (E) amended, and caption to paragraph (c) amended, former paragraph (d) deleted and new paragraph (d) added _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-7 Changes

The PRRC agrees with the following proposed revisions by the OAE to this rule setting forth additional rules of procedure. The OAE's proposed amendments are largely housekeeping in nature, but they also fine-tune the provisions relating to subpoenas.

The following are the OAE's comments explaining the proposed amendments.

Paragraph (h), titled "Service," is amended. The word "letter" has been deleted from the rule as overbroad and the phrase "other document required by these rules to be served" substituted in its place as more appropriate. Service by facsimile, which was new technology in 1995 when first adopted, is now a tested method for service. Consent to service by this method is no longer appropriate.

Subparagraph (i)(1), involving subpoenas, is amended to add court reporters to the persons who can administer oaths and affirmations in "discipline and disability" matters. Subparagraph (i)(2) is amended to state explicitly existing law, which is that, prior to issuing a subpoena, a showing of relevance and materiality may be required. Subparagraph (i)(3) regarding service of subpoenas on respondents is amended to clarify that service may be made either by service on respondent, certified mail, or by similarly serving his/her counsel. The title of subparagraph (i)(4) has been modified to add "Contempt" to the existing title "Enforcement." This change will reinforce the ultimate penalty for non-compliance under enforcement proceedings pursuant to R. 1:9-6. Subparagraph (i)(6) concerning subpoenas pursuant to the law of another jurisdiction has been modified to provide an additional safeguard, which is that the foreign disciplinary counsel certifies that the issuance of the subpoena has been duly approved under the law of the other jurisdiction. Also, the initial capital in the word "State" has been made lower case for grammatical accuracy.

In paragraphs (m) and (n), the word "misconduct" is changed to "unethical conduct." Paragraph (m), regarding transcripts, is amended to accord with recently adopted R. 1:20-15A and clarify that the trier of fact must order a transcript whenever a "censure" is recommended.

In subparagraph (n), the number "5" is changed to the word "five." Additionally, the term "ethics counsel" is deleted. The term "presenter" is now defined in the Glossary to R. 1:20 as an attorney appointed to prosecute a complaint. The term "presenter," therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to "ethics counsel" unnecessary.

1:20-7. Additional Rules of Procedure

(a) Nature of Proceedings. [... no change].

(b) Evidence Rules Relaxed. [...no change].

(c) Time Limitations. [...no change].

(d) Delay Caused by Grievant. [...no change].

(e) Immunity of Disciplinary and Fee Authorities. [...no change].

(f) Immunity of Grievants, Witnesses and Others. [...no change].

(g) Immunity From Criminal Prosecution. [...no change].

(h) Service. Service on the respondent of any pleading, motion, [letter] or other document required by these rules to be served [or notice] in a disciplinary or disability proceeding may be made by personal service, or by certified mail (return receipt requested) and regular mail, at the address listed in the New Jersey Lawyers' Diary and Manual or the address shown on the records of the Lawyers' Fund for Client Protection. Service on a respondent may also be made by serving respondent's counsel, if any, by regular mail[; and] or by facsimile transmission[, with the consent of respondent or respondent's counsel].

(i) Subpoena Power.

(1) Oaths. In discipline and disability matters, [pending before them] members of a hearing panel, special ethics masters, court reporters or ethics counsel may administer oaths and affirmations.

(2) Investigative and Hearing Subpoenas. During the investigation or hearing of a matter, a subpoena may be issued in the name of the Supreme Court to compel the appearance of any person for questioning or testimony or to compel the production of books, records, documents or other items designated therein. A showing of relevance or materiality may be required before the issuance of any subpoena. The subpoena shall issue in a form approved by the Supreme Court. Investigative and hearing subpoenas may be signed by any Ethics Committee member, the presenter, ethics counsel or by the Board or its legal staff. Hearing subpoenas may also be issued by a hearing panel member, special ethics master or by the Board or its staff.

(3) Service; Fees. Subpoenas shall be served within the State of New Jersey by any person 18 or more years of age by delivering a copy thereof to the person named, except that subpoenas may be served on an attorney who is a witness or a party, by certified mail, return receipt requested. No attendance fee need be paid. Service on a respondent may also be made by serving respondent's counsel, if any, by regular mail.

(4) Enforcement; Contempt. Subpoenas issued under this rule may be enforced pursuant to R. 1:9-6.

(5) Standards; Quashing Subpoena; Appeals.

(A) Generally. The Board chair, during the investigation stage of a matter, or the hearing panel chair or special ethics master, after the filing of a complaint, may, on motion made promptly, quash or modify a subpoena if the subject testimony or documentation is patently irrelevant or if compliance would be unreasonable or oppressive.

(B) Interlocutory Appeals. [...no change].

(6) Subpoena Pursuant to Law of Another Jurisdiction. When[-]ever a subpoena is sought in this [S]state by a foreign disciplinary authority pursuant to the law of that jurisdiction for use in a discipline or disability proceeding, and where the foreign disciplinary counsel certifies that the issuance of the subpoena has been duly approved under the law of the other jurisdiction, the Disciplinary Review Board, on petition for good cause, on notice to the Director, may issue a subpoena as provided in this rule to compel the attendance of witnesses and production of documents in this [S]state.

(j) Grievances Against Disciplinary Agency Members. [...no change].

(1) Grievances Alleging Improper Processing. [...no change].

(2) Other Grievances. [...no change].

(k) Extension of Time; Adjournments. [...no change].

(l) Absent or Non-Responding Respondent. [...no change].

(m) Transcripts. Where in a pending matter a respondent is found guilty of unethical [mis]conduct warranting reprimand, censure, suspension or disbarment, the trier of fact shall order the original transcript and shall file it, together with its report and the record of the matter, with the Board. If no finding of unethical [mis]conduct is made, the trier of fact may order the transcript only with prior permission of the Director or the Board. Where a matter is pending, a respondent may, at personal expense, order a transcript of the hearing, provided that the respondent also directs the reporter to furnish a copy of the transcript to the trier of fact. Where a matter is concluded the respondent may, at personal expense, order a transcript of the hearing. Except where a protective order has been issued pursuant to R. 1:20-9(g), any other person may order all or any part of a transcript at the individual's prepaid expense. Either the Board or the Director shall have the right to order a transcript wherever necessary.

(n) Prior Discipline or Disability. Information concerning prior final discipline or disability of the respondent shall not be a matter for consideration by the trier of fact until a finding of unethical [mis]conduct has first been made, unless such information is

probative of issues pending before the trier of fact. On a finding of unethical [mis]conduct the trier of fact shall request the Office of Attorney Ethics to disclose to it and to the presenter [or ethics counsel] and to the respondent a summary of any orders, letters or opinions imposing temporary or final discipline or disability on the respondent. Within [5] five days of receipt of the submission of any prior discipline or disability, either the presenter or ethics counsel or respondent may submit written argument on the issue of the effect to be given thereto.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraphs (h), (i)(1)-(3) and (6) amended, and the caption of (i)(4) amended; paragraphs (m) and (n) amended _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-8 Changes

The PRRC agrees with the OAE's proposed revisions to this rule, which deal with time goals in disciplinary proceedings.

The following are the OAE's comments explaining the proposed amendments.

Paragraph (a) is amended to delete reference to “minor misconduct cases,” since the time goals for such matters were previously changed by the Supreme Court from three to six months effective September 1, 1998 so that they were the same as for standard cases. Therefore, there is no longer any reason to distinguish “minor misconduct matters” from standard. See also correlative changes made to delete reference to the “minor” track in R. 1:20-6 (d) and R. 1:20-3(i). For these same reasons, reference to “minor” cases is also deleted from R. 1:20-8(b) governing time goals for hearings and R. 1:20-8(c) governing time goals for appellate review by the Board.

Paragraph (b), dealing with “Formal Hearings,” is also changed to clarify the existing practice in which formal hearing reports are filed with the “Director for transmittal to the Board.”

Paragraph (g) is titled “Priority of Disciplinary Matters.” The second sentence is reworded to change from passive to active voice. A comma is added in the first sentence. A new last sentence is also added to make clear that at the same time that “advance notice of potential litigation conflicts” is given to the Assignment Judge, it should also be given to the participants in the disciplinary proceeding.

1:20-8. Time Goals; Accountability; Priority

(a) Investigations. The Disciplinary system shall endeavor to complete all investigations of [minor misconduct matters and of] standard matters within six months, and of complex matters within nine months, the time period commencing on the date a written grievance is docketed and concluding on the date a formal complaint is filed, the grievance is dismissed or other authorized disposition is made.

(b) Formal Hearings. The disciplinary system shall endeavor to complete formal hearings [involving minor misconduct matters within three months and all other formal hearings] within six months from the expiration of the time for filing an answer to a complaint until a report is filed with the Director for transmittal to the Disciplinary Review Board.

(c) Appellate Review. The disciplinary system shall endeavor to complete all recommendations for discipline filed with the Disciplinary Review Board [in minor misconduct cases within three months and all other recommendations for discipline] within six months from the date of docketing by the Office of Board Counsel until the issuance of the Board's decision. All ethics and fee arbitration appeals should be completed and a decision issued within three months of docketing the appeal by the Board.

(d) Supreme Court Review. [...no change].

(e) Effect of Goals. [...no change.]

(f) Accountability. [...no change].

(g) Priority of Disciplinary Matters. Generally, disciplinary matters shall take precedence over administrative, civil and criminal cases. All courts and tribunals shall make reasonable accommodations for the attendance of counsel, witnesses and other participants. [Reasonable accommodations for the attendance of counsel, witnesses and other participants shall be made by all courts and tribunals.] Every participant in a disciplinary proceeding shall be obligated to give reasonable advance notice of potential litigation conflicts to the assignment judge or to the particular judge or officer in charge of the litigation. The same advance notice also shall be given to the presenter, respondent, counsel, and the panel chair or special ethics master in the disciplinary matter.

Note: Former R. 1:20-8 deleted, new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b), (c), and (g) amended _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-9 Changes

This rule is captioned "Confidentiality; Access to and Dissemination of Disciplinary Information." The PRRC agrees with the OAE's proposed amendments, which include expanding the exceptions to the confidentiality restrictions to permit the Director to respond to inquiries on the status of disciplinary proceedings against attorneys charged with crimes.

The following are the OAE's comments explaining the proposed amendments.

Subparagraph (a)(1) is amended to add a respondent's "breach" of confidentiality as a reason authorizing the Director to make limited comment about the pendency, subject matter, and status of a grievance. The current rule permits the Director to publicly state the pendency, subject matter, and status of a grievance where the respondent "has waived confidentiality." If the respondent breaches confidentiality during the investigative stage of a disciplinary investigation without formal waiver, however, the disciplinary system cannot stand mute to press inquiries generated by the respondent's comments and issue statements of "no comment," while the respondent proceeds to discuss the case at will. The Director's discretion to make limited public statements has been exercised very sparingly in the past and no change in frequency is intended by this rule change.

Subparagraph (a)(2) regarding confidentiality is also amended. It deals with the limited public disclosure that may be made by the Director when allegations are based on reciprocal discipline and criminal convictions and findings. The modification adds the phrase "a pending criminal charge." This addition permits the Director to simply acknowledge that an investigative file has been opened when a New Jersey attorney is indicted or otherwise charged with a criminal offense. Since the information is already publicly known, acknowledging that fact underscores the fact that the disciplinary system is aware of it and is proceeding responsibly. The existing rule provision allows disclosure where there is "a guilty plea or conviction of a crime." An indictment or information should also be included and the proposed addition remedies this omission.

Paragraph (b) regarding "Public Proceedings" is amended for clarity and ease of reference to add a new subparagraph (5) that specifically references disability proceedings as being a recognized exception to the general rule that disciplinary proceedings are public. Disability proceedings are also specifically dealt with in paragraph (f).

Subparagraph (c)(1) regarding "Public Records" is amended to delete the introductory phrase "Unless a protective order has been issued" and replace it with the phrase "Subject to paragraphs (a) and (b)," which more accurately depicts the records that are not public. What is intended is that all records and documents that become part of a disciplinary record are public, unless excluded under paragraph (a) "Confidentiality" and paragraph (b) "Public Proceedings." Protective orders are included under (b)(4). The first sentence of subparagraph (c)(1) has also been reworded for clarity. A literal reading of the existing sentence would mean that only the documents filed "subsequent" to the complaint and other enumerated charging documents are public, but that the charging documents themselves remain confidential. That result is unintended and is remedied by the proposed change. Also, since prehearing conferences are confidential under paragraph (b)(2), paragraph (c) is amended to exclude documents submitted in connection therewith. Nevertheless, the Case Management Order resulting from the prehearing conference is

public in accordance with R.1:20-5(b)(4).

This subparagraph is also amended to clarify that public records are available, not only for inspection, but also for copying. Transcripts, however, need not be copied. They are available at any time, in accordance with R. 1:20-7(m), directly from a court reporting agency. The entire transcript or any part thereof may be ordered, except for any portion covered by a protective order. The reporting agency will provide copies at the same rate charged to the disciplinary system at the prepaid expense of the member of the public requesting the transcript. Additionally, where other public documentation to be copied is voluminous, in the opinion of the district secretary or the Director, a commercial photocopy service may be used to satisfy copying requests. In this event, the amount charged is limited to the exact cost charged by the commercial service; except for reasonable postage charges, if required, no additional charge shall be made by the district secretary or the Director.

The title of subparagraph (e) is modified to add the phrase “Including Subpoenas” to the existing title of “Disclosure of Evidence of Criminal Conduct; All Other Disclosure.” This change will assist persons using the rules to better find the provisions dealing with subpoenas issued to disciplinary personnel. Subparagraph (e)(1) is also amended to clarify that the Director may refer matters to law enforcement whenever a complaint has been filed and served or the respondent has been temporarily suspended. Both the filing of a formal complaint and the issuance of an order for temporary suspension are public actions. In both cases, the Director must also send a copy of the referral letter to the respondent.

Since letters are not documents that are “served,” that term is eliminated as unnecessary in subparagraph (e). This change is also consistent with the proposed change to R. 1:20-7(h), which eliminates the word “letter” as inappropriate, since letters are not documents that are served. Additionally, the words “any known counsel” are added after the word “respondent” in subparagraphs (e)(1) and (2) to clarify that both should be noticed of any referral. Finally, in the next to last sentence of this subparagraph, the number “10” is replaced by the word “ten.” This same change from number to word is also made in subparagraph (e)(2).

Paragraph (f) is amended to hyphenate the term "disability-inactive status."

The first sentence of paragraph (g) is amended by adding the words “In exceptional cases,” as the introductory language for this entire paragraph. This is done to underline the fact set forth in the comment to the rule when originally adopted, that protective orders are unusual and should be used very sparingly. As the original 1995 comment notes make clear, this rule is to be strictly construed. It is not, of course, intended to cover ordinary attorney-client privileged matters. As stated in the 1995 comment, “Rather, only exceptionally sensitive matters should be the subject of a protective order, including, for example, by way of illustration, copyright or trademark secrets or testimony by minors regarding sexual misconduct involving children.” The paragraph is also amended to specify that only the “presenter or the respondent” shall make such an application. Grievants, who are witnesses, may make any such request to the presenter; however, it is the presenter who must decide whether to request such relief. This provision is consistent with R. 1:20-5(g)(3), titled “Grievant’s Counsel,” which provides that the grievant’s attorney has a role that is “limited to consulting with the grievant.” The grievant is a witness, not a principal in the disciplinary proceeding. The second sentence of paragraph (g) is also amended to change the language from passive to active voice.

In paragraph (i), the first sentence is amended to add the term “restoration” to refer to disability-inactive proceedings, as that term has been used throughout these rules (see R.1:20-12)

to distinguish restoration to active status from reinstatement, which applies only to discipline proceedings.

Paragraph (j), dealing with providing complaints and certain other public documents to a respondent's law firm or public employer, is amended to state that a motion for discipline by consent must first be approved by the Board before it can be provided to an employer. This change accords with current paragraph (a), since such motion becomes public only after it is first approved by the Board. The proposal also clarifies that only employers "known" to the disciplinary system need be notified and that no separate investigation need be conducted to determine the employer.

Paragraphs (k), (l), (m), and (n) are amended to hyphenate the term "disability-inactive status."

Paragraph (m), governing "Notice to the Courts," is modified to include as reasons for the possible appointment of an Attorney-Trustee under R. 1:20-19, the failure or refusal of an attorney who is suspended, disbarred or transferred to disability-inactive status to comply with R. 1:20-20. The change also gives the Director and the County Bar Association the discretion to make a request for an Attorney-Trustee by changing the word "shall" to "may." There are some situations, for example when the respondent did not maintain a practice within the state when disciplined, where no appointment is necessary.

1:20-9. Confidentiality; Access to and Dissemination of Disciplinary Information

(a) Confidentiality. Prior to the filing and service of a complaint in a disciplinary matter, or a motion for final or reciprocal discipline, or the approval of a motion for discipline by consent, the disciplinary matter and all written records received and made pursuant to these rules shall be confidential, except that the pendency, subject matter, and status of a grievance may be disclosed by the Director if:

(1) the respondent has waived or breached confidentiality; or

(2) the proceeding is based on allegations of reciprocal discipline, [or] a pending criminal charge, a guilty plea or conviction of a crime, either before or after sentencing; or

(3) there is a need to notify another person or organization, including the Lawyers' Fund for Client Protection, in order to protect the public, the administration of justice, or the legal profession; or

(4) the Supreme Court has granted an emergent disciplinary application for relief; or

(5) the matter has become common knowledge to the public.

(b) Public Proceedings. All proceedings shall be public except:

(1) as otherwise provided by paragraph (a); or

(2) prehearing conferences; or

(3) deliberations of the trier of fact, Board or Supreme Court; or

(4) information subject to a protective order; or

(5) proceedings alleging disability in accordance with paragraph (f).

(c) Public Records.

(1) Subject to paragraphs (a) and (b), [Unless a protective order has been issued, all documents and records filed subsequent to] on the filing and service of a complaint, a motion for final or reciprocal discipline or the approval of a motion for discipline by consent (except for documents submitted in connection with confidential prehearing conferences), those documents, as well as the all documents and records filed subsequent thereto, shall be available for public inspection and copying. Inspection shall be available by appointment at the office of the body where the matter is then pending. Transcripts shall be available to the public in accordance with R. 1:20-7(m) at their pre-paid expense. Where, in the opinion of the district secretary or the Director, the documentation to be

copied is voluminous, a commercial photocopy service may be used for reproduction at the prepaid expense of the person requesting them.

(2) [...no change].

(3) [...no change].

(4) [...no change].

(5) [...no change].

(d) Referral to Admissions/Disciplinary Agencies. [...no change].

(e) Disclosure of Evidence of Criminal Conduct; All Other Disclosure Including Subpoenas.

(1) Subsequent to the filing of a complaint, the Director may refer any matter to law enforcement authorities without prior notice to respondent if criminal conduct may be involved. Prior to the filing and service of a complaint, the Director may refer a matter to law enforcement authorities if criminal conduct may be involved and the respondent has been temporarily suspended. In both cases, [A] a copy of the letter of referral shall be sent to [served on] the respondent and any known counsel. Where criminal conduct may be involved but where the respondent has not been temporarily suspended or served with a complaint, the Director shall, prior to such referral, give [10] ten days written notice to the respondent and any known counsel of the intention to make a referral. The respondent may, within said period, apply to the Board for a protective order based on good cause shown.

(2) In all other cases, including cases where civil or criminal subpoenas have been issued to disciplinary personnel, the Board may authorize the referral of any confidential documentary information to the appropriate authority only for good cause shown. When a requesting authority shall seek such information, it shall issue its subpoena, which shall be transmitted to the Board or shall file a motion seeking disclosure with the Board, on [10] ten days notice to the respondent and any known counsel, and the Director, both of whom shall be given an opportunity to be heard.

(f) Proceedings Alleging Disability. Proceedings for transfer to or from disability-inactive status are confidential. All orders transferring an attorney to or from disability-inactive status are public.

(g) Protective Orders. In exceptional cases, [P]protective orders may be sought to prohibit the disclosure of specific information to protect the interests of a grievant, witness, third party or respondent. The presenter or respondent shall make any [An] application for a protective order [shall be made by the investigator, presenter, ethics counsel or respondent]. On application or on its own motion, and for good cause shown, the Supreme Court, the Board, or the trier of fact may issue the protective order. A copy of

any protective order entered shall be sent promptly to the Director, the secretary of any appropriate Ethics Committee, all parties, Board Counsel and the Clerk of the Supreme Court. The trier of fact or the Board may also direct that implementation of the protective order include a requirement that any hearing on the matter be conducted in such a manner as to preserve the confidentiality of the information that is the subject of the order.

(h) Duty to Maintain Confidentiality. [... no change].

(i) Records Retention, Expungement and Reporting. The Clerk of the Supreme Court shall maintain permanently all disciplinary and disability files processed by the Supreme Court for decision including, but not limited to, all files resulting in the imposition of final or temporary discipline or the transfer to disability-inactive status, and all applications for reinstatement or restoration. Chief Counsel to the Disciplinary Review Board shall permanently maintain all ethics files previously resulting in private reprimands and admonitions issued by the Board, and shall maintain files of all ethics and fee arbitration appeals processed to the Board for a period of three years after the matter is terminated or for one year after the date of death of the attorney, whichever is earlier. All Ethics Committees shall maintain files for one year after the date a matter is terminated or after the attorney's death. All files maintained by the Office of Attorney Ethics and all other files maintained by the Disciplinary Review Board may be destroyed after five years following the date the matter is terminated or after one year following the date of the attorney's death. However, Chief Counsel to the Disciplinary Review Board and the Director of the Office of Attorney Ethics shall permanently maintain a summary of all docketed matters processed by each office containing the name of the respondent and any grievant or client, a brief summary of the nature and disposition of the matter and the date the case was opened and closed by their respective offices.

Except with respect to any application by an attorney for appointment to or employment by a judicial branch of government or a law enforcement or corrections agency, the matter shall, after the time herein specified for destruction of the file, be deemed expunged and any agency response to an inquiry requiring a reference to such matter shall state that there is no record of the filing of cases that are over five years old where the matter is dismissed or terminated other than by discipline or transfer to disability-inactive status. Except with respect to inquiries by the judicial branch of government, or a law enforcement or corrections agency, the respondent may answer any inquiry requiring a reference to a destroyed file by stating that the grievance was dismissed and thereafter expunged pursuant to court rule.

(j) Law Firm/Public Agency Notice of Public Action [Complaint]. Unless the respondent is the sole proprietor of a law firm, an Ethics Committee or the Office of Attorney Ethics shall send promptly to the law firm of which the respondent is known to be a member or by which the respondent is known to be employed, or the public agency by which the respondent is known to be employed, a copy of every complaint filed and served by that entity, [or] motion for final or reciprocal discipline or approved motion for discipline by consent.

(k) Notice to National Lawyer Regulatory Data Bank. The Clerk of the Supreme Court shall transmit promptly notice of all discipline, whether temporary or final, imposed on an attorney, transfers to or from disability-inactive status, and reinstatements to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

(l) Public Notice of Discipline Imposed. The Clerk of the Supreme Court shall cause promptly notices of all discipline, whether temporary or final, imposed against an attorney, transfers to or from disability-inactive status and reinstatements to be published in the official newspaper designated by the Supreme Court.

(m) Notice to the Courts. The Clerk of the Supreme Court shall promptly transmit a copy of all orders of discipline, whether temporary or final, transfers to or from disability-inactive status and reinstatements to all Assignment Judges, to the Presiding Judge for Administration of the Appellate Division, the Presiding Judge of the Tax Court of New Jersey, and to the Clerk of the United States District Court for the District of New Jersey. If a respondent has been suspended, disbarred or the subject of an equivalent sanction or transferred to disability-inactive status and [or is otherwise] fails to or is unable to comply with the requirement of R. 1:20-20, the Office of Attorney Ethics or the County Bar Association may [shall], where necessary, request the Assignment Judge of the county in which the respondent practiced law to designate a practicing attorney member of the bar of that county to take such action pursuant to R. 1:20-19 as may be necessary to protect the interests of the respondent and the respondent's clients.

(n) Notice to Disciplinary Agencies. The Office of Attorney Ethics shall promptly transmit notice of final discipline and transfers to disability-inactive status to the disciplinary enforcement agency of every other jurisdiction in which the respondent is known to have been admitted.

(o) Annual Reports. [...no change].

Note: Former R. 1:20-9 redesignated R. 1:20-12, new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (k) amended July 10, 1998 to be effective September 1, 1998; paragraphs (d) and (g) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(1) and (2), (b) (4), (c)(1), (e), (f), (g), (i), (j), (k), (l), (m), and (n) amended, the caption to (e) amended, and a new (b)(5) added _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-10 Changes

The PRRC agrees with the OAE's proposed amendments to this rule governing discipline by consent. The amendments are housekeeping in nature.

The following are the OAE's comments explaining the proposed amendments.

In subparagraphs (a)(2)(D) and (F) and (b)(2), the phrase “ethical misconduct” is replaced by the phrase “unethical conduct” for uniformity.

In subparagraphs (b)(1) and (2), reference to “ethics counsel” is deleted. The term “presenter” is now defined in the Glossary to R. 1:20 as an attorney appointed to prosecute a complaint. The term “presenter,” therefore, now covers both an ethics counsel from the Office of Attorney Ethics or a volunteer attorney for an Ethics Committee, making reference to “ethics counsel” unnecessary.

Subparagraphs (b)(1) and (2) are also amended to make some minor grammatical changes. In the last sentence of (b)(2), the phrase “in so far as applicable” is deleted and the specific paragraphs of R. 1:20-10(a)(2) that are applicable are specifically set forth.

1:20-10. Discipline by Consent

(a) Disbarment by Consent.

(1) General Procedure. [...no change].

(2) Affidavit of Consent. Consents to disbarment shall be by affidavit in the form approved by the Supreme Court in which the respondent asserts:

(A) the respondent has consulted with an attorney; and

(B) the respondent's consent is freely and voluntarily given; the respondent has not been subjected to coercion or duress; the respondent is fully aware of the implications of submitting the consent; and

(C) the respondent is not under any disability, mental or physical, nor under the influence of any medication, intoxicants or other substances that would impair the respondent's ability to knowingly and voluntarily execute the disbarment by consent; and

(D) the respondent is aware that there is presently pending an investigation or proceeding involving allegations of unethical [mis]conduct, which allegations are set forth in the consent form; and

(E) an acknowledgement that the material facts so alleged are true; and

(F) an acknowledgement that the allegations of unethical [mis]conduct could not be successfully defended against; and

(G) the understanding that the disbarment by consent, if accepted by the Supreme Court, is tantamount to disbarment and constitutes an absolute bar to reinstatement to the practice of law; and

(H) the understanding that disciplinary costs will be assessed by the Supreme Court in accordance with R. 1:20-17.

The affidavit of consent to disbarment shall not be received by the Director unless accompanied by a letter from the respondent's attorney certifying that an attorney has consulted with respondent and that, in so far as the attorney is able to determine, respondent's consent is knowingly and voluntarily given and that respondent is not under any disability affecting respondent's capacity knowingly and voluntarily to consent to disbarment.

(3) Action by Supreme Court. [...no change].

(b) Other Discipline by Consent.

(1) Timeliness and Form of Petition. At any time during the investigation of a disciplinary matter or within 60 days after the time prescribed for the filing of any answer to a complaint, the respondent may agree with the investigator[,] or presenter [or ethics counsel] to submit an affidavit of discipline by consent in exchange for a specific recommendation for discipline. Following approval by the chair or Director, the matter shall be submitted to the Board as an agreed matter by way of a motion to impose discipline on consent in accordance with R. 1:20-15(g). A copy of the motion shall be provided to the Director.

(2) Contents of Motion. The motion, which shall be filed by the investigator[,] or presenter [or ethics counsel,] shall certify the concurrence of the chair or the Director, and shall be supported by a signed stipulation setting forth in detail the admitted facts regarding the unethical [mis]conduct, the specific ethical rules violated, a specific recommendation for, or range of, discipline, together with a brief analysis of the legal precedent therefore. [and] The stipulation shall attach the respondent's affidavit of consent in the form approved by the Supreme Court and containing the assertions[, in so far as applicable,] set forth in paragraph (a)(2)(B),(C),(E) and (H).

(3) Action by Board. [...no change].

Note: Former R. 1:20-10 text deleted, new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (a)(2)(H) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(2)(D) and (F) and (b)(1) and (2) are amended _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-12 Changes

This rule deals with the non-disciplinary topic of "Incapacity and Disability." After making minor changes to a proposal by the OAE, the PRRC offers the following amendments, which seek to streamline the current procedures.

The following are the OAE's comments explaining the proposed amendments and, in respect of amendments to paragraphs (c) and (d), the PRRC's comments concerning its minor changes to the OAE's proposal.

The existing rule deals primarily with the concept of involuntary commitment of a lawyer under former paragraph (a). The existing rule also addresses the situation where a lawyer becomes so disabled or incapacitated as to lack the "capacity to practice law" under paragraph (d). The remedy if such conditions can be proven is to transfer the lawyer to disability-inactive status, which prevents the lawyer from practicing law until the lawyer is no longer disabled. The existing rule makes clear that such a transfer is also appropriate when the attorney in a disciplinary matter asserts that the attorney is "unable to defend or assist counsel" in his/her matter under former paragraph (e).

The new rule proposals suggest necessary procedural changes to enable the system to determine whether or not the attorney is, in fact, disabled or incapacitated. The existing rule, while containing general provisions for these situations, does not set forth with adequate specificity procedures necessary to make these determinations. The current rule's procedures are also unduly cumbersome. The Office of Attorney Ethics bases these suggested changes on its years of experience with the existing rule, including recent experiences where attorneys claim to be disabled to secure the benefit of the rule, but then fail to produce competent medical proofs to support such claims. They then sometimes fail to cooperate with the disciplinary system by claiming an inability to produce such report or inability to undergo medical examinations, either by their own physicians or at examinations scheduled with medical professionals hired by the disciplinary system. In some cases, when charged with serious disciplinary offenses, attorneys try to use this rule offensively, and inappropriately, to shield themselves from adjudication of those disciplinary charges or fee arbitration matters through undue delay, non-cooperation or outright refusal to complete reasonable and necessary medical examinations.

The proposed rule has been realigned for clarity and now consists of the following subsections. Additions to these captions are doubly underscored.

(a) Disability-Inactive Status Defined.

(b) [(a)] Disability Inactive Status; [Effect of] Judicial Determination of Mental Incapacity or [on] Involuntary Commitment.

[(b) Request for Medical Examination.]

(c) [(e)] Inability to [Properly] Defend or Participate in a Disciplinary or Fee Arbitration Proceeding.

(d) Other Proceedings to Determine Incapacity.

(e) [(c)] Assignment of Counsel; Notice of Proceedings.

(f) [Transfer to Active Status] Restoration to Practice on Termination of Disability.

(g) Burden of Proof; Standard of Proof.

(h) Waiver of Doctor-Patient Privilege.

In order to emphasize the non-disciplinary nature of the disability-inactive status, the term “respondent” has been eliminated throughout the rule and the word “attorney” used. Likewise, and for the same reason, the term “reinstatement” has been changed to “restoration.” Finally, the term "disability inactive" has been hyphenated for uniformity throughout the rule.

A new proposed paragraph (a) is included titled “Disability-Inactive Status Defined.” This is the appropriate topic to introduce the rule because it explains what the rule is all about and what it means to be transferred to that status. The text is taken almost verbatim from the first sentence of existing paragraph (f).

Existing paragraph (a) is redesignated (b) and amended. The caption is amended slightly to state “Disability-Inactive Status; Judicial Determination of Mental Incapacity or Involuntary Commitment.” The text of this paragraph has been changed primarily to clarify and correct grammar. Additionally, it has been divided into three paragraphs for ease of reading. The first subparagraph of the rule is modified to make the automatic stay provisions apply to either disciplinary or fee arbitration proceedings. The former rule dealt only with disciplinary proceedings. Similarly, the second subparagraph of the rule is modified to state the corollary, namely, that when the attorney is restored to practice, any stay will be eliminated so that disciplinary and fee arbitration proceedings will resume.

This paragraph has not been strictly followed in the past. Some confusion surrounds the fact that occasionally an attorney will be released from a facility to which a court has confined him/her involuntarily before the disciplinary system is aware of the initial confinement order. In such event there may be a reluctance to transfer the attorney to disability-inactive status. The understanding appears to have been that all releases must be pursuant to a judicial declaration of competency as provided by the rule. However, further research discloses that release often does not result from a judicial order at all. Rather, the prevalent practice is for a physician (treatment team) to release the confined person when convinced he/she is no longer a danger to self or others. N.J.S.A. 30:4-27.15 and N.J.S.A. 30:4-27-17a. The later statute provides that a treatment team may “administratively discharge a patient from involuntary commitment status, if the treatment team determines that the patient no longer needs involuntary commitment.” It is evident, therefore, that absent proof of a judicial declaration of competency, on receipt of an order of involuntary commitment, the attorney should be immediately transferred to disability-inactive status pending further review by the disciplinary system and the Court to insure that the attorney is indeed competent. The second subparagraph of (b) now contains language specifically stating that the Court can dispense with proof of competency where the attorney receives a judicial declaration of competency or is "judicially released from involuntary

commitment."

Where no judicial declaration or judicial release is secured, the attorney must demonstrate competency. Proof of competency, if it exists, should not be difficult for the attorney to produce. The attorney can apply for restoration at any time under new paragraph (e). If adequate proof of competency cannot be produced, then the attorney must be continued on disability-inactive status until the attorney is found to be competent in order to protect the public, the attorney and the administration of justice. Depending on the particular circumstances of the case, it may be possible for the Court to return the attorney to practice subject to certain medical or practice conditions.

As explained above, the word "restoration" is used in subparagraphs two and three of paragraph (b) to distinguish it from the word "reinstatement," which is a disciplinary term.

The third subparagraph of (b) deals with the duty of state court judges to report to the Office of Attorney Ethics attorneys who are involuntarily committed or declared to be competent. An amendment to the latter is made to include reporting where a judge “releases an attorney from involuntary commitment.” This addition parallels the change in language that was made to the second subparagraph. Finally, grammatical revisions are made to the last sentence of this subparagraph.

Former paragraph (b) is deleted.

New paragraph (c), titled “Inability to Defend or Participate in a Disciplinary or Fee Arbitration Proceeding,” is taken from former subsection (e). It is substantially modified and the procedure is streamlined. These new modifications to the rule deal with the situation where a grievance or fee arbitration is pending and the attorney asserts that the attorney is “unable to defend or to assist counsel in defense of, or otherwise participate in, the matter due to mental or physical incapacity.” As in former paragraph (a) and former paragraph (e), the rule calls for the immediate and mandatory transfer of the attorney to disability-inactive status by the Court after being so notified by the Director. The rationale is that if the attorney personally avers that the attorney lacks the capacity to assist counsel in his/her own disciplinary defense, or to otherwise participate in a disciplinary or fee arbitration matter due to mental or physical incapacity, the attorney obviously lacks the capacity to represent others in the practice of law.

However, since there is a disciplinary or fee arbitration proceeding pending, there must be a method to permit the disciplinary system, through the Director, OAE, to test the bona fides of the attorney’s assertion in order to determine whether or not those proceedings should go forward. Otherwise, in a serious case such as a knowing misappropriation, an attorney can avoid suspension or disbarment, for example, by simply asserting he/she cannot assist counsel. If transfer to disability-inactive status were the only and incontrovertible result, the attorney would remain on disability-inactive status and the misappropriation issue could never be adjudicated until the attorney choose to try to be restored to active status. Similarly, with fee arbitration proceedings, the attorney could simply avoid adjudication of the fee dispute.

The Office of Attorney Ethics’ experience has demonstrated an increased assertion by attorneys wishing to avoid a fee arbitration or disciplinary proceeding that their medical condition precludes them from undergoing the stress involved in a fee arbitration or disciplinary proceeding. However, the attorney and his/her physician find that the stress is insufficiently great to require the attorney to cease practicing law. Such a situation permits the attorney to escape being properly evaluated and, if appropriate, being transferred to disability-inactive status, while

at the same time permitting the attorney to continue to practice law without diminution. Such situations reflect poorly on the fee arbitration and disciplinary systems to clients and the public who see the attorney getting away without accounting for his/her actions or legal fee. To help ameliorate this situation, both disciplinary and fee arbitration proceedings are addressed by this rule.

The proposed rule sets forth an orderly process by which the Director may test the bona fides of the attorney's assertion, while leaving the ultimate decision on the issue to the special ethics master. The rule calls for a hearing before a special ethics master with a report to the Court if the attorney is incapacitated. Although the OAE's proposal contemplated that the Court would order any necessary medical examination, the PRRC amended this paragraph to permit the special master to order a medical examination. The PRRC incorporated a similar reference in paragraph (d). Paragraph (c) requires full cooperation by the attorney to produce competent medical evidence to support his or her claim, together with release of all medical and treatment information under paragraph (h). If the attorney is not incapacitated, the special master's finding shall cause the disciplinary or fee arbitration matters to resume.

Paragraph (d) is retained with substantial revisions. In all other cases except those outlined in new paragraphs (b) and (c), paragraph (d) sets forth the manner in which one can prove incapacity on the part of an attorney. In conjunction with an investigation into an attorney's possible incapacity, the Court may direct a hearing before a special master "whenever the Director presents facts that reasonably bring into question an attorney's capacity to practice law, whether by reason of mental or physical infirmity, senility or illness, or because of the use of drugs or intoxicants." For example, the Director occasionally receives reports from judges in the state or federal court system in New Jersey, including judges of Workers Compensation and judges of the Office of Administrative Law that, in their opinion, raise a significant question as to the attorney's incapacity to practice law. The Director may use this rule in an appropriate situation to secure a determination of the incapacity issue. The final portion of (d) sets forth that "all further hearings" shall be conducted as other disciplinary proceedings under R. 1:20-1 et. seq. The master will then report to the Court. If the Court concludes that the attorney lacks the capacity to practice law, it will transfer the attorney to disability-inactive status. Otherwise, it shall make such order as it deems appropriate.

New paragraph (e), titled "Assignment of Counsel; Notice of Proceedings," is almost identical to former paragraph (c), but is renumbered. In accord with the streamlined procedure set forth in this new paragraph, the Court is the body that will assign counsel.

Paragraph (f) is retained, but retitled "Restoration to Practice on Termination of Disability." The caption and text are changed to use the uniform term "restoration," rather than the disciplinary term "reinstatement." The first sentence of the existing rule is deleted here, but relocated in new paragraph (a). The paragraph is also amended to afford the Director ten days prior written notice if an attorney seeks to be transferred from disability-inactive status and restored to active status, in order for the Director to properly evaluate the case. The next to the last sentence is deleted as unnecessary. The subject of the attorney's ineligibility is adequately covered by the first sentence of this paragraph.

Paragraph (g), currently titled "Burden of Proof," is retained. The title has been changed to add the phrase "Standard of Proof." This paragraph has been restructured to deal with the burden of proof under proceedings covered in paragraph (c), which is on the attorney. The rule next deals with the burden of proof under paragraph (d), which is on the party seeking the

transfer. This is identical to the existing statement in R.1:20-6(c)(2)(C). Finally, the rule sets forth the burden of proof dealing with restoration, which is on the attorney. This is identical also to the statement of R.1:20-6(c)(2)(C). A new last sentence is added dealing with the standard of proof, which is clear and convincing evidence, as to all proceedings under R.1:20-12. This statement is consistent with existing R.1:20-6(c)(2)(B).

Paragraph (h), titled "Waiver of Doctor-Patient Privilege," is retained. The first sentence of the paragraph has been modified to make clear that waiver occurs when a respondent asserts an "inability to properly defend…or participate in a disciplinary or fee arbitration proceeding," in addition to the situation where an attorney files an application for transfer to or restoration from disability-inactive status as already stated in the rule. The second sentence has been amended to add to the attorney's required disclosures "the nature and extent of (an) examination, evaluation or treatment." This will help the Director to properly evaluate the evidence of disability. Finally, the rule has also been changed to give the Director the discretion to either request the attorney to produce specified medical records and information or to execute a written consent thereto.

1:20-12. Incapacity and Disability

(a) Disability-Inactive Status Defined. An attorney transferred to disability-inactive status under the provisions of this rule shall be ineligible to practice law and shall comply with R. 1:20-20 governing suspended attorneys.

(b) [(a)] Disability-Inactive Status; [Effect of] Judicial Determination of Mental Incapacity or [on] Involuntary Commitment. When an attorney who is admitted to practice in this state has been judicially declared mentally incapacitated or involuntarily committed to a mental hospital, the Supreme Court, on proof of the fact, shall enter an order transferring the attorney to disability-inactive status, effective immediately and until further order of the Court. Such transfer shall stay any pending disciplinary or fee arbitration proceedings.

When an attorney who has been transferred to disability-inactive status is thereafter, in proceedings duly taken, judicially declared to be competent or judicially released from involuntary commitment, the Court may dispense with the need for further evidence that the disability has been removed and may direct [reinstatement] restoration to active status on such terms as are deemed proper and advisable. On restoration, any stayed disciplinary or fee arbitration proceeding shall resume on such terms as the Court may direct.

Any judge sitting in a court in this state who declares an attorney admitted to practice in this state mentally incapacitated [,] or who commits [such] an attorney to a mental hospital, or who [thereafter] declares [the] an attorney to be competent or releases an attorney from involuntary commitment, shall [, on entry of the final order,] promptly forward a copy of the order so entered to the Director.

[(b) Request For Medical Examination. Whenever the Director presents evidence which reasonably brings into question the capacity of an attorney to practice law, whether by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, the Board shall direct that the attorney submit to such medical examination as may be appropriate to enable the Director to determine whether the attorney is so incapacitated. Such action shall be taken on an expedited basis. Thereafter the Director may request the Board to recommend to the Supreme Court that the attorney be immediately transferred to Disability Inactive Status. If the Board concludes that the attorney lacks the capacity to practice law, it shall forthwith recommend to the Supreme Court that the attorney be transferred to disability inactive status until the further order of the Court. No pending disciplinary proceeding against the attorney shall be held in abeyance unless the Court shall additionally find that the respondent is incapable of assisting counsel in defense of any ethics proceedings.]

(c) [(e)] Inability to [Properly] Defend or Participate in a Disciplinary or Fee Arbitration Proceeding. If, during the course of a disciplinary or fee arbitration proceeding, the Director informs the Court that an [respondent] attorney asserts that the attorney is unable to defend or to assist counsel in defense of, or otherwise participate in, the matter due to

mental or physical incapacity, and the attorney is not suspended or disbarred, the Court shall immediately transfer the [respondent] attorney to disability-inactive status [pending determination of the incapacity]. The disciplinary or fee arbitration proceeding shall be stayed from the date the attorney is transferred to disability-inactive status until the date the attorney is restored to practice.

If the Director disagrees with the attorney's assertion, the Director may request that the Court appoint a special ethics master to conduct a hearing and determine the issue. A hearing held under this paragraph shall be conducted in an expedited fashion, on such terms and utilizing such medical and/or non-medical proofs as the special ethics master shall determine are appropriate, including the results of any medical examination ordered by the special master. If the special master determines at any time that the attorney has failed to reasonably cooperate in the proceeding, the master shall make an interim report in writing to the Court on notice to the attorney and the Director. If the Court concurs, it may temporarily suspend the attorney from practice, terminate the hearing and direct that the underlying disciplinary or fee arbitration proceeding resume.

1) If the special master determines that the attorney lacks the capacity to defend and/or participate, the disciplinary or fee arbitration matter shall be stayed pending further order of the Court and the special master shall issue a report to the Court containing findings and conclusions as to the attorney's incapacity within 30 days of the conclusion of the hearing.

If the Court determines that the attorney is unable to defend against [the] disciplinary charges or [complaint] otherwise participate in disciplinary or fee arbitration proceedings because of mental or physical incapacity, the [disciplinary] proceeding shall be deferred and the [respondent] attorney shall be transferred to or retained on "disability inactive" status until the Court subsequently considers a petition for restoration of the [respondent] attorney to active status. On application of the Director, the Court may also make such order for the perpetuation of testimony in the disciplinary proceedings as may be appropriate. If the Court considering a petition for restoration determines to grant the petition, any deferred disciplinary or fee arbitration proceeding[s] shall be reactivated.

If the Court determines that the attorney is able to defend against the disciplinary charges or [complaint] otherwise participate in disciplinary or fee arbitration proceedings, the proceeding shall resume and the attorney shall be restored to practice if previously transferred to disability-inactive status.

2) If the special master determines that the attorney has the capacity to defend and/or participate, the disciplinary or fee arbitration matter shall proceed in the normal course and the attorney shall be restored to practice if previously transferred to disability-inactive status.

(d) Other Proceedings to Determine Incapacity. Information relating to an attorney['s physical or mental condition] that may adversely affect[s] the attorney's capacity to practice law, whether involving mental or physical infirmity or illness, or suspected use

of drugs or intoxicants, may be investigated by the Director. [and, where warranted, shall be the subject of a hearing to determine whether the attorney shall be transferred to disability inactive status.] In conjunction with any such investigation, whenever the Director [may also request the Board to direct the attorney to submit to an appropriate medical examination.] presents facts that reasonably bring into question an attorney's capacity to practice law, whether by reason of mental or physical infirmity, senility or illness, or because of the use of drugs or intoxicants, the Director may request that the Court appoint a special ethics master to conduct any necessary hearing and to order a medical examination, if needed, to determine whether the attorney lacks the capacity to practice law or should be transferred to disability-inactive status. All [proceedings and any formal] hearings shall be conducted in the same manner as a disciplinary proceeding[s]. The issue before the [hearing panel or] special ethics master [, the Board] and the Court shall be whether the attorney lacks the capacity to practice law. If on due consideration of the [matter] findings and recommendations of the special master the Court concludes that the attorney lacks the capacity to practice law, it shall enter an order transferring the attorney to disability-inactive status for an indefinite period and until the further order of the Court. Otherwise, the Court shall make such order as it deems appropriate, including dismissal.

(e) [(c)] Assignment of Counsel; Notice of Proceedings. [Either t] The Court [or the Board] may order the assignment of counsel for an attorney during any proceeding under this rule if it is in the interest of justice to do so. A copy of all applications and orders made pursuant to this rule shall be served on the attorney or counsel, any guardian, or the director of any institution to which the attorney has been committed.

(f) [Transfer to Active Status] Restoration to Practice on Termination of Disability. [Any attorney transferred to disability-inactive status under the provisions of this rule shall be ineligible to practice law and shall comply with R. 1:20-20 governing suspended attorneys. Such] An attorney [may apply for transfer to active status on] transferred to disability-inactive status may apply to the Court to be restored to the practice of law on ten days advance written notice to the Director. [No such attorney shall be eligible to practice law until transferred to active status by order of the Supreme Court.] Such application may be granted by the Court or referred by the Court for hearing in accordance with paragraph (d) above.

(g) Burden of Proof; Standard of Proof. The burden of proof [I]in a proceeding [seeking an order of transfer to disability inactive status, the burden of proof by clear and convincing evidence shall rest with the petitioner] under paragraph (c), asserting inability to defend or participate in the defense of a disciplinary or fee arbitration matter shall be on the attorney. The burden of proof in a proceeding under paragraph (d), concerning other proceedings to determine incapacity, shall be on the party seeking the transfer. The burden of proof [I]in a proceeding [seeking an order revoking the disability inactive status, the burden of proof by clear and convincing evidence] under subparagraph (f), seeking restoration to active status, shall rest with the attorney. The standard of proof in all proceedings shall be clear and convincing evidence.

(h) Waiver of Doctor-Patient Privilege. The assertion of an inability to properly defend or to assist counsel in defense of a disciplinary proceeding, or to otherwise participate in, a disciplinary or fee arbitration matter due to mental or physical incapacity, [Either] the filing of an application [by an attorney] for transfer to disability-inactive status or the filing of an application [by an attorney for transfer from disability inactive to] for restoration to active status shall be deemed to constitute a waiver of any doctor-patient privilege. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution or facility by whom or at which the attorney has been examined, evaluated or treated and the nature and extent of such examination, evaluation or treatment. The Director may request the attorney to furnish all such information and/or the records of such examination, evaluation or treatment within a reasonable period of time or to provide an [The attorney shall furnish to the Director written]executed consent to the release of such [information and]records[as requested].

Note: Adopted January 31, 1984 to be effective February 15, 1984; paragraph (g) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (b) caption and text amended, paragraphs (c) and (d) deleted, new paragraphs (c), (d) and (e) added and former paragraphs (e), (f) and (g) amended and redesignated (f), (g) and (h) November 7, 1988 to be effective January 2, 1989; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; former R. 1:20-9 redesignated as R. 1:20-12, paragraphs (a) through (f) and (h) amended January 31, 1995 to be effective March 1, 1995; caption and text of paragraph (a) amended July 12, 2002 to be effective September 3, 2002; new paragraph (a) added, former paragraph (a) redesignated (b) and amended, former paragraph (b) deleted, former paragraph (c) redesignated (e) and amended, former paragraph (e) redesignated (c) and amended, paragraphs (d), (f), (g) and (h) amended _____, 2003, to be effective _____, 2004.

Comment to Proposed R. 1:20-13 Changes

This rule is titled "Attorneys Charged With or Convicted of Crimes." The PRRC agrees with the OAE's suggested housekeeping changes.

The following are the OAE's comments explaining the proposed amendments.

Subparagraph (b)(1) regarding "Automatic Temporary Suspension," is amended to add a comma between the word "proceeding" and the word "whether" in the first sentence. Minor grammatical changes have been made to subparagraph (b)(2).

1:20-13. Attorneys Charged With or Convicted of Crimes

(a) Reporting Criminal Matters.

(1) Duty of Attorney Charged. [...no change].

(2) Cooperation of Law Enforcement. [...no change].

(b) Automatic Temporary Suspension.

(1) Procedure. On the filing with the Supreme Court of the Director's certification that any attorney authorized to practice law in the State of New Jersey has been determined to be guilty (whether sentenced or not) in any court of the United States or the District of Columbia or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the Supreme Court shall enter an order immediately suspending that attorney from the practice of law until final disposition of a disciplinary proceeding to be commenced at the conclusion of the criminal proceeding, whether the determination resulted from a plea of guilty, no contest, or nolo contendere, or from a verdict after trial or otherwise, and regardless of the pendency of any appeal. A copy of the order of suspension shall immediately be served on the attorney. On good cause shown, the Supreme Court may set aside the order when it appears in the interest of justice to do so. Nothing herein shall be construed to preclude the application for a temporary suspension otherwise allowable by court rule, of any attorney determined to be guilty of any other crime.

(2) Serious Crimes Defined. The term "serious crime" shall include any crime of the first or second degree as defined by the New Jersey Code of Criminal Justice (N.J.S.A.2C:1-1 et seq.); or any felony of the United States or the District of Columbia or of any state, territory, commonwealth or possession of the United States; or any other crime of this state or of the United States or the District of Columbia or of any state, territory, commonwealth or possession of the United States, a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft; or any attempt or a conspiracy or solicitation of another to commit a "serious crime;[,]" or violations involving criminal drug offenses, excluding solely minor possessory offenses.

(3) Reinstatement. [...no change].

(c) Final Discipline.

(1) Conclusive Evidence. [...no change].

(2) Procedure. [...no change].

Source-Former Rule 1:20-6 adopted January 31, 1984 to be effective February 15, 1984; paragraph (a)(1) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and(b) amended November 5, 1986 to be effective January 1, 1987; new paragraph (a) adopted and paragraphs (a) and (b) redesignated (b) and (c) November 7, 1988 to be effective January 2, 1989; former R. 1:20-6 redesignated as R. 1:20-13, captions added, former text of paragraph (a) redesignated (a)(1); new paragraph (a)(2) adopted, paragraph (b) and (c) amended January 31, 1995 to be effective March 1, 1995; paragraphs (b)(1) and (2) amended 2003 to be effective , 2004.

Comment to Proposed R. 1:20-14 Changes

This rule is titled "Reciprocal Discipline and Disability Proceedings." The PRRC agrees with the OAE's proposed amendments, which are primarily housekeeping in nature. The exception to this characterization is a new subsection (d), which permits the Director, in his or her discretion, to file a formal ethics complaint rather than proceeding on a motion for reciprocal discipline.

The following are the OAE's comments explaining the proposed amendments.

Subparagraphs (a)(1), (2) and (5) are changed to add a hyphen between the words "disability" and "inactive" for uniformity. Subparagraph (a)(4) is amended for uniformity to change the reference from the "Office of Attorney Ethics" to the "Director." The word "misconduct" is changed to "unethical conduct" in subparagraphs (a)(4)(E) and (a)(5). In subparagraph (a)(5), the initial capital in the word "State" is eliminated as grammatically incorrect.

In subparagraph (b)(3), the word "misconduct" is changed to "unethical judicial conduct." The word "that" is substituted for the word "which" in the fifth sentence of subparagraph (b)(3).

A new subparagraph (d), titled "Alternative Procedure; Complaint," is added. It provides the Director with the discretion to proceed by way of complaint before a trier of fact in an individual case, rather than proceeding directly before the Board on a motion for reciprocal discipline. This provision conforms to the identical provision in R. 1:20-13(c)(2) involving criminal convictions.

There are situations where it is preferable to proceed against a respondent via formal complaint and hearing, such as when there are additional charges to be filed against a respondent that do not arise out of a reciprocal disciplinary matter. Proceeding by way of complaint in these instances often allows the reciprocal disciplinary matter to form part of a charged pattern of conduct with other non-reciprocal charges. This procedure also permits reciprocal discipline to be used to demonstrate knowledge in the reciprocal case that is important to a trier of fact's understanding of the other non-reciprocal charges. In fact, the OAE has filed formal complaints in lieu of motion for reciprocal discipline in the past. An excellent example of the need to file a formal complaint arose in the case of *In re Steven M. Kramer*, 162 *N.J.* 609 (2002). This case involved a reciprocal disciplinary referral for disbarment from New York, which may not have warranted reciprocal disbarment in New Jersey under the specific facts of the case. Instead of proceeding directly before the Board with this count, the OAE combined it as one of several counts in a formal complaint and proceeded to hearing before a special ethics master. Among the other charges brought by the OAE was one charge that the respondent acted unethically when he conducted a private investigation of a judge of the United States District Court for the District of New Jersey for personal purposes. As part of respondent's investigation, he illegally accessed the judge's credit records. Additionally, the OAE brought charges in the same complaint that respondent practiced law while previously suspended. The Supreme Court of New Jersey disbarred respondent on June 18, 2002. Another reason favoring this procedure in particular

cases is judicial efficiency achieved by combining several cases in one proceeding.

Paragraph (d), of course, applies both to attorney and judicial disciplinary proceedings under paragraphs (a) and (b).

1:20-14. Reciprocal Discipline and Disability Proceedings

(a) Reciprocal Attorney Discipline and Disability.

(1) Reporting Duty. An attorney admitted to practice in this state shall promptly inform the Director in writing on transfer to disability-inactive status or on imposition of discipline as an attorney in another jurisdiction, including any federal court of the United States or the District of Columbia, a state or federal administrative agency or other tribunal, a court of any state, territory, commonwealth or possession of the United States.

(2) Procedure. On the filing with the Board and service on the respondent by the Director of a motion for reciprocal discipline or disability attaching a certified or exemplified copy of a judgment or order that demonstrates that an attorney admitted to practice in this state has been transferred to disability-inactive status or disciplined by another court, agency or tribunal, the respondent shall have 21 days after service of that motion to file and serve any brief containing any claim predicated on the grounds set forth in subsection (4) hereof that the recommendation to the Supreme Court of the imposition of the identical action or discipline by the Board would be unwarranted, together with the reasons therefor. The attorney shall have the burden of establishing by clear and convincing evidence the grounds asserted. The Director shall prosecute these proceedings and may submit a reply brief within 21 days after the expiration of the attorney's time for filing.

(3) Stay of Foreign Proceedings. In the event the discipline or disability imposed in the other jurisdiction has been stayed there, proceedings under this rule shall be deferred until such stay expires unless good cause appears to the contrary.

(4) Board Decision. On the expiration of the time allowed for the Director's filing of a reply brief, the matter shall be set down before the Board. If the respondent either fails to file a timely brief or timely files a brief that does not contest the sanction requested by the Director [Office of Attorney Ethics], no oral argument is required and the Board may decide the matter on the record. The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical [mis]conduct established warrants substantially different discipline.

When the Board determines that any of said elements exists, it shall make such recommendation to the Court as it deems appropriate. The Director may argue that the law of this state or the facts of the case do or should warrant the imposition of greater discipline than that imposed in other jurisdictions, but in such event the Director shall bear the burden of establishing such contentions by clear and convincing evidence. In the event that the Board determines that the Director has met the burden in this regard, the Board shall recommend the imposition of such greater discipline as it deems appropriate.

(5) Conclusive Evidence. In all other respects, a final adjudication in another court, agency or tribunal, that an attorney has been transferred to "disability-inactive" status or is guilty of unethical [mis]conduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this [S]state.

(b) Reciprocal Judicial Discipline.

(1) Reporting Duty. Any attorney admitted to practice in this state shall promptly inform the Director in writing on being subjected to discipline as a judge in any other jurisdiction including any federal court of the United States or the District of Columbia, a state or federal administrative agency or other tribunal, a court of any state, territory, commonwealth or possession of the United States.

(2) Procedures for Foreign Judicial Determination. On the filing with the Board and service on the respondent by the Director of a motion for final discipline attaching a certified or exemplified copy of a judgment or order that demonstrates that an attorney admitted to practice in this state has been disciplined as a judge by another court, agency or tribunal, the matter shall proceed in accordance with subsections (a)(2) through (5).

(3) Procedure for New Jersey Judicial Determination. If a motion for final discipline is based on a final determination of unethical judicial [mis]conduct by the Supreme Court of New Jersey, that determination shall conclusively establish the facts on which it rests for purposes of an attorney disciplinary proceeding. In such case the Director may file directly with the Board and serve on the respondent or counsel, if any, a motion for reciprocal discipline. Within 21 days after service of such motion the respondent shall file with the Board and serve on the Director a brief together with any other permissible filings. The Director may within 21 days thereafter file and serve any responding brief. If the respondent either fails to file a timely brief or timely files a brief that [which] does not disagree with the sanction requested; no oral argument is required and the Board may decide the matter on the record. In all other cases the Board shall notify the parties of a date for oral argument, following which the Board shall issue its decision and recommendation for final discipline to the Supreme Court.

The sole issue to be determined under this section shall be the extent of final discipline to be imposed. The Board and Court may consider any relevant evidence in mitigation that is not inconsistent with the findings of fact and determinations of the Supreme Court of

New Jersey in the judicial proceeding. No witnesses shall be allowed and no oral testimony shall be taken; however, both the Board and the Court may consider written materials otherwise allowed by this rule that are submitted to it. Either the Board or the Court, on the showing of good cause therefore or on its own motion, may remand a case to a special ethics master for a limited evidentiary hearing and report consistent with this subsection.

(c) Attorney Discipline Based on New Jersey Judicial Discipline. Where a judge has been removed or disciplined pursuant to R. 2:14 or 2:15, respectively, those proceedings shall be conclusive of the conduct on which that discipline was based in any subsequent disciplinary proceeding brought against the judge arising out of the same conduct. Attorney disciplinary proceedings may be taken in accordance with R. 1:20-14(b)(2).

(d) Alternative Procedure; Complaint. Nothing in this rule shall be construed to preclude the Director from filing a complaint pursuant to R. 1:20-4 where the Director determines that procedure to be appropriate.

Note: Adopted January 31, 1984 to be effective February 15, 1984; paragraphs (a), (b), (d) and (e) amended November 5, 1986 to be effective January 1, 1987; paragraph (d)(5) amended July 13, 1994 to be effective September 1, 1994; former R. 1:20-7 redesignated as R. 1:20-14, captions added, subsections (a)(b)(c)(d) and (e) amended and renumbered (a)(1) through (5), and new subsections (b) and (c) added January 31, 1995 to be effective March 1, 1995; paragraphs (a)(1),(2), (4) and (5) and (b)(3) are amended and new paragraph (d) added _____, 2003 to be effective _____, 2004.

Comment to Proposed R. 1:20-15 Changes

This rule is titled “Disciplinary Review Board.” The PRRC agrees with the following housekeeping amendments proposed by the OAE.

In subparagraph (a), the numbers “9” and “5” and “3” are changed to “nine” and “five” and “three.”

In subparagraph (c), the numbers “5” and “3” are changed to the words “five” and “three.”

In paragraph (e)(1), titled “Ethics Actions Subject to Review,” the phrase “ethical misconduct” is replaced by the phrase “unethical conduct.” In paragraph (e)(2), titled "Perfection of Review," the words “as appropriate” are added to the serial references to several entities including the Committee on Attorney Advertising in this rule. As well, the reference to the “Office of Attorney Ethics” is deleted in favor of the term “Director,” and the words “twenty-one” are replaced by the number “21” for uniformity.

Subparagraph (f)(2), dealing with “Recommendations for Discipline,” is modified to delete the phrase “assigned ethics counsel” as unnecessary, since the word “presenter” is more inclusive. Further, in subparagraph (f)(3) the word “upon” is changed to “on.” Subparagraph (f)(4) is modified both in the title and in the text to delete all references to admonitions as “public.” This is no longer necessary as all discipline imposed since July 14, 1995 is public. The word “misconduct” is also changed to “unethical conduct.” The first sentence of subparagraph (f)(4) is amended to delete the word “interested” in describing the term “parties.” The use of the deleted term is too general and, therefore, inaccurate. The proper term “parties” is used throughout the rest of existing R. 1:20-15. Also, in the fourth sentence from the end of the paragraph, the term “ethical” is changed to “ethics” as modifying the term “violation.” The last sentence of this subparagraph is reworded to change text from passive to active voice.

The initial capitalization of the word “State” in paragraph (i) is made lower case to be grammatically correct.

Paragraph (l), titled “Fee Arbitration Appeals,” is changed from passive to active voice.

1:20-15. Disciplinary Review Board

a) Appointment; Officers. The Supreme Court shall appoint a Disciplinary Review Board consisting of [9] nine members, at least [5] five of whom shall be attorneys of this state and at least [3] three of whom shall not be attorneys. Members shall be appointed for [3] three-year terms and may be reappointed in the Supreme Court's discretion. The Supreme Court shall annually designate a chair and vice chair of the Board from among its members.

(b) Office of Counsel. [...no change].

(c) Quorum; Dissenting Report. Five members of the Board shall constitute a quorum and all determinations shall be made by a majority of a quorum, provided however that a determination that discipline be imposed or a recommendation for temporary suspension shall have the concurrence of at least [5] five members of the Board who have considered the record and briefs, if any; and provided further that at least [3] three of them were present at any oral argument. Any Board member not concurring in a majority decision may file a separate report.

(d) Regulations. [...no change].

(e) Review of Final Action.

(1) Ethics Actions Subject to Review. The Board shall review, upon the filing of an ethics appeal by the original grievant or the Director, the following actions taken by an Ethics Committee, a special ethics master or by the Committee on Attorney Advertising:

(i) a determination to dismiss after investigation on the basis that there is no unethical [mis]conduct.

(ii) a determination to dismiss made after hearing on the basis that there has been no unethical [mis]conduct.

(2) Perfection of Review. The original grievant or the Director may, within 21 [twenty-one] days after receipt of notice of the action, file with the Board a notice of appeal in the form prescribed by the Board and shall serve a copy thereof by regular mail upon the respondent, and, where appropriate, the presenter and the secretary of the Ethics Committee, the Director or the Committee on Attorney Advertising. The notice of appeal shall have attached a complete copy of the investigation report. The secretary of the Ethics Committee or of the Committee on Attorney Advertising or [, if appropriate,] the Director [Office of Attorney Ethics], as appropriate, shall provide the record of its proceedings to the Board within ten days after its request. Within 21 [twenty-one] days after receipt of the notice of appeal the respondent, the Ethics Committee, [or, if appropriate,] the Director, or the Committee on Attorney Advertising, as appropriate, may file a response with the Board.

(3) Review; Disposition. [...no change].

(f) Recommendations for Discipline.

(1) Generally. [...no change].

(2) Procedure; Waiver of Hearing. The notice of Board hearing shall contain a briefing schedule for the parties. Within ten days after receipt of that notice, the respondent and the presenter [or assigned ethics counsel] shall enter an appearance with the Office of Disciplinary Review Board Counsel. At that time, respondent may agree in writing to proceed on the record and waive oral argument. The waiver shall specify whether or not respondent agrees with the conclusions and recommendation of the trier of fact. Neither the presenter nor assigned ethics counsel may elect to waive oral argument but if respondent has filed a complete waiver, the Board may elect to review the matter without argument.

(3) Disposition. The Board shall render a formal decision including findings of fact and conclusions of law as to each issue presented, and shall make a specific determination as to the appropriate disciplinary sanction, if any, to be imposed, except in those matters in which a reprimand has been recommended and the Board determines to impose an admonition. When the Board determines to impose an admonition rather than a reprimand, it shall promptly issue a letter in accordance with paragraph (4) of this Rule. The letter shall include a statement of reasons for the Board's conclusion that a lesser sanction is warranted. The Board's disposition shall require respondent to make reimbursement of disciplinary costs in accordance with R. 1:20-17. The Board's decision shall be promptly filed with the Clerk of the Supreme Court and served [up]on the Director and the parties by regular mail.

(4) [Public] Admonitions. All post-hearing recommendations for admonitions received by the Board shall be considered promptly de novo on the record below on notice to all [interested] parties. [Public a] Admonitions recommended by the Committee on Attorney Advertising shall be reviewed in accordance with Rule 1:19A-4(f). In its discretion the Board may direct that the transcript be produced, briefs be filed, or that oral argument be held. Except in minor unethical [mis]conduct matters the Board, in its discretion, may direct that a panel report recommending an [public] admonition be treated as a recommendation for greater discipline. In that event, all proceedings shall be held in conformance with paragraph (1) above. The Board shall have the authority to impose an [public] admonition together with a direction for reimbursement of costs. When the Board determines that an [public] admonition should be imposed, including admonition by consent, it shall issue the letter of [public] admonition. When the Board determines that no ethics[al] violation has occurred, it shall dismiss the charges. The Board's determination, in letter form, shall be sent promptly to the respondent by certified mail. Copies shall be forwarded by regular mail to the Clerk of the Supreme Court, the Director, the Ethics Committee, the Committee on Attorney Advertising, if applicable,

and the original grievant, if any. [Public admonitions may be reviewed by t]The Supreme Court may review admonitions in accordance with Rule 1:20-16(b).

(g) Consent Matters. [...no change].

(h) Constitutional Challenges. [...no change].

(i) Temporary Suspension. On receipt of evidence demonstrating that an attorney subject to the disciplinary jurisdiction of this [S]state has committed a violation of the Rules of Professional Conduct, caselaw or other authority, or is under a disability as herein defined, and poses a substantial threat of serious harm to the public or, where necessary to protect the interests of an attorney, a client or the public, or where otherwise authorized by these rules, the Board may, on the motion of the Director, or on its own motion, recommend to the Supreme Court that an attorney be suspended temporarily from practice upon such terms and conditions as it deems appropriate.

(j) Imposition of Sanctions. [...no change].

(k) Enforcement of Fee Arbitration Committee Determination or Stipulation. [... no change].

(l) Fee Arbitration Appeals. The Board shall review [A]an appeal from a determination of a fee arbitration committee [shall be reviewed by the Board] in accordance with R. 1:20A-3(c).

(m) Exemption From Costs. [...no change].

(n) Committee on Disciplinary Decisions; Publication of Disciplinary Dispositions. [...no change].

Note: Former Rule redesignated as Rule 1:20-5 January 31, 1984 to be effective February 15, 1984. Source-Former Rule 1:20-3 adopted February 23, 1978, to be effective April 1, 1978; paragraphs (a), (e), (g), (h) and (I) amended July 16, 1981, to be effective September 14, 1981; paragraph (f) (g), and (h) deleted; paragraph (a) amended; paragraphs (b), (c), (d), (e), (I) and (j) amended and redesignated (c), (d), (e), (f), (g) and (I); new paragraphs (b) and (h) adopted January 31, 1984, to be effective February 15, 1984; paragraph (I) amended November 1, 1985, to be effective January 2, 1986; paragraphs (e) and (f) amended November 5, 1986, to be effective January 1, 1987; paragraphs (e) and (f) amended June 26, 1987, to be effective July 1, 1987; paragraph (I) caption and text amended November 7, 1988 to be effective January 2, 1989; paragraph (f)(2) amended November 6, 1989, to be effective January 2, 1990; paragraph (f) amended June 29, 1990 to be effective September 4, 1990; paragraph (e)(2) amended July 13, 1994 to be effective September 1, 1994; paragraph (f)(2) caption and text amended August 8, 1994 to be effective immediately; R. 1:20-4 redesignated R. 1:20-15, paragraphs (a), (b), (c), (d) and (e) amended, former text of paragraph (f)(1) and (2) amended and incorporated into new (f)(1)(2)(3) and (4), and former paragraphs (f)(3), (g),(h) and (I) amended and redesignated

paragraphs (h)(i)(j) and (k), new paragraphs (g), (l) and (m) adopted January 31, 1995 to be effective March 1, 1995; paragraph (j) amended July 10, 1998 to be effective September 1, 1998; paragraph (f)(3) amended and new paragraph (n) adopted March 20, 2003, to be effective immediately; paragraphs (a), (c), (e)(1)(i) and (ii), (e)(2), and (f)(2) – (4) amended and the caption to (f)(4) amended; paragraphs (i), and (l) amended _____, 2003 to be effective _____, 2004.

Comment to Proposed R. 1:20-16 Changes

This rule is entitled “Action by the Supreme Court.” The PRRC agrees with the OAE's proposed revisions, which are primarily housekeeping in nature. The exception to this characterization of the amendments is new paragraph (k), which proposes that orders of the Supreme Court suspending respondents contain stronger language advising them of their obligations pursuant to Rule 1:20-20.

The following are the OAE's comments explaining the proposed amendments.

Subparagraph (f)(1), dealing with “Interlocutory Review” of constitutional claims, is modified to specify that the mere filing of such an application does not constitute an automatic stay of disciplinary proceedings, absent the Court’s issuance of a specific order to that effect.

Subparagraph (i) is amended to add a hyphen between the words "disability" and "inactive" for uniformity. Subparagraph (j) is amended to eliminate the initial capital letter in the word “State” for grammatical accuracy.

Subparagraph (k) is new. Its purpose is to aid in encouraging suspended and disbarred attorneys to comply with R.1:20-20(b)(15) (Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability-Inactive Status) and to serve notice to the suspended attorneys of the repercussions provided for in R.1:20-20(c) for failure to file a timely and complete affidavit of compliance. Please see discussion under that rule for background on the need for changes in that rule, as well as the specific proposals therefore.

1:20-16. Action by the Supreme Court

(a) Review of Recommendations for Disbarment. [...no change].

(b) Review of Other Final Disciplinary Determinations. [...no change].

(c) De Novo Review. [...no change].

(d) Non-appealable Matters. [...no change].

(e) Consent Orders. [...no change].

(f) Constitutional Issues.

(1) Interlocutory Review. An aggrieved party may file with the Supreme Court a motion for leave to appeal to seek interlocutory review of a constitutional challenge to proceedings pending before the trier of fact or the Board. The motion papers shall conform to R. 2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument. The filing of any motion to the Supreme Court for interlocutory review authorized by these rules shall not automatically stay disciplinary proceedings unless the Court enters an order specifically granting a stay pending its resolution of the request.

(2) Final Review. [...no change].

(g) Review of Other Matters. [...no change].

(h) Restraint on Attorney Accounts. [...no change].

(i) Practice of Law Prohibited. No attorney who has been ordered disbarred, suspended, or transferred to disability-inactive status shall practice law during the period of such disability, and every order of disbarment shall include a permanent injunction from such practice.

(j) Practicing Law in Violation of Supreme Court Order. Whenever there is reason to believe that an attorney may have violated an Order of the Supreme Court prohibiting that attorney from practicing law in this [S]state, the Director may refer the underlying facts to the appropriate law enforcement agency. The Director also may file and prosecute an action for contempt under R. 1:10-2. Any action under R. 1:10-2 shall be instituted on order to show cause to the Assignment Judge of the vicinage in which the respondent is alleged to have engaged in the prohibited practice of law.

(k) Advice to Suspended and Disbarred Attorneys; Supreme Court Order. An order of the Supreme Court suspending an attorney shall contain a provision specifically advising

the attorney of the requirements of R.1:20-20(b)(15) for filing an affidavit of compliance within 30 days with the Director, the Clerk of the Supreme Court and the Board; and of the serious consequences for failure to fully and timely comply with those requirements as provided in R.1:20-20(c).

Note: Former rule redesignated as R. 1:20-8, R. 1:20-10 and R. 1:20-11. Source--Former Rule 1:20-4 adopted February 23, 1978, to be effective April 1, 1978; paragraph (a) amended January 10, 1979 to be effective immediately; new paragraph (d) adopted and paragraphs (d) and (e) redesignated (e) and (f) July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended; paragraph (c) deleted; paragraphs (d), (e) and (f) amended and redesignated (c), (d) and (e) January 31, 1984 to be effective February 15, 1984; new paragraph (d) adopted and former paragraphs (d) and (e) redesignated (e) and (f) November 6, 1989, to be effective January 2, 1990; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended August 8, 1994 to be effective immediately; former R. 1:20-5 redesignated R. 1:20-16, caption and text of paragraph (a) amended, paragraphs (b) and (d) deleted, new paragraphs (b)(c)(d)(e) and (i) adopted, former paragraphs (c)(e)(f) amended and redesignated (f)(g) and (h) January 31, 1995 to be effective March 1, 1995; paragraph (b) amended March 24, 1995, to be effective immediately; former paragraphs (h) and (i) redesignated as paragraphs (i) and (j) and new paragraph (h) adopted July 10, 1998 to be effective September 1, 1998; paragraphs (f)(1), (i) and (j) amended and new paragraph (k) added _____, 2003 to be effective _____, 2004.

Comment to Proposed R. 1:20-17 Changes

Rule 1:20-17 is entitled "Reimbursement of Disciplinary Costs." The PRRC agrees with the OAE's proposed amendments to this rule, which include housekeeping changes along with amendments to the fee structure. The Disciplinary Oversight Committee supports these revisions.

The following are the OAE's comments explaining the proposed amendments.

The comma after the word "status" has been eliminated in paragraph (a) as unnecessary.

Paragraph (b) has been renumbered for greater clarity. It has been divided into two main subparagraphs. Subparagraph (b)(1) deals with the topic of "(1) Basic Administrative Costs." Subparagraph (b)(2) deals with the topic of "(2) Disciplinary Costs Actually Incurred." The basic administrative costs assessed in paragraph (b)(1)(A), (B) and (C) have been increased by approximately one-third as follows: Discipline By Consent, from $500 to $650; Final/Reciprocal Discipline, from $750 to $1,000; and for Other Final Discipline, from $1,500 to $2,000. The existing amounts were established in 1995, almost nine years ago. The costs of the discipline system have increased and inflation has also increased the expenses to the system. An adjustment upward is warranted for 2003. In order to encourage admonitions by consent, the 1995 rule provided an exemption from assessment of disciplinary costs for respondents who accepted this form of discipline early on in the process. Since admonitions by consent, and other discipline by consent procedures, are now firmly established, there is no longer a need for an exemption and it is deleted in subparagraph (b)(1)(A) of these rules. Subparagraph (b)(1)(C) is also amended to incorporate reference to the recently adopted sanction of "censure" contained in R. 1:20-15A. Moreover, the word "Public" is deleted as modifying the word "Reprimand," since private reprimands were eliminated in 1995 and there is no further need to distinguish them from "public" reprimands. Additionally, the reimbursement for copy costs by the Board is increased from 0.10 to 0.15 cents a page in subparagraph (b)(2)(E).

Paragraph (c), concerning "Disputes," is amended to change "which" to "that" in the first sentence, and the words "disability-inactive" have been hyphenated. Additionally, the fourth sentence is reworded from passive voice to active voice. Also, the number "10" in the last sentence of this paragraph is changed to "ten."

The first subparagraph of paragraph (d), dealing with "Claims of Extraordinary Financial Hardship," is amended to clarify that a respondent's certification in a requested claim of extraordinary financial hardship is to be made in accordance with R. 1:4-4. The second subparagraph of paragraph (d) is amended to add a final sentence to deal with the difficult situation where the Board has afforded a respondent, by reason of demonstrated extraordinary financial hardship, an opportunity to enter into an agreement to make installment payments. Unfortunately, in a number of cases, the respondent subsequently defaults. This situation causes significant difficulty for Board Counsel's staff and deprives the disciplinary system of payments justly due. While it would be draconian to suggest that no further installment agreements should be accepted from these respondents – a one-strike and you're out rule – default on installment agreements should be taken into account by Board Counsel in determining whether to enter into any subsequent installment agreements with particular respondents. This rule change accomplishes that goal, thus giving Board Counsel needed flexibility. Additionally, a sentence in

the second subparagraph within paragraph (d) is reworded to change from passive to active voice.

In subparagraph (e)(1), the number “10” is changed to “ten.” The last sentence of paragraph (e)(3) is reworded to change from passive to active voice.

1:20-17. Reimbursement of Disciplinary Costs

(a) Generally. Except in extraordinary cases, the final order of discipline or final order of transfer to disability-inactive status[,] shall impose costs as recommended by the Disciplinary Review Board.

(b) Amount and Nature of Costs Assessed. In calculating its recommendation the Disciplinary Review Board shall assess both basic administrative costs and disciplinary expenses actually incurred.

(1) Basic Administrative Costs.

Basic administrative costs shall be assessed as follows:

(A) [(1)] For final Discipline [B]by Consent (including Disbarment by Consent, if tendered prior to hearing), $650 [500. There shall, however, be no basic administrative costs assessed for admonition by consent].

(B) [(2)] For a Motion for Final Discipline or a Motion for Reciprocal Discipline, $1,000 [750].

(C) [(3)] For other final discipline or transfer to disability-inactive status ordered by the Board or the Court, including Admonition, [Public] Reprimand, Censure, Suspension, Transfer to Disability-Inactive Status, Disbarment and Disbarment [B]by Consent (if tendered after the commencement of hearing), $2,000 [1,500].

(2) Disciplinary Expenses Actually Incurred.

Disciplinary expenses actually incurred shall be separately assessed, including, but not limited to, the following:

(A) [(1)] Costs of any outside experts, such as accountants, auditors, interpreters, physicians, and other consultants;

(B) [(2)] Charges for service of process and notice by publication;

(C) [(3)] Transcript and recording or court reporter costs;

(D) [(4)] Costs of a special ethics master;

(E) [(5)] Disciplinary Review Board reproduction costs at .15 [10] cents per page;

(F) [(6)] Costs and fees paid to witness;

(c) Disputes; Procedure. On the entry of an order imposing final discipline or final transfer to disability-inactive status by the Supreme Court that [which] includes an

authorization for imposition of costs, Counsel to the Board shall promptly furnish the respondent with a statement of disciplinary costs. Within 20 days thereafter the respondent shall reimburse in full all basic administrative costs and such disciplinary expenses actually incurred as to which there is no dispute. A respondent disputing any included actually-incurred disciplinary expense shall, within that time, specifically detail in writing the items disputed and the factual basis for the dispute. The Board shall review a timely filed [ing of a] letter of dispute [shall be reviewed by the Board] without oral argument. Board Counsel shall notify respondent of the Board's decision, which shall be final and not subject to appeal. Respondent shall remit full payment of any balance due within 20 days after receipt of said notice.

Interest shall be charged on the unpaid balance of costs assessed beginning [10] ten days after the date the assessment becomes final. The rate of interest charged shall be 10% per annum, or such other rate established by the Supreme Court from time to time.

(d) Claims of Extraordinary Financial Hardship. Service on respondent of the statement of disciplinary costs shall be accompanied by a notice advising that, in the event of inability to make payment by reason of extraordinary financial hardship, an installment payment schedule may be requested in writing. The request shall be made in writing within 20 days after service of the statement on respondent and shall include a proposed payment plan and be supported by a detailed statement of reasons together with such information specified in the notice. Respondent shall certify the truth of the information provided in accordance with R. 1:4-4.

The Board shall review a [A] timely request under this section. [shall be reviewed by] T[t]he Board's [whose] decision shall be final and not subject to appeal. On respondent's failure to comply with the schedule of payments, the entire unpaid balance of disciplinary costs shall become immediately due and payable. Board Counsel may, in the exercise of discretion, decline to enter into further installment agreements with a respondent who has already defaulted on an agreed installment plan.

(e) Failure to Pay Disciplinary Costs.

(1) Temporary Suspension. On a default in payment required by this rule, Board Counsel, on [10] ten days notice to the respondent, may file with the Supreme Court a certification of the default. The Supreme Court shall forthwith enter an order temporarily suspending the attorney from the practice of law until payment is made and until further order of the Court.

(2) Denial of Reinstatement. The Supreme Court shall not consider a recommendation for reinstatement unless accompanied by a Board certification that all assessed disciplinary costs have been paid.

(3) Docketing Judgment. Upon certification of the amount of disciplinary costs assessed and due, the Clerk of the Superior Court shall, without fee, enter on the civil judgment and order docket both the order authorizing costs and Board Counsel's certification of the

amount due. Upon payment, Board Counsel shall execute a warrant for satisfaction [shall be executed by Board Counsel].

Note: Adopted January 31, 1995 to be effective March 15, 1995; paragraph (f) deleted July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b), (c), (d) and (e)(1) and (3) amended and new subcaptions added to (b) and the subparagraphs renumbered _____, 2003 to be effective _____, 2004.

Comment to Proposed R. 1:20-18 Changes

Rule 1:20-18 is titled “Supervision of Disciplined Attorney.” The PRRC agrees with the OAE's recommended changes to the rule, which are primarily housekeeping in nature. The exception to this characterization is an addition to subsection (j) barring a respondent's counsel in a disciplinary matter from serving also as the respondent's supervisor in situations in which a proctorship is required.

The following are the OAE's comments explaining the proposed amendments.

The second sentence of paragraph (a) is amended to change from passive to active voice.

For uniformity with other rules, the term "Office of Attorney Ethics" or “OAE” is replaced in paragraphs (a), (b), (c), (h), (j) (k), and (l) by the word “Director.”

Paragraphs (b), (c), and (f) are reworded to change from passive to active voice.

The last sentence of paragraphs (g) and (h) are reworded to change from passive to active voice and minor grammatical changes are made. These two paragraphs are also changed to specify that reports are to be both printed and submitted on computer disk.

The capital “s” in Supervisor is made lower case in paragraphs (b), (c), (f), (g), (h), (i), (j) and (l).

Paragraph (j) is modified to clarify that, where an attorney has served as counsel for respondent in a disciplinary matter, that attorney may not be appointed a supervisor in order to avoid conflicts of interest.

Paragraph (k) is amended to make minor grammatical changes.

1:20-18. Supervision of Disciplined Attorney

(a) Generally. An order of discipline or reinstatement entered by the Supreme Court may require the respondent to practice law under supervision by a practicing attorney. Such order shall include the general conditions prescribed by this rule and such specific additional conditions as the Director may [be] require[d by the Office of Attorney Ethics] with the approval of the Supreme Court.

(b) Violation of Supervision or RPC's. The [S]supervisor and the respondent shall [have an obligation to] report promptly to the Director [OAE] any facts that appear to constitute a violation by the respondent of the Rules of Professional Conduct or the [C]conditions of [S]supervision.

(c) Mental or Physical Disability. The [S]supervisor and the respondent shall [have an obligation to] report promptly to the Director [OAE] any facts that appear to demonstrate alcohol or substance abuse by the respondent, or that indicate that the respondent may be incapacitated from practicing law by reason of mental or physical infirmity or illness.

(d) Weekly Conferences. [...no change].

(e) Time Records. [...no change].

(f) New Cases. The respondent shall not accept any [No new] cases [may be accepted by the respondent] without the prior approval of the [S]supervisor.

(g) Respondent's Monthly Reports. The respondent shall provide monthly Case Listing Reports [(in a form acceptable to the OAE)] to the [S]supervisor by the fifth business day of each month, listing for each case assigned to the respondent: (1) the case caption, (2) the full name and address of the client(s), (3) a brief description of the nature of the case, (4) a brief narrative of its current status, (5) the name of all opposing attorneys, and (6) in all litigated matters, the name of the court and docket number, as well as the names of all judges before whom the attorney appeared during that month. The respondent shall certify a[A]ll monthly reports [shall be certified by the respondent] in accordance with Rule 1:4-4(b). Reports shall be submitted in writing and on computer disk in a form acceptable to the Director.

(h) Supervisor's Quarterly Reports. The supervisor shall provide to the Director [OAE] the supervisor's [q]Quarterly [printed or typewritten] R[r]eports, in writing and on computer disk in a form acceptable to the Director [OAE] beginning on the tenth business day of the third month following respondent's order of discipline or of reinstatement by the Supreme Court of New Jersey imposing Conditions of Supervision. Reports shall be made quarterly thereafter on the tenth business day of the month. The quarterly report shall be certified in accordance with Rule 1:4-4(b) and shall have appended to it a copy of each monthly Case Listing R[r]eport submitted by the respondent during the quarter. The quarterly report shall set forth the [S]supervisor's overall analysis of the handling of all legal matters entrusted to the respondent and shall

indicate specifically whether, in the [S]supervisor's judgment, the respondent's handling of any matter is unsatisfactory. The [S]supervisor['s] shall support his/her conclusions [shall be supported] by a brief statement of facts and reasons.

(i) Financial Record Keeping Instructions. During the term of this supervision, the [S]supervisor shall instruct the respondent as to the proper maintenance of trust and business accounts and records in accordance with RPC 1.15 and Rule 1:21-6.

(j) Selection of Supervisor. The respondent shall submit the name of a proposed [S]supervisor to the Director [OAE,] for approval. No supervisor shall be approved who has served as the respondent's counsel in a disciplinary matter.

(k) Termination of Supervision. After the expiration of time set forth in the order of discipline or reinstatement imposing the Conditions of Supervision, the respondent shall apply to the Supreme Court for termination of the conditions on notice to the Director [OAE], who[ich] shall file a report and recommendation with the Court.

(l) Failure to Comply. If during the term of the supervision, the Director [OAE] becomes aware of facts that should be brought to the Court's attention, such as a respondent's failure to comply with the [C]conditions of [S]supervision or a [S]supervisor's failure to comply therewith or a request to be relieved, the Director [OAE] shall petition the Court for an appropriate order on notice to the [S]supervisor and the respondent.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraphs (a), (b) (c), (f), (g), (h), (i), (j), (k), and (l) amended _____, 2003 to be effective _____, 2004.

Comment to Proposed R. 1:20-19 Changes

The PRRC agrees with the OAE's substantial revisions to this rule governing the appointment of attorney-trustees. Primary among the changes is the recognition that an attorney for whose account an attorney-trustee is appointed is financially liable to pay the reasonable costs of the attorney-trusteeship as approved by a court. Most attorney-trustees serve *pro bono* because the attorney's practice, particularly in the case of disciplined attorneys, is insufficient to generate monies for payment. The proposed revisions to this rule provide that a judgment may be entered against the attorney. The revisions also make clear that the attorney-trustee's duties are 1) to inventory and distribute active client files, 2) to take possession of the attorney trust and business accounts, 3) to make reasonable efforts to distribute identified trust funds to clients, and 4) to obtain a court order directing disbursal of any remaining funds. In order to eliminate claims against the attorney-trustee by the disciplined attorney, the revisions stress that the attorney-trustee has no obligation to the attorney; the attorney-trustee is immune from any such claims. Other procedural changes have been made, including a requirement of filing an interim and final report to the court prior to discharge.

The following are the OAE's comments explaining the proposed amendments.

For clarity, paragraph (a) has been retitled "Jurisdiction; Appointment." Moreover, the clause that discusses the purposes of the appointment has been deleted. This topic is now dealt with in paragraph (b), which is titled "Purposes; Inventory of Files, Trust and Other Assets." The first sentence of the rule has been modified to relocate the phrase "transferred to disability-inactive status," since those attorneys, like suspended or disbarred attorneys, are also required to comply with R. 1:20-20. The phrase "no partner, shareholder, executor, administrator or other responsible party," is retained. However, the next to last sentence now clarifies that to be appointed as attorney-trustee, the "responsible party" must be "a New Jersey attorney" or must retain New Jersey counsel," so that only a New Jersey attorney is appointed as an attorney-trustee.

In all cases where an attorney-trustee is appointed, the underlying principle of the rule recognizes that the attorney on whose account the attorney-trustee is appointed has the first obligation to perform the functions required by this rule. If the attorney fails or refuses to do so, those functions should be performed at the expense of the attorney. The paragraph is also amended to add "disappearance" as an event affording jurisdiction under this rule for appointment of an attorney-trustee. This covers the situation where a disciplined attorney simply disappears, but where sufficient time has not passed to demonstrate conclusively outright abandonment. Additionally, the next to last sentence of the existing rule, regarding notice of any attorney-trustee appointment, has been moved to become the last sentence, and the secretaries of the appropriate Ethics Committee and Fee Committee have been added as persons to receive notice.

Paragraph (b) is new and is titled "Purposes; Inventory of Files, Trust and Other Assets." These subjects are so important that they are given their own paragraph. The new provisions

recast the purposes for the attorney-trustee and the main functions of that appointment out of the language formerly contained in the last sentence and most of the third to the last sentence of former paragraph (a). This new paragraph states the attorney-trustee's priorities unequivocally. Those priorities are 1) to help clients with active files, 2) to take possession of the trust and business accounts, 3) to make reasonable efforts to distribute identified trust funds to clients, and 4) to obtain a court order directing the disposition of any remaining funds and assets. A court order may direct that any balance of funds will be deposited to the Superior Court Trust Fund. The next to last sentence of the rule states unequivocally that the attorney-trustee has "no obligation or liability to the attorney."

This paragraph also restates that, in the discretion of the attorney-trustee, that person may take over the law practice and all monies and fees due the attorney from case files or otherwise. Such action is undertaken "for the sole purpose of creating a fund for payment of reasonable costs and expenses of the trusteeship" under paragraph (h) and not for the benefit of the attorney. An attorney whose failure or refusal to act has necessitated the appointment of another attorney as trustee (almost invariably a *pro bono* assignment) should not be permitted to make a claim against the attorney-trustee.

Former paragraphs (b), (c), (d), (e) and (f) have been renumbered (c), (d), (e), (f) and (h).

The caption of newly renumbered paragraph (c) is changed to "Protection of Client Information," to better state the subject of the paragraph. Minor grammatical changes are also made.

Paragraph (d) is retitled to read "Reports; Instructions." So that the court can be properly apprised of the handling of the matter, the rule requires the attorney-trustee to make at least an initial report and a final report to the court. The initial report is due 120 days after appointment and the final report is a condition precedent to discharge of the attorney-trustee. The reports should describe the scope of the work accomplished and to be accomplished under this rule and the significant activities of the attorney-trustee in meeting the obligations stated in the rule. The final report must include any accountings of trust and business accounts, the disposition of cases and any requests for disposition of remaining files and property, including the distribution of files. The existing sentence permitting the attorney-trustee to seek "instructions" from the court at any time is retained. Requests for instruction are separate from reports and a report is not a prerequisite to such requests.

Newly renumbered paragraphs (e) and (f) contain minor grammatical changes to more clearly state these sentences or to change rule citations.

A new paragraph (g), titled "Legal Responsibility of Attorney," is added. It clarifies that a judgment may be entered against the attorney for whom (as stated in paragraph (a)) the attorney-trustee is appointed with respect to all reasonable fees, costs and expenses incurred as approved by the court in paragraph (h).

In a given case, an attorney-trustee may spend hundreds to thousands of hours over many months or even years, straightening out the attorney's records or practice and fulfilling the attorney's R. 1:20-20 obligations. Unfortunately, the attorney disciplinary system has seen an increasing number of attorneys simply abandon their practices. While attorneys are free to change careers, they must do so responsibly, properly and legally or pay the consequences. This rule addresses the past failure to hold them personally liable for these costs and expenses.

Former paragraph (f) is now (h) and has been modified to incorporate the personal

liability provision of new paragraph (g). The rule now states that the court may, on proper notice, enter judgment in favor of the attorney-trustee against the attorney. It also makes clear that reimbursement may be for legal fees, costs and expenses, if reasonable and approved by the court. Moreover, the attorney-trustee has recourse to utilize the attorney's law practice as an asset from which the attorney-trustee may be reimbursed. A reference is inserted in the final sentence of this paragraph to the attorney-trustee's right under R. 1:20-23(e), titled "Release of Restrained Funds in Attorney Accounts," to assert a claim to any remaining funds of the attorney that have been restrained from disbursement by the Supreme Court and not allowed to the Fund or the Disciplinary Oversight Committee.

1:20-19. Appointment of Attorney-Trustee to Protect Clients' Interest

(a) Jurisdiction; Appointment. [Inventory of Files, Trust Assets and Other Duties.] If an attorney has been suspended or disbarred or transferred to disability-inactive status and has not complied with R. 1:20-20 (future activities of disciplined or disability-inactive attorneys), [or has been transferred to disability-inactive status,] or has abandoned the law practice, or disappeared, or has died and no partner, shareholder, executor, administrator or other responsible party capable of conducting the respondent's affairs as stated hereinafter is known to exist, the Assignment Judge, or designee, in the vicinage in which the attorney maintained a practice may, on proper proof of the fact and on the application of any interested party, appoint one or more members of the bar of the vicinage where the law practice is situate as attorney-trustee. [to inventory the active files of the attorney, to take control of the attorney's trust and business accounts and any trust assets, to take possession of the attorney's law practice and to take such action, including, if the attorney-trustee requests, marshalling assets of the law practice, as is necessary, first, to protect the interests of the attorney's clients; and then to protect the interests of the attorney. Notice of an order of appointment shall be given to the Director and the appropriate county bar association in the vicinage.] Where a responsible party capable of conducting respondent's affairs is known to exist, and where that person is a New Jersey attorney or has retained a New Jersey attorney, [such person] that attorney may be appointed and directed to take appropriate action. Notice of an order of appointment shall be given to the Director and the secretaries of the appropriate Ethics Committee and Fee Committee and county bar association in the vicinage.

(b) Purposes; Inventory of Files, Trust and Other Assets. The purposes of the appointment shall be 1) to inventory active files and make reasonable efforts to distribute them to clients, 2) to take possession of the attorney trust and business accounts, 3) to make reasonable efforts to distribute identified trust funds to clients or other parties (other than the attorney) and 4) after obtaining an order of the court, to dispose of any remaining funds and assets as directed by the Court. The attorney-trustee shall have no obligation or liability to the attorney. The attorney-trustee may take possession of the attorney's law practice and, in accordance with R.1:20-20(b)(13), all monies and fees due the attorney for the sole purpose of creating a fund for payment of reasonable fees, costs and expenses of the trusteeship as ordered by the court under paragraph (h).

(c) [(b)] Protection of Client Information[for Records Subject to Inventory]. Any attorney-trustee [so appointed] shall not [be permitted to] disclose any information contained in any files [inventoried] under this rule without the consent of the client to whom the file relates, except as necessary to carry out the order of appointment or to comply with any request from an [District] Ethics Committee or the Director.

(d) [(c)] Reports; Instructions. The attorney-trustee shall file an initial report with the Assignment Judge or designee within 120 days after appointment and a final report prior to being discharged. The reports shall describe the nature and scope of the work accomplished and to be accomplished under this rule and the significant activities of the attorney-trustee in meeting the obligations under the rule. The final report must include

accountings for any trust and business accounts, the disposition of active case files and any requests for disposition of remaining files and property. The attorney-trustee may apply to the Assignment Judge, or such other [such] Judge as may be designated, for instructions whenever necessary to carry out or conclude the duties and obligations imposed by this rule.

(e) [(d)] Immunity. All attorney-trustees appointed pursuant to this rule shall be immune from liability for conduct in the performance of their official duties in accordance with R. 1:20-7(e). This immunity shall not extend to employment under section (f) [(e)].

(f) [(e)] Acceptance of Clients. With the consent of any client, the [appointed] attorney-trustee may, but need not, accept employment to complete any legal matter.

(g) Legal Responsibility of Attorney. The attorney for whom an attorney-trustee has been appointed is liable to the attorney-trustee for all fees, costs and expenses reasonably incurred by the attorney-trustee as approved by the court under paragraph (h).

(h) [(f)] Legal Fees, Costs and Expenses. The attorney-trustee shall be entitled to reimbursement from the attorney [law practice] for 1) actual expenses incurred by the attorney-trustee for costs, including, but not limited to, reasonable secretarial, paralegal, legal, accounting, telephone, postage, moving and storage expenses, and 2) [for] reasonable hourly attorneys' fees. Application for allowance of fees, [and] costs and expenses shall be made by affidavit to the appointing judge, or designee, [at the conclusion of the trusteeship] who may enter a judgment in favor of the attorney-trustee against the attorney. The application [and] shall be accompanied by an [detailed] accounting in a form and substance acceptable to the court. The application shall be made on notice to the attorney or, if deceased, to the attorney's personal representative, or heirs. For good cause shown, an interim application for costs and legal fees may be made. The attorney-trustee shall be accorded a priority as an administrative expense for all attorney fees, costs and expenses awarded by the court. If, after paying the attorney-trustee, there are funds or assets remaining, the Assignment Judge or designee may make such order of disposition as may be appropriate. An attorney-trustee may also apply to the Supreme Court in accordance with R. 1:20-23(e) for payment of any remaining monies of the attorney restrained by the Court.

Note: Adopted November 5, 1986 to be effective January 1, 1987; former R. 1:20-12 redesignated 1:20-19, paragraphs (a) and (b) amended and paragraph (f) adopted January 31, 1995 to be effective March 1, 1995; paragraph (a) amended, paragraphs (b), (c), (d), (e), and (f) redesignated (c), (d), (e), (f) and (h) and amended, paragraphs (a), (c), (d) and (h) re-captioned and new paragraphs (b) and (g) added _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-20 Changes

R. 1:20-20 is titled "Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability-Inactive Status." The PRRC agrees with the OAE's proposed revisions to this rule, which include housekeeping changes along with several substantial revisions. In respect of financial obligations, notable amendments include an addition to subsection (b)(5) that retains the requirement that attorneys who have been suspended, disbarred or placed on disability-inactive status cease using their bank accounts, but the OAE proposes additional language advising those attorneys of their obligations concerning trust monies. Additionally, subsection (b)(13) is amended to state that if an attorney-trustee has been appointed, any compensation for completed services owed to the attorney shall be paid to the attorney-trustee for disbursement as directed by the court, pursuant to Rule 1:20-19. In seeking to enhance compliance with the rule, new subsection (c) creates an incentive by delaying reinstatement in situations where the attorney failed to file the affidavit of compliance in a timely manner. Finally, the amendments to subsection (d), now renumbered subsection (e), add to the existing requirements placed on partners and shareholders. The rule currently requires that firms take reasonable actions to ensure that the provisions are complied with. The OAE's proposal adds that if the disciplined or former attorney fails to comply with this rule within 30 days of the date of suspension, transfer or disbarment, the law firm shall do so.

The following are the OAE's comments explaining the proposed amendments.

The caption of this rule is amended to add a hyphen between the words "Disability" and "Inactive" for uniformity. The same change is made in the text of paragraphs (a) and (b), and renumbered paragraph (e).

Paragraph (b) is amended to refer to any "equivalent sanction" in addition to the ones specifically mentioned in this rule. Previously, the term resignation with prejudice was employed to refer to disbarments by consent. Additionally, other sanctions are developed and employed in unusual situations, such as the sanction of revocation, which has been used by the Supreme Court on occasion.

Subparagraph (b)(4) is amended to add the word "stationary." That word was moved from subparagraph (b)(5) to this subparagraph in order that (b)(5) deal exclusively with attorney bank accounts.

Subparagraph (b)(5) deals with an attorney's bank accounts and requires attorneys to cease using their attorney trust account if sanctioned as stated in the rule. However, it does not specify what is to be done with these trust funds. The rule amendment requires attorneys who have been sanctioned by suspension for more than six months, transferred to disability-inactive status, disbarred or their equivalent to take appropriate action to pay over trust funds due and to disburse any remainder to a New Jersey admitted attorney in good standing or utilize the provisions of R. 1:21-6(j), titled "Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners." In this way, the public is protected.

Subparagraph (b)(6) is amended to clarify that immediately on the date of the Supreme Court's order of discipline (regardless of the effective date thereof) the disciplined attorney shall not accept any new clients or retainers. In several disciplinary cases suspended or disbarred attorneys have preyed on clients between the date of the Court's order and the date the order

became effective by accepting monies from new clients. The disciplined attorney knows that in almost all of these cases the attorney will not be able to complete these newly accepted cases in the interim period (usually three to four weeks) that the Court sometimes gives before the suspension or, in rarer occasions, the disbarment becomes effective. The purpose of this interim period is for the attorney to complete the very few existing matters that are almost completed and to wind down, not gear up, the practice and take monies for new matters from unsuspecting clients. Almost invariably, these clients do not know of the attorney's impending suspension or disbarment. This rule amendment addresses this problem by providing explicit guidance to the disciplined attorney. As stated in subparagraph (b)(15), the attorney should be winding down the practice and be preparing the required affidavit of compliance with this rule during the 30 day period following the Court's order of discipline. See also the comment below under paragraph (c).

The last sentence of subparagraph (b)(11) is reworded from passive to active voice.

Subparagraph (b)(12) is amended at the suggestion of the Camden County Surrogate. The current rule requires a suspended, disbarred or disability-inactive attorney, who is then acting as a fiduciary (executor, guardian, etc.) to notify co-fiduciaries, beneficiaries, Assignment Judges and Surrogates of their disciplinary status. The modification proposed would extend this rule to any attorney who, after being disciplined, "attempts to obtain letters of appointment from a Surrogate" to act in those capacities. This suggestion came after well-publicized multi-million dollar thefts by fiduciaries in Camden and Ocean Counties.

Subparagraph (b)(13) is amended to correlate with R. 1:20-19(h) governing attorney-trustees. It provides that if an attorney-trustee is appointed, all compensation due to an attorney shall be payable only to the attorney-trustee for possible reimbursement of the costs and legal services incurred as directed by the court appointing the attorney-trustee. "Compensation" is also defined as including any monies or other thing of value paid that is related to any agreement, sale, assignment or transfer of any aspect of the attorney's share of a law firm. If an attorney-trustee is not appointed, the rule provides that the attorney may accept such compensation, provided the attorney has fully complied with the obligations placed by R. 1:20-20.

Subparagraph (b)(15) is amended to conform this provision to other references in the rule to the term "Director" instead of the "Office of Attorney Ethics." Also the number "5" is changed to the word "five." An amendment is also made to clarify when the 30 day period for preparing the required affidavit of compliance should begin, namely "after the date of the order of discipline (regardless of the effective date thereof)." The existing rule simply referred to a point in time "after the date of the attorney's prohibition from practice…." This lack of precision caused some attorneys to believe that the period for complying with the rule only began to run from the effective date of the order, in those cases where the Court made the action effective in the future. The amendment settles any confusion. It also underlines the fact that any effective date for discipline is given for a limited purpose and is not intended to permit the attorney to practice as usual and take on new clients. It is a winding-down period. The subparagraph is further amended to make clear that the "original" of the affidavit of compliance is filed with the Director, while "(s)igned copies of that affidavit shall be provided at the same time to the Clerk of the Supreme Court and to the Disciplinary Review Board." Finally, the last sentence of the existing rule is deleted there and the text is substantially transferred to newly created paragraph (c).

A new paragraph (c), titled "Failure to Comply," is created. The purpose of this change is

to emphasize the penalties for non-compliance with R. 1:20-20 and to also enhance the penalties in order to encourage greater compliance with the rule and the timely filing of the required affidavit of compliance. The Director monitors compliance with R. 1:20-20 to see that pending clients, courts and adversaries are notified of the attorney's status. In recent years, a number of attorneys have either ignored the rule or failed to follow it. As a result clients, courts and adversaries in a number of cases do not know until months or, sometimes, a year or more after discipline that the lawyer was suspended, disbarred, or disabled. When clients complain to the disciplinary agency, an attorney-trustee may be appointed. However, both the significant delay in providing notice and the imposition on an attorney-trustee are unfair. For the clients, courts and adversaries, this failure disserves them and the administration of justice. For the attorney-trustee, who almost invariably serves without compensation to complete that which the disciplined attorney is obligated to do, the situation is unwarranted.

While disbarred attorneys present special challenges, suspended attorneys can be dealt with more effectively. The Office of Attorney Ethics proposes an amendment that modifies the existing provision in R.1:20-21(i)(A) by increasing the period a delinquent suspended attorney must wait to petition for reinstatement from the current three-month period to a period of six months. The hope here is that the increased penalty will sufficiently encourage attorneys to meet their obligations in a timely fashion. The PRRC has added to this provision a clause permitting the Director the discretion to extend the mandatory thirty-day period of compliance provided by paragraph (b)(15).

As for disbarred and suspended attorneys, the new provision contains a reference to the contempt provisions of R. 1:20-16(j) in new paragraph (c). This provision existed in the last sentence of (b)(15). It has been deleted there and replaced here. The Director has had success with contempt proceedings in cases where disbarred or suspended attorneys improperly practice law after they have been disciplined.

Former paragraphs (c) and (d) are renumbered (d) and (e). Paragraph (e) is amended to make clear that if "the disciplined or former attorney fails to comply with this rule within 30 days of the date of suspension, transfer, or disbarment, the law firm shall do so."

1:20-20. Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability-Inactive Status

(a) Prohibited Association. No attorney or other entity authorized to practice law in the State of New Jersey shall, in connection with the practice of law, employ, permit or authorize to perform services for the attorney or other entity, or share or use office space with, another who has been disbarred, resigned with prejudice, transferred to disability-inactive status, or is under suspension from the practice of law in this or any other jurisdiction.

(b) Notice to Clients, Adverse Parties and Others. An attorney who is suspended, transferred to disability-inactive status, disbarred, or disbarred by consent or equivalent sanction:

(1) shall not practice law in any form either as principal, agent, servant, clerk or employee of another, and shall not appear as an attorney before any court, justice, judge, board, commission, division or other public authority or agency;

(2) shall not occupy, share or use office space in which an attorney practices law;

(3) shall not furnish legal services, give an opinion concerning the law or its application or any advice with relation thereto, or suggest in any way to the public an entitlement to practice law, or draw any legal instrument;

(4) shall not use any stationery, sign or advertisement suggesting that the attorney, either alone or with any other person, has, owns, conducts, or maintains a law office or office of any kind for the practice of law, or that the attorney is entitled to practice law;

(5) shall, except for the purposes of disbursing trust monies for the 30-day period stated in this subparagraph, cease to use any [stationery,] bank accounts[,] or checks on which the attorney's name appears as a lawyer or attorney-at-law or in connection with the words "law office"[;]. If the suspension is for a period greater than six months or involves transfer to disability-inactive status, disbarment, disbarment by consent or their equivalent sanction, the attorney shall, within the 30 day period prescribed in subparagraph (15), disburse all attorney trust account monies that are appropriate to be disbursed and shall arrange to transfer the balance of any trust monies to an attorney admitted to practice law in this state and in good standing for appropriate disbursement, on notice to all interested parties, or dispose of the balance of funds in accordance with R. 1:21-6(j), “Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners.”

(6) shall, from the date of the order imposing discipline (regardless of the effective date thereof), not solicit or procure any legal business or retainers for the disciplined attorney or for any other attorney;

(7) shall promptly require the telephone company to remove any listing in the telephone directory indicating that the attorney is a lawyer, or holds a similar title;

(8) shall promptly require the publishers of Martindale-Hubbell Law Directory, the New Jersey Lawyers Diary and Manual, and any other law list in which the attorney's name appears to remove any listing indicating that that attorney is a member of the New Jersey Bar in good standing;

(9) shall notify the admitting authority in any jurisdiction to whose bar the attorney has been admitted of the disciplinary action taken in the State of New Jersey;

(10) shall, except as otherwise provided by paragraph (d) of this rule, promptly notify all clients in pending matters, other than litigation or administrative proceedings, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent, and of the attorney's consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, and shall advise said clients to seek legal advice elsewhere and to obtain another attorney to complete their pending matters. Even if requested by a client, the attorney may not recommend another attorney to complete a matter. When a new attorney is selected by a client, the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no new attorney is selected, without waiving any right to compensation earned as provided in paragraph (13) below;

(11) shall, except as otherwise provided by paragraph (d) of this rule, as to litigated or administrative proceedings pending in any court or administrative agency, promptly give notice of the suspension, transfer to disability-inactive status, disbarment, or disbarment by consent and of the consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, to: (1) each client; (2) the attorney for each adverse party in any matter involving any clients; and (3) the Assignment Judge with respect to any action pending in any court in that vicinage, or the clerk of the appropriate appellate court or administrative agency in which a matter is pending. The notice to clients shall advise them to obtain another attorney and promptly to substitute that attorney for the disciplined or former attorney. Even if requested by a client, the disciplined or former attorney may not recommend an attorney to continue the action. The notices to opposing attorneys and the Assignment Judge or Court Clerk shall clearly indicate the caption and docket number of the case or cases and name and place of residence of each client involved. In the event a client involved in litigation or a pending proceeding does not obtain a substitute attorney within 20 days of the mailing of said notice, the disciplined or former attorney shall move pro se in the court or administrative tribunal in which the action or proceeding is pending for leave to withdraw therefrom. When a client selects a new attorney [is selected by a client], the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no attorney is selected, without waiving any right to compensation earned, as provided in paragraph (13), below;

(12) shall, in all cases in which the attorney is then acting, or who thereafter attempts to obtain letters of appointment from a Surrogate to act, in any specified fiduciary capacity, including, but not limited to, executor, administrator, guardian, receiver or conservator, promptly notify in writing all (1) co-fiduciaries, (2) beneficiaries, (3) Assignment Judges and Surrogates of any vicinage and county out of which the matter arose, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent. Such notice shall clearly state the name of the matter, any caption and docket number, and, if applicable, the name and date of death or current residence of the decedent, settlor, individual or entity with respect to whose assets the attorney is acting as a fiduciary;

(13) shall not share in any fee for legal services performed by any other attorney following the disciplined or former attorney's prohibition from practice, but may be compensated for the reasonable value of services rendered and disbursements incurred prior to the effective date of the prohibition, provided the attorney has fully complied with the provisions of this rule and has filed the required affidavit of compliance under subparagraph (b)(15). The reasonable value of services for the disciplined or former attorney and the substituted attorney shall not exceed the amount the client would have had to pay had no substitution been required. If an attorney-trustee has been appointed under R. 1:20-19, all fees for legal services and other compensation due the attorney shall be paid solely to the attorney-trustee for disbursement as directed by the court in accordance with the provisions of that rule. Compensation shall include any monies or other thing of value paid for legal services due or that is related to any agreement, sale, assignment or transfer of any aspect of the attorney’s share of a law firm;

(14) shall maintain:

(A) files, documents, and other records relating to any matter that was the subject of a disciplinary investigation or proceeding;

(B) files, documents, and other records relating to all terminated matters in which the disciplined or former attorney represented a client prior to the imposition of discipline;

(C) files, documents, and other records of pending matters in which the disciplined or former attorney had responsibility on the date of, or represented a client during the year prior to, the imposition of discipline or resignation;

(D) all financial records related to the disciplined or former attorney's practice of law during the seven years preceding the imposition of discipline, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports; and

(E) all records relating to compliance with this rule.

(15) shall within 30 days after the date of the order of suspension (regardless of the effective date thereof) [attorney's prohibition from practice] file with the Director the original of a detailed affidavit specifying by correlatively numbered paragraphs how the

disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order. Signed copies of that affidavit shall be provided at the same time to the Clerk of the Supreme Court and to the Disciplinary Review Board. The affidavit shall be accompanied by a copy of all correspondence sent pursuant to this rule and shall also set forth the current residence or other address and telephone number of the disciplined or former attorney to which communications may be directed. The disciplined or former attorney shall thereafter inform the Director [, Office of Attorney Ethics,] of any change in such residence, address, or telephone number. The affidavit shall also set forth whether the attorney maintained malpractice insurance coverage for the past [5] five years and, for each policy maintained, the name of the carrier, the carrier's address, the policy number, and the dates of coverage. The affidavit shall also attach an alphabetical list of the names, addresses, telephone numbers, and file numbers of all clients whom the attorney represented on the date of discipline or transfer to disability-inactive status. [Failure to comply substantially with these obligations shall preclude consideration of an application for reinstatement as set forth in R. 1:20-21(h) and shall constitute a contempt of court.]

(c) Failure to Comply. Failure to comply fully and timely with the obligations of this rule and file the affidavit of compliance required by paragraph (b)(15) within the 30-day period, unless extended by the Director for good cause, shall, in the case of a suspension, preclude the Board from considering any petition for reinstatement until the expiration of six months from the date of filing proof of compliance in accordance with R.1:20-21(i)(A). Such failure shall also constitute a contempt of court in accordance with R. 1:20-16(j).

(d)[(c)] Definite Suspension of Six Months or Less. A lawyer who has been suspended for a definite period of six months or less is exempt from the requirements of paragraph (b)(7) and (b)(8).

(e)[(d)] Responsibility of Partners and Shareholders. An attorney who is affiliated with the disciplined or former attorney as a partner, shareholder, or member shall take reasonable actions to ensure that the attorney complies with this rule. In lieu of compliance by the attorney with the requirement of paragraph (b)(10) and (b)(11), the firm, corporation, or limited liability entity may promptly notify all clients represented by the disciplined or former attorney of the attorney's inability to act due to disbarment, suspension, or disability-inactive status and that the firm will continue to represent the client unless the client requests in writing that the firm withdraw from the matter and substitute a new attorney.

If the disciplined or former attorney fails to comply with this rule within 30 days of the date of suspension, transfer, or disbarment, the law firm shall do so. Proof of compliance shall be by verified affidavit of a member of the firm, shareholder, or member filed with the Director within 30 days of the date of suspension, transfer, or disbarment. The affidavit shall be accompanied by a copy of all notices sent to clients pursuant to this paragraph.

Note: Adopted February 23, 1978, to be effective April 1, 1978; amended January 31, 1984 to be effective February 15, 1984; amended July 13, 1994 to be effective September 1, 1994; paragraph (a) was former R. 1:21-8, new paragraphs (b), (c) and (d) adopted January 31, 1995 to be effective March 1, 1995; paragraph (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b)(10), (b)(11) and (d) amended, paragraphs (b)(12), (b)(13), and (b)(14) amended and redesignated as paragraphs (b)(13), (b) (14), and (b)(15), and new paragraph (b)(12) adopted July 5, 2000 to be effective September 5, 2000; caption of rule amended; paragraphs (a), (b), (b)(4), (5), (6), (10), (11), (12) (13) and (15) amended; former paragraphs (c) and (d) renumbered as (d) and (e) and renumbered paragraph (e) amended; and new paragraph (c) added _____, 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-21 Changes

Rule 1:20-21 deals with "Reinstatement After Final Discipline." The PRRC agrees with the OAE's proposed revisions to this rule, which include housekeeping changes and a substantive amendment to subsection (i), entitled "Consideration of Petition for Reinstatement." The additional language in this subsection mirrors the proposed amendment to R. 1:20-20(c), which delays reinstatement for failure to timely file the affidavit of compliance.

The following are the OAE's comments explaining the proposed amendments.

Paragraph (c) is amended to reduce the number of copies of the petition that must be filed with the Board from eighteen to twelve, and to express it in numerals.

The amount of costs required to be paid by respondents who petition for reinstatement in paragraph (d) has been increased by approximately one-third, from $500 to $750. The existing amount was established in 1995, almost nine years ago. The costs of the discipline system have increased and inflation has also increased the expenses to the system. An adjustment upward is warranted for 2003.

Subparagraph (e) is amended to change the year of publication from "19--" to "20--."

The language of the first sentence of paragraph (f) is reworded for clarification and to change from passive to active voice. Language has been added to point out that the purpose of the petitioner's reinstatement application is to "establish fitness to resume the practice of law. " In the current rule, this statement is contained in subparagraph (f)(18), but it is better relocated at the beginning of (f), therefore (f)(18) is deleted and (f)(19), (20), (21), and (22) are renumbered. Also, subparagraph (f)(5) is amended to change the word "ethical" to "disciplinary" as more appropriate.

Paragraph (g) is amended to reduce the number of copies of the petition that the Director files with the Board from 18 to 12 and to express it in numerals. Also, the number "6" is changed to the word "six." It is also amended to underline the fact that the Board's "findings and recommendations" relate to "the attorney's fitness to practice law."

A comma is added in paragraph (h).

Subparagraph (i)(A) is amended to conform to the change made in R. 1:20-20(c). That amendment increases the period of time before a delinquent suspended attorney can apply for reinstatement from the current three months to six months.

The name of the "Client Protection Fund" in subparagraph (i)(E) is amended to include the full name of the "Lawyers' Fund For Client Protection" to avoid any misunderstandings by suspended attorneys.

New paragraphs (l), titled "Standard of Proof," and (m), titled "Burden of Proof; Burden of Going Forward," have been added. The substance of these rules was taken almost verbatim from existing R. 1:20-6(c)(2)(B) and (C) and placed here for ease of reference.

1:20-21. Reinstatement After Final Discipline

(a) Definite Suspension of More Than Six Months and Indefinite Suspensions. [...no change].

(b) Definite Suspension of Six Months or Less. [...no change].

(c) Filing and Service of Petition. The petitioner shall file an original and 12 [eighteen] copies of the verified petition with the Board and shall serve two copies on the Director.

(d) Costs. Petitions for reinstatement shall be accompanied by a non-refundable check payable to the Disciplinary Oversight Committee in the amount of $750 [500] to cover the reasonable administrative costs of processing the petition. Either the Board or the Court may also direct the petitioner to pay such additional sum during the processing of a petition as it deems appropriate to meet the cost of actual out-of-pocket expenses, including, but not limited to, medical or psychiatric examinations, transcripts and other investigatory and review expenses deemed necessary to a proper evaluation of the reinstatement petition.

(e) Publication of Notice. Contemporaneously with the filing of the petition for reinstatement, or within twenty-one days prior thereto, the petitioner shall publish a notice of application for reinstatement in bold-faced type in all official newspapers designated by the Supreme Court and in a newspaper of general circulation in each county in which the respondent last maintained a law office and in the county in which respondent resided at the time of the imposition of discipline. Publication of a notice shall be sufficient if in the following language: NOTICE TO THE PUBLIC. John Doe, who was admitted to the bar of the State of New Jersey on ....., [19] 20.. and who was thereafter suspended from the practice of law by the Supreme Court, is applying to be reinstated to the practice. Objections or relevant information concerning this application for reinstatement should be forwarded immediately to Chief Counsel, Disciplinary Review Board, P.O. Box 962, Trenton, New Jersey 08625-0962.

(f) Contents of Petition. The petitioner shall provide a certified [A] petition for reinstatement setting forth all material facts on which the petitioner relies to establish fitness to resume the practice of law.[shall be certified by the petitioner and] The petition shall in the discretion of the Board considering the nature of the disciplinary offense contain, in correlatively numbered paragraphs, the following information:

(1) the name of the petitioner and a copy of a current photograph of petitioner, not smaller than three inches by three inches showing front and side views;

(2) the date on which the suspension was imposed and the citation of the reported opinion, if any;

(3) the age, current residence address and telephone number of the petitioner, the address of all residences maintained during the suspension period and the date of each residence;

(4) the nature of petitioner's occupation during the suspension, including the name and address of each employer, the dates of each employment, the positions occupied and titles held, the name, address and telephone of the immediate supervisor, and the reason for leaving the employment;

(5) the case caption, general nature, dates and disposition of every civil, criminal, administrative or disciplinary [ethical] action which was pending during the period of suspension to which petitioner was either a party or claimed an interest;

(6) petitioner's written consent to the Board and to the Director to examine and secure copies of any records relating to any criminal investigation of or action against petitioner;

(7) a statement of the monthly earnings and other income of the petitioner and the sources from which all earnings and income were derived during the period of suspension;

(8) a statement of assets and financial obligations of the petitioner as of the date of the original suspension and at the time of the reinstatement application, the dates when acquired or incurred, and the names and addresses of all creditors;

(9) the names and addresses of all financial institutions at which petitioner had, or was signatory to, accounts, safety deposit boxes, deposits or loans during the period of suspension, the number of each account, box, deposit or loan; the date each account, box, deposit or loan was opened, approved or made; and the date each account, box, deposit or loan was closed, discharged or paid;

(10) copies of petitioner's federal and state income tax returns and any business tax returns for each of the three years immediately preceding the date the petition is filed and for each year, or part of a year, during the period of suspension and, in an appropriate form, petitioner's written consent to the Board and the Director to secure copies of the original returns;

(11) a statement of restitution made for any and all obligations to all former clients and the Lawyers' Fund for Client Protection and the source and amount of funds used for this purpose;

(12) whether the petitioner, during the period of suspension, sought or obtained assistance, consultation or treatment, whether as an in- or out-patient, for a mental or emotional disorder or for addiction to drugs or alcohol, if such services relate to the disciplinary offenses or the Board determines that such information is relevant to the petitioner's present ability to practice law. The name, address and telephone of each provider of these services, the services rendered, their duration and purpose and a copy of all medical records shall be provided to the Board;

(13) whether the petitioner, during the period of suspension, applied for admission or reinstatement to practice as an attorney in this state or any other state and the caption and details of the application;

(14) whether the petitioner has ever applied for or been granted a license or certificate relating to any business or occupation and whether that license or certificate has ever been the subject of any disciplinary action and the details thereof;

(15) a statement as to whether or not any applications were made during the period of suspension for a license requiring proof of good character, the dates, name, address and telephone of the authority to whom such applications were addressed and the disposition thereof;

(16) whether petitioner, during the period of suspension, engaged in the practice of law in any jurisdiction and all material facts relating thereto;

(17) a statement of any procedure or inquiry during the period of suspension, relating to petitioner's standing as a member of any other profession or organization, or holder of any license or office, which involved the censure, removal, suspension, revocation of license, or discipline of petitioner, and, as to each, the dates, facts, and the disposition thereof and the name, address and telephone of the authority in possession of the record thereof;

[(18) all material facts on which the petitioner relies to establish fitness to resume the practice of law;]

[(19)] (18) a written representation of petitioner's intentions concerning the practice of law, if reinstated;

[(20)] (19) a newly completed Annual Attorney Registration Statement;

[(21)] (20) a copy of the detailed affidavit required to be filed in accordance with R. 1:20-20;

[(22)] (21) such other information as the Director, the Board or the Supreme Court may from time to time require.

(g) Objections by Director; Recommendation by the Board. Within 21 days following receipt of the petition or 14 days if the period of suspension was [6] six months or less, the Director shall file an original and 12 [eighteen] copies of a response with the Board either objecting or not objecting to the petition. The Director shall serve the respondent with a copy of the response. If the Director consents or fails to file objections, the Board may submit its findings and recommendations to the Supreme Court. If the Director files objections, the Board may set the matter down for oral argument on notice to the parties or may, after considering the objections, submit its findings and recommendations as to the attorneys' fitness to practice law to the Supreme Court without argument. The Board may recommend and the Court may impose conditions on the attorney's reinstatement deemed necessary to protect the lawyer, clients or the public.

(h) Referral to Trier of Fact. In an appropriate case, the Board may refer specific issues regarding reinstatement to a trier of fact, which shall then hold a hearing and furnish the Board with a report of findings and recommendations.

(i) Consideration of Petition for Reinstatement. No petition for reinstatement shall be considered by the Board unless:

(A) the respondent first affirmatively demonstrates full [substantial] and timely compliance with R. 1:20-20. If compliance has not occurred, and if the required affidavit of compliance has not been timely filed, the Board shall not consider the petition until the expiration of [three] six months from the date of filing of that proof of compliance.

(B) all disciplinary costs assessed have been paid, unless an extraordinary financial hardship claim has been timely requested and granted and unless respondent is current in the schedule of payments thereunder;

(C) all orders for restitution have been paid;

(D) the respondent has reimbursed or has reached agreement in writing with the Lawyers' Fund for Client Protection to reimburse it in full for all sums paid or authorized to be paid as a result of the respondent's conduct;

(E) all annual registration fees and charges for ethics and the Lawyers' Fund for Client Protection [Fund] have been paid.

(j) Successive Petitions. [...no change].

(k) Public Proceedings and Records. [...no change].

(l) Standard of Proof. The standard of proof in reinstatement proceedings shall be by clear and convincing evidence.

(m) Burden of Proof; Burden of Going Forward. The burden of proof in proceedings seeking reinstatement shall be on the petitioner.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; paragraphs (c), (d), (e), (f), (g), (h) and (i)(A) and (E) amended and new paragraphs (l) and (m) added _____ 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20-22 Changes

Rule 1:20-22 is titled "Resignation Without Prejudice." The PRRC agrees with the OAE's proposed amendments to this rule, which are housekeeping in nature.

The following are the OAE's comments explaining the proposed amendments.

The number "2" in paragraph (a) is changed to the word "two." The initial capital in the word "State" is deleted as grammatically incorrect in paragraphs (a) and (c).

The word "misconduct" is changed to "unethical conduct" in paragraph (c).

1:20-22. Resignation Without Prejudice

(a) Generally. A resignation without prejudice from the bar of this [S]state of a member in good standing shall be submitted through the Director and may be accepted by the Supreme Court, provided that at the time of its submission, the member presents satisfactory proof that no disciplinary proceedings are pending in any jurisdiction to which the member has been admitted and that, if the attorney has actively engaged in the practice of law in this [S]state in the preceding [2] two years, all clients for whom the attorney has performed any professional services or by whom the attorney has been retained during that time in this [S]state have been notified of the resignation.

(b) Form. [...no change].

(c) Effect. On acceptance of the resignation, which shall be by order of the Supreme Court, the membership in the bar of this [S]state shall cease, and any subsequent application for membership shall be in accordance with the provisions of R. 1:24. An attorney whose resignation without prejudice from the bar is accepted by the Supreme Court shall cease the practice of law in this [S]state as of the effective date of the order of acceptance. A resignation shall not affect the jurisdiction of the disciplinary system with regard to any unethical [mis]conduct which occurred prior to resignation.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraphs (a) and (c) amended , 2003 to be effective , 2004.

Comments to Proposed R. 1:20-23 Changes

This rule addresses the release of funds that have been restrained from disbursement by Supreme Court Order. The PRRC agrees with the OAE's proposed amendments to this rule. The amendments are primarily housekeeping in nature. The one exception is a proposed addition to subsection (e) that permits attorney-trustees to seek reimbursement under this rule to the extent that there are funds remaining after priorities are afforded to the Lawyers' Fund for Client Protection and the Disciplinary Oversight Committee.

The following are the OAE's comments explaining the proposed amendments.

Paragraph (b) is amended to delete the requirement that all petitions for release of restrained funds be served on the Office of Attorney Ethics, since that entity has no legal interest in the disposition of those funds. The proper parties in interest are: 1) the Board, which collects disciplinary costs; 2) the Fund, which has a claim to all restrained funds to the extent that it makes payments on account of an attorney's defalcation; 3) any R. 1:20-19 Attorney-Trustee and 4) any creditor or other party in interest. Finally, the term "Attorney-Trustee" is substituted for "Trustee" in this paragraph.

Paragraph (e) is amended to afford an Attorney-Trustee an opportunity to be paid sums approved under R. 1:20-19, to the extent any restrained funds are available, after priority is first afforded to the Fund and the Oversight Committee.

1:20-23. Release of Restrained Funds in Attorney Accounts

(a) Petition for Release of Funds. [...no change].

(b) Notice. Two copies of the petition shall be served on the disciplined attorney, the Disciplinary Review Board, [the Office of Attorney Ethics,] the Lawyers' Fund for Client Protection, any Attorney-Trustee appointed pursuant to Rule 1:20-19, and any other parties in interest. Proof of service shall be filed with the petition.

(c) Response to Petition. [...no change].

(d) Supreme Court Action; Publication. [...no change].

(e) Priority Over Remaining Funds. If the actual ownership of the funds cannot be established by clear and convincing evidence, the Lawyers' Fund for Client Protection shall have priority over the funds to the extent it has been subrogated to the rights of claimants against the Fund. If the Fund does not make a claim or if satisfaction of its claim does not exhaust the funds that have been restrained, the Disciplinary Oversight Committee shall have priority over the remaining funds to satisfy unpaid costs assessed against the disciplined attorney. An Attorney-Trustee appointed under R. 1:20-19 may seek reimbursement of sums allowed under that rule to the extent there are funds remaining under this rule after priorities afforded to the Fund and the Oversight Committee.

Note: Adopted July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (e) amended , 2003 to be effective _____, 2004.

Comments to Proposed R. 1:20A-1

R. 1:20A-1 governs District Fee Arbitration Committees appointed by the Supreme Court. The PRRC agrees with the OAE's proposed amendment to this rule, which is housekeeping in nature.

The following are the OAE's comments explaining the proposed amendment.

Paragraph (c) is amended in conformance with the identical amendment to R. 1:20-3(c), also titled “Officers; Organization.” Specifically, language is added to underline the fact that the annual emolument paid to secretaries is to reimburse for “costs and expenses.” The payment is not intended as compensation.

RULE 1:20A. DISTRICT FEE ARBITRATION COMMITTEES

1:20A-1. Appointment and Organization

(a) Fee Arbitration Districts. [… no change].

(b) Appointments. [… no change].

(c) Officers; Organization. The Supreme Court shall annually designate a member of each Fee Committee to serve as chair and another member to serve as vice chair. When the chair is absent or unable to act or is disqualified from acting due to a conflict, the vice chair shall perform the duties of the chair. Each Fee Committee shall hold an organization meeting in September of each year and shall meet regularly, except when there is no business to be conducted. The Fee Committee shall also meet at the call of the Supreme Court, the Chair, the Board or the Director.

The Director shall, after consultation with the chair, appoint a secretary who shall not be a member of the Fee Committee but who shall be a member of the bar maintaining an office in the district or county in which the district is located. The secretary shall serve at the pleasure of the Director and be paid an amount annually set by the Supreme Court to reimburse the secretary for costs and expenses. The secretary shall keep full and complete records of all Fee Committee proceedings, shall maintain files with respect to all fee disputes received, shall transmit copies of all documents filed immediately on receipt thereof to the Director, and shall promptly notify the Director of each final disposition. Reports with respect to the work of the Fee Committee shall be filed by the secretary with the Director, as instructed by the Director.

(d) Office. [...no change].

(e) Filing; Transfer. [… no change].

Note: Adopted February 23, 1978 to be effective April 1, 1978; amended January 31, 1984 to be effective February 15, 1984; text of R. 1:20A-1 amended and incorporated into 1:20A-1(e), new paragraphs (a)(b)(c) and (d) adopted January 31, 1995 to be effective March 1, 1995; paragraph (c) amended _____, 2003, to be effective _____, 2004.

Comments to Proposed R. 1:20A-3

Rule 1:20A-3 governs arbitration of fee disputes. The rule establishes procedures for fee arbitrations, including review of fee committee decisions by the Disciplinary Review Board.

In December 2002, the Court referred to the PRRC the question whether the rules governing arbitration should be amended to address situations similar to one that arose when a client contended that a discretionary procedural decision by a fee committee caused an unfair result. After reviewing the rules, the PRRC determined that Rule 1:20A-3(c)(2) should be amended to broaden the Disciplinary Review Board's scope of review of matters relating to procedure. Currently, subparagraph (c)(2) permits review by the Board of situations in which the fee committee "failed substantially to comply with the procedural requirements of R. 1:20A." Recognizing that these requirements are imprecise because of the nature of the proceedings, the committee did not believe it was practical to establish a structured process to cover every possible situation. Instead, the committee determined to address any fundamental unfairness that might arise during the arbitration process through the rule's provision for limited appeal. To accomplish this goal, the PRRC recommends adding to subparagraph (c)(2) that the Board may review "substantial procedural unfairness that led to an unjust result." With this revised standard, the Board will have the right to determine whether the result of the proceeding was fair, despite a claim of procedural unfairness.

1:20A-3. Arbitration

(a) Submission.

(1) Request Form. [...no change].

(2) Administrative Filing Fee. [...no change].

(i) Non-payment. [...no change].

(ii) Dishonored Instruments. [...no change].

(b) Procedure.

(1) Hearing Panel; Burden of Proof. [...no change].

(2) Notice; Attorney Response. [...no change].

(3) Third Party Practice. [...no change].

(4) Conduct of Hearing; Determination. [...no change].

(c) Appeal. No appeal from the determination of a Fee Committee may be taken by the client or the attorney to the Disciplinary Review Board except where facts are alleged that:

(1) any member of the Fee Committee hearing the fee dispute failed to be disqualified in accordance with the standards set forth in R. 1:12-1; or

(2) the Fee Committee failed substantially to comply with the procedural requirements of R. 1:20A[;], or there was substantial procedural unfairness that led to an unjust result; or

(3) there was actual fraud on the part of any member of the Fee Committee; or

(4) there was a palpable mistake of law by the fee committee which on its face was gross, unmistakable, or in manifest disregard of the applicable law, which mistake has led to an unjust result.

(d) Procedure on Appeal. [...no change].

(e) Enforcement. [... no change].

Note: Adopted February 23, 1978 to be effective April 1, 1978; paragraph (c) amended, new paragraph (d) adopted and paragraph (d) redesignated (e) July 15, 1982 to be effective September 13, 1982; paragraphs (a) through (e) amended January 31, 1984 to be effective February 15, 1984; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 5, 1986 to be effective January 1, 1987; paragraphs

(d) and (e) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended and subheadings (1), (2), (3) and (4) added June 29, 1990 to be effective September 4, 1990; paragraph (a)(1) amended and subparagraph (a)(2) added February 8, 1993 to be effective March 1, 1993; paragraphs (a)(b)(c)(d) and (e) amended, new paragraph (c)(4) adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended June 28, 1996 to be effective September 1, 1996; paragraph (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1), (a)(2), (b)(2), (b)(3), (d), and (e) amended July 5, 2000 to be effective September 5, 2000; paragraph (c)(2) amended _____, 2003 to be effective _____, 2004.

Comment on Proposed R. 1:21-6 Changes

The PRRC agrees with the OAE's proposed housekeeping changes to this rule governing recordkeeping.

In subparagraphs (c), (f) and (g) the initial capital in the word “State” is made lower case for grammatical accuracy. Subparagraph (c)(1) and (g) are also amended to change the number “7” to the word “seven.” In subparagraph (e), an incorrect reference to subparagraph (b) is changed to (c).

The numbers “1” and “2” in paragraph (j) are changed to the words “one” and “two.”

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) Required Trust and Business Accounts. [… no change].

(b) Account Location; Financial Institution's Reporting Requirements. [... no change].

(c) Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this [S]state shall maintain in a current status and retain for a period of [7] seven years after the event that they record:

(A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and

(B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(C) copies of all retainer and compensation agreements with clients; and

(D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) copies of all bills rendered to clients; and

(F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and

(H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement for overdraft protection.

(d) Type and Availability of Bookkeeping Records. [...no change].

(e) Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (c) [(b)] of this rule.

(f) Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this [S]state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) Attorneys Associated With Out of State Attorneys. An attorney who practices in this [S]state shall maintain and preserve for [7] seven years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) Availability of Records. [...no change].

(i) Disciplinary Action. [...no change].

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of [2] two years, an attorney's trust

account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of [1] one year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Note: Source-R.R. 1:12-5A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(2) amended September 15, 1992, to be effective January 1, 1993; former paragraph (e) deleted and new paragraph (e) adopted November 18, 1996, to be effective January 1, 1997; paragraph (a) amended, new paragraph (b) added, former paragraphs (b) through (i) redesignated as paragraphs (c) through (j), and redesignated paragraphs (c), (d), (e), (h), and (i) amended July 12, 2002 to be effective September 3, 2002; caption of Rule and paragraphs (a) and (b) amended February 6, 2003 to be effective March 1, 2003; paragraph (c) and (c)(1), (e) (f), (g) and (j) amended , 2003 to be effective , 2004.

Comment on Proposed R. 1:23-5 Changes

The OAE proposes this new rule as part of the rules governing the "Board of Bar Examiners" to address instances of cheating during bar examinations. The PRRC requested that the Board of Bar Examiners review the rule. The Board approved the rule and the PRRC concurs.

The following are the OAE's comments explaining the proposed amendment.

There is no existing rule provision governing the processing of bar cheating cases and other instances of impropriety in taking the bar examination. Over the past years, the Supreme Court has designated the Director to investigate and prosecute two bar cheating cases (1984 and 2000). The results of both cases were that the applicants' bar examination results were voided. In the absence of specific procedural rules, each matter was processed *ad hoc*. This rule fulfills that need, so that future cases can proceed expeditiously and with procedural certainty.

If the impropriety in taking the bar examination is discovered prior to an applicant's admission to the bar, it should be subject to the jurisdiction of the Board of Bar Examiners and, subsequently, the Supreme Court in accordance with procedures outlined in this new rule. However, if the applicant is already admitted to the bar of this state at the time the impropriety is discovered, then the matter is subject to the jurisdiction of the attorney disciplinary system, including review by the Disciplinary Review Board and the Supreme Court.

For simplicity, the general rules of procedure for disciplinary cases under R. 1:20-1 et. seq. should govern these pre-admission cases. The Director should conduct an investigation. If warranted by the evidence, the Director would file a formal complaint under R. 1:20-4, followed by an answer from the applicant, limited discovery and a hearing before a special master appointed by the Supreme Court. While the hearing could also be held by the Board of Bar Examiners en banc, experience in the disciplinary arena has demonstrated that evidentiary hearings with multiple member panels is logistically unwieldy, especially where multiple hearing days are expected. A body that does not regularly hold evidentiary hearings is not the best one to do so. Moreover, the Board of Bar Examiners already has a significant amount of work to perform for the Court. The attorney disciplinary system now uses Superior Court judges who are retired or on recall for a number of complex disciplinary cases and, as expected, they do a good job and speed resolution of these cases.

The Board of Bar Examiners has a legitimate appellate role to play, however. It should receive the report of the special master and conduct an appellate oral argument based on the record. It would then issue its findings and report to the Supreme Court, which would take any final action, including ordering any oral argument.

The burden of proving the charges in bar examination impropriety cases should be established by a preponderance of the evidence. While the burden of proof in attorney disciplinary cases is clear and convincing evidence, bar applicants have not yet attained any right to practice law of which they are being deprived. Therefore, the higher standard of proof is unnecessary. Moreover, under Regulation 303:6 of the Supreme Court's Character Committee:

> "The candidate shall have the burden to establish by clear and convincing evidence his or her good character and current fitness to be admitted to the practice of law in this State."

While it would be inappropriate for that same burden to be placed on the applicant charged with

impropriety in taking the bar examination, the burden on the system to prove test taking improprieties should not be excessive. The preponderance standard strikes an appropriate balance.

Like attorney and judicial disciplinary proceedings, all proceedings, and written records received or made subsequent to the filing of a formal complaint shall be public, except as stated in R. 1:20-9.

1:23-5. Bar Examination Test-Taking Improprieties

(a) All allegations of impropriety in the taking of a bar examination by a bar applicant who has not been admitted to practice law in this state shall be investigated and prosecuted by the Director, Office of Attorney Ethics in accordance with the applicable provisions of R. 1:20-1 et. seq., except that:
(1) the burden of proving the charges shall be by a preponderance of the credible evidence;
(2) the Supreme Court shall appoint a special master to make findings of fact and recommended conclusions;
(3) the special master's report shall be forwarded to the Board of Bar Examiners for appellate review on the record, including oral argument, before a three-member panel of the Board appointed by the Chair;
(4) the decision of the Board of Bar Examiners shall be submitted to the Supreme Court for such final action as it deems appropriate, including oral argument if directed by the Court; and
(5) issues of confidentiality, access to and dissemination of information in these cases shall be governed by R. 1:20-9.
(b) If such allegations of impropriety arise after the bar applicant has been admitted to the bar of this state, the matter shall proceed as any other attorney disciplinary matter in accordance with R. 1:20-1 et. seq.

Note: Adopted ,2003 to be effective ,2004.

Comment on Proposed R. 1:28-2 Changes

Rule 1:28-2 concerns payment of the annual assessment to the Lawyers' Fund for Client Protection. Proposed amendments to paragraph (a) of this rule reflect the suggested changes to Rule 1:20-1(d) regarding late fees for failing to pay the assessment in a timely manner. Paragraph (a) is amended also to increase the fees for reinstatement from the Ineligible List. The fees for reinstatement have not been updated in many years. The current provisions call for a reinstatement fee of "$25 if the attorney's name is being removed from one calendar year's Ineligible List or $50 if the attorney's name is being removed from two or more calendar years' Lists." In view of inflation, the OAE, the Disciplinary Oversight Committee and the Lawyers' Fund for Client Protection agree that an increase to $50 and $100 is appropriate. Paragraph (a) is amended further to replace a reference to "Ethics Financial Committee" with the name of the proper entity, the "Disciplinary Oversight Committee."

A proposal by the Lawyers' Fund for Client Protection resulted in the addition of new subsection (c) to address attorneys who fail to pay their annual assessment. This amendment calls for the administrative revocation of the license of an attorney who, at the time of the publication of the Fund's list for 2004 and thereafter, has been declared ineligible for five or more consecutive years. The PRRC has proposed amendments also to Rule 1:20-1(d) and 1:28B(1)(e) to reflect this new administrative revocation provision.

The following are comments by the Lawyers' Fund explaining the rationale for the administrative revocation provision:

In general, the impetus for the proposal is the size of the ever-growing Ineligible List. A total of 14,312 members of the Bar (comprising about 18% of the nearly 78,000 lawyers admitted) were ineligible as of Monday, September 15. Two striking characteristics of those ineligible are that they tend to be (1) out of state and (2) ineligible for a long time.

Of the 14,312 on the list, 11,293 (or 79%) had mailing addresses outside New Jersey. Furthermore, in the group of approximately 1,000 lawyers who typically rush to get off of the Ineligible List very shortly after its publication, the great majority of them will be in state - which is why they are so anxious to be reinstated. For most of the year, then, it is safe to say that an even greater percentage of the Ineligible List consists of out of state lawyers.

A sizeable number of lawyers have been ineligible for many years. Indeed, with about 3300 on this year's list only, 11,000 are on two or more years' lists. Of them, 6,590 are ineligible 5 years or more, 4,960 for 7 years or more, and a remarkable 2,690 for 10 years or more. Nearly a thousand, 985 to be precise, have been ineligible since 1989 or before. Most of those who quickly reinstate will be from the first-time group.

For many years, the Trustees of the Fund have believed the Court's ruling that exemptions from payment be few and narrowly defined to be sound policy. In short, when a lawyer steals from a client, it besmirches all lawyers, and when the Fund makes good on that

debt of honor, it benefits them all. Adding the discipline and LAP components to the annual assessment has in no way weakened the point.

In that large number of 14,312, there are undoubtedly deaths of which we have not learned, and lawyers who have simply forgotten about New Jersey or lost interest in their Bar membership here. As indicated in the Annual Report, the Fund knows it has lost touch with approximately 2,300 lawyers on the List. There is, however, a small but steady stream of lawyers who pay large amounts to reinstate themselves from long periods of ineligibility. It is difficult not to conclude that a certain number of out of state lawyers have come to consider their defiance of Supreme Court Rule as a simple business decision. If a sufficiently lucrative New Jersey matter comes along, they will pay off their arrears and reinstate; if not, they won't.

The proposal suggests that there comes a point where lawyers' continuous failure to comply with so basic a requirement as payment of a licensing fee, whether by design or disinterest, merits formal recognition that the attorneys have severed meaningful ties. There is simply no point in carrying these names on the rolls as ineligible forever.

1:28-2. Payment to the Fund; Enforcement

(a) Generally. Except as hereinafter provided, each holder of a plenary license to practice law in the State of New Jersey shall pay annually to the treasurer of the Fund a sum that shall be determined each year by the Supreme Court. An attorney who makes payment after February 1 of the billing year, or such other date as the Court may determine, but before being placed on the Ineligible List shall be subject to a late fee [of $25] as set forth in Rule 1:20-1(d), which shall be shared equally with the [Ethics Financial Committee] Disciplinary Oversight Committee. The treasurer shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on the list of those attorneys deemed ineligible to practice law in New Jersey by order of the Court. An attorney shall be reinstated automatically to the practice of law without further order of the Court on filing with the Fund the annual registration statement for the current year together with the annual payment, the late fee, any arrears due from prior years, and a reinstatement fee of $50 [25] if the attorney's name is being removed from one calendar year's Ineligible List or $100 [50] if the attorney's name is being removed from two or more calendar year's Lists.

For the purpose of annual assessment all members of the Bar shall report changes of address as they occur and thus keep their billing address current with the Fund at all times.

Any member of the Bar who receives a billing notice addressed to another member of the Bar shall either forward the notice to the intended recipient or return it to the Fund.

(b) Exceptions. [...no change]

(c) License Revocation for Repeated Non-Compliance. Any attorney who, at the time of the publication of the Fund's Ineligible Attorneys List for 2004 and thereafter, has been declared ineligible for five or more consecutive years shall have his or her license to practice in this State administratively revoked by Order of the Supreme Court.

On the entry of a license revocation Order pursuant to this Rule, the attorney's membership in the Bar of this State shall cease. Any subsequent application for membership shall be in accordance with the provisions of Rule 1:24. An Order of revocation shall not, however, preclude the exercise of jurisdiction by the disciplinary system in respect of any misconduct that occurred prior to Order's effective date.

Note: Source-R.R. 1:22A-2; amended July 17, 1975 to be effective September 8, 1975; amended January 31, 1984 to be effective February 15, 1984; amended June 29, 1990 to be effective September 4, 1990; redesignated paragraph (a) amended and paragraph (b) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended February 8, 1993, to be effective immediately; paragraph (a) amended and new paragraph (c) added _____, 2003 to be effective _____, 2004.

Comment on Proposed R 1:28B-1 Changes

This rule addresses the Lawyers Assistance Program. Subsection (e) is amended to refer to the new provision proposed for Rule 1:28-2 revoking the license of attorneys who fail to pay the annual assessment for five consecutive years.

1:28B. NEW JERSEY LAWYERS ASSISTANCE PROGRAM

1:28B-1. Board of Trustees; Purpose; Administration; Annual Assessment

(a) Appointments. [...no change.]

(b) Purpose; Administration. [...no change.]

(c) Meetings. [...no change.]

(d) Compensation. [...no change.]

(e) Annual Assessment. Every attorney admitted to practice law in the State of New Jersey, including those holding a plenary license and those admitted pro hac vice in accordance with Rule 1:21-2, shall be assessed and shall pay annually to the Lawyers Assistance Program a fee in a sum that shall be determined each year by the Supreme Court. All fees so paid shall be used for the administration of the Lawyers Assistance Program. This assessment shall be collected administratively in the same manner as and subject to the same exemptions as provided under Rule 1:28-2, except that no such fee shall be assessed to attorneys during the first calendar year of their admission, a partial fee (in an amount determined by the Supreme Court) shall be assessed during calendar year two, and a full fee shall be assessed from calendar years three through forty-nine. The names of any and all attorneys failing to comply with the provisions of this rule shall be reported to the Supreme Court for inclusion on its Ineligible to Practice Law List. Any attorney who fails to pay the annual assessment for five consecutive years shall be subject to the license revocation procedures contained in Rule 1:28-2(c).

Note: Adopted July 15, 1999, to be effective September 1, 1999; caption amended and new paragraph (e) added July 12, 2002 to be effective September 3, 2002; paragraph (b) amended February 4, 2003 to be effective immediately; paragraph (e) amended , 2003 to be effective , 2004.

OTHER RECOMMENDATIONS

Judges Testifying as Expert Witnesses; Prohibition

In response to correspondence from the Citizens for Justice in New Jersey, Inc., the PRRC considered whether there should be a specific prohibition against municipal court judges testifying as expert witnesses in attorney disciplinary cases. A 1987 Administrative Directive bars sitting Superior Court judges from testifying as experts in ethics proceedings. Similarly, the Code of Judicial Conduct, Canon 2, states that judges, including those who serve part time, shall not testify as character witnesses.

The PRRC solicited the opinion of the Advisory Committee on Judicial Conduct, which agreed that municipal court judges should be precluded from testifying as expert witnesses in disciplinary matters.

Consequently, the PRRC recommends that the Court either 1) issue an administrative directive advising that no judge, including a municipal court judge, is permitted to testify as an expert in ethics matters, or 2) amend Canon 2 of the Code to add to the existing prohibition a proscription on testifying at trial generally, whether in disciplinary matters or in litigation. The PRRC recommends that suitable language be prepared for the commentary to put the new provision of the Code in context. The PRRC emphasizes that it does not consider this proposal a substantive change in the Court's policies.

AMENDMENTS CONSIDERED AND REPORTED TO THE COURT OUT OF CYCLE

Confidentiality of Grievances; Employers

The Court referred to the PRRC for consideration a question by the Office of Attorney Ethics whether an employer of an ethics respondent should be informed of a grievance pending against the respondent before the issuance of a formal complaint. Rule 1:20-9 imposes on ethics officials and parties a duty of confidentiality that bars disclosure of the filing of the grievance but does not bar the grievant from publicly complaining about the attorney conduct that generated the grievance. This duty of confidentiality exists until the grievance is investigated and, if warranted, a formal complaint is filed. If the grievance is dismissed and no formal complaint is filed, the confidentiality requirement continues in effect. If a formal ethics complaint is filed following the investigation, a copy of the complaint is sent to the employer pursuant to Rule 1:20-9(j).

After consideration of the issue, the PRRC recommended to the Court that the rule remain unchanged. The PRRC suggested that disclosing a pending grievance should be left to the respondent's discretion because such disclosure is almost certain to adversely affect the employer-employee relationship even if the grievance is ultimately dismissed. Because the employer receives a copy of any formal complaint that issues, pursuant to the current rule, the employer is advised of the substance of the alleged ethical violations after an investigation has confirmed that the allegations have merit.

The Court agreed with the PRRC's analysis and its conclusions, and determined at its conference on March 23, 2003, to make no changes to the Rule.

PROPOSED AMENDMENTS CONSIDERED AND NOT ADOPTED OR RESOLVED WITHOUT RULE AMENDMENTS

The PRRC considered proposed amendments to the following rules, but determined them to either be unnecessary at this time or to need additional consideration.

- Proposed amendments by the OAE to the Rules located in 1:20 to change the following references: Office of Attorney Ethics to "Director"; Lawyers' Fund for Client Protection to "Fund"; and Disciplinary Oversight Committee to "Oversight Committee." The PRRC declined to adopt these blanket changes because the rules as written are not confusing and, in light of the extensive proposals for change that are being recommended, these revisions are unnecessary.

- Proposed amendment to Rule 1:20-1(d) by the Disciplinary Oversight Committee and the OAE to implement a lower annual fee of $15 for attorneys in their second calendar year of admission. The PRRC contends that second-year attorneys should have the same obligations as all other attorneys.

- Proposed amendment to Rule 1:20-3(e) by Citizens for Justice to eliminate the requirement that DEC Secretaries decline jurisdiction over grievances that involve aspects of both a fee dispute and a charge of unethical conduct. The intent of the existing rule is to encourage resolution of fee disputes through the fee arbitration process or through litigation. Once that is accomplished, the unethical conduct can be addressed. Moreover, the concerns behind this proposal are addressed by the OAE's suggested amendment to Rule 1:20-3(e)(2)(D), included in this Report, which adds the term "substantial" to describe the type of fee dispute that requires the Secretary to decline jurisdiction.

- Proposed amendment to Rule 1:20-3(g)(2) and (5) by Dorothy Mataras to revise the rule that currently permits the "substance" of a grievance and the attorney's response to be transmitted to the opposing party, rather than a blanket rule requiring that the full document be provided in all instances. Although the full grievance or answer is generally provided, the rule was amended in 2000 to permit flexibility. The comments to that proposed amendment stated that on occasion there is unusually sensitive or privileged information in such documents that should not be transmitted to the other party in exactly the same form as that in which it was received. This is particularly true where the grievant is not the client of the attorney who is the subject of the complaint. Based on that rationale, the PRRC declined Ms. Mataras' proposal.

- Proposed amendments to Rules 1:20-5(b)(1) and 1:20-6(c)(2)(D) by the OAE to clarify that respondent's "presence" is required at hearings and prehearing conferences. The PRRC believes that the rules do not need clarification.

- Proposed amendments by the OAE to consolidate rules governing various aspects of

interlocutory appeals of disciplinary matters into a new subsection of Rule 1:20-7. The PRRC determined that the current rules do not need consolidation or clarification.

- Proposed amendment to Rule 1:20-7(j) by Citizens for Justice. The current rule requires that that the DRB consider a grievance against a DEC Secretary that alleges improper processing of a disciplinary matter in conjunction with any appeal of the matter under Rule 1:20-15(e). The proposed amendment would permit grievances to be filed against DEC Secretaries for their decisions to decline the docketing of a grievance. The PRRC believes that the proposed amendment is not necessary. Rule 1:20-3(e)(6) states that there shall be no appeal from a decision to decline a grievance. Instead, the rule provides a safeguard against abuse by requiring that a public member of the DEC concur in the decision of a Secretary to decline a grievance pursuant to Rule 1:20-3(e)(3).

- Proposed amendments by Citizens for Justice and by the OAE to Rule 1:20-15(e)(2) regarding the time to perfect an appellant's request for review of a final action, and to Rule 1:20A-3(d) regarding the time to request review of a fee committee decision. Citizens for Justice proposed amendments to conform the rules to the actual practice of the DRB as outlined on its website, and the OAE agreed. The DRB's practice required that the appellant request the appeal forms within 21 days. The DRB's mailing of the forms in response to the request triggered an additional 21 days for the filing. On inquiry, the DRB opposed the amendments and advised the PRRC that it was amending its internal procedures so that fee committees or ethics committees, as appropriate, would send the appeal forms with their decisions. In light of the DRB's decision, amendments to these rules are not necessary.

- Proposed amendment by the OAE to Rule 1:20-15 to add a formal procedure for the filing of a motion to vacate a default, pursuant to Rule 1:20-4(f). The new proposal sought to set time limits for such motions. The DRB opposed the amendment on grounds that it would deprive it of the discretion needed to address situations in which a respondent has a valid reason for failing to timely file an answer to a formal ethics complaint.

- A question regarding Rule 1:20-15 was raised to the PRRC by a member, Mary Maudsley, concerning the composition of the "quorum" that is required for DRB determinations. Although the DRB is composed of both attorneys and public members, pursuant to subsection (a), the "quorum" requirements for a DRB determination, pursuant to subsection (c), do not distinguish between attorney members and public members. Instead, a quorum requires the presence of "five members of the Board." Ms. Maudsley suggested that at least one public member should be required for a quorum. The PRRC discussed the value of lay-person input in disciplinary rulings, but expressed some concern whether the suggestion would elevate their status over that of the attorney members. Although the PRRC did not resolve the issue, the Court may wish to consider it in the future. If so, and if the Court determines to mandate lay input in all DRB decisions, other areas of the

disciplinary system, such as the Advisory Committee for Judicial Conduct, should be considered as well.

- Proposed amendment to Rule 1:20-19 by the Citizens for Justice to require the appointment of an attorney-trustee in every instance in which an attorney fails to file the required Rule 1:20-20 affidavit, and also to establish a public fund to pay attorney-trustees for their services. The PRRC declined to recommend this proposal for several reasons. First, not every attorney who is required to file the affidavit is practicing law and has clients. Second, included in this Report are recommended amendments to Rule 1:20-20 increasing the ramifications for failing to timely file the affidavit and to Rule 1:11-1 to automatically stay litigation in the event an attorney dies, resigns, ceases to practice, or is disbarred, suspended, or placed on disability-inactive status. These new amendments address the concerns behind this proposal.

- The OAE offered alternative amendments to Rule 1:20-20(c) and Rule 1:20-21(i) increasing the sanctions for failing to timely file the required affidavit of compliance. The PRRC agreed with the OAE's recommended modification of the current sanction to increase from three months to six months the time that an attorney who files an untimely affidavit must wait to petition for reinstatement. That modification is incorporated into the rule amendments section of this Report. The PPRC declined to adopt the OAE's alternative proposal to shift the entire term of suspension so that the suspension commences on the attorney's filing of the affidavit.

- Proposed amendment to Rule 1:21-6 by the OAE to impose new recordkeeping obligations specifically addressing the problem of attorneys using runners to generate business. The PRRC acknowledged that this practice is a problem, but it believes that the proposed amendment would create unreasonable and unnecessary burdens on attorneys and law firms. The committee urges further consideration of this problem and suggests that the Court consider appointing a committee to address the issue, beginning with an analysis of the conduct that constitutes running and working from that viewpoint.

- Proposed amendments to RPC 1.5, and by implication to Rule 1:21-7, by Common Good, a "bi-partisan legal reform coalition," to alter the rule's contingent fee structure to limit contingent fees in "early settlement personal injury cases." After receiving input from the NJSBA and several county bar associations, including Burlington, Cumberland, Essex and Hunterdon, the PRRC declines to recommend this proposal for the following reasons.

  Common Good's proposal, which was submitted to the courts in a large number of states, is a one-size-fits-all proposal. It fits New Jersey least of all because New Jersey, unlike several of its neighboring states, already protects the public through the structure imposed on contingent fees by Rule 1:21-7(c). Pursuant to subsection (e) of the rule, this structure "is intended to fix maximum permissible fees" and does not preclude an attorney from "charging or collecting a contingent fee below such limits." As such, clients are free to negotiate with the attorney on the terms of compensation. Moreover, prior to entering into a contingent fee agreement, subsection (b) requires

that the attorney explain to the client that he or she may elect to compensate the attorney on the basis of the "reasonable value of the services." In the small class of cases in which there is "little risk" of non-recovery and little attorney time or labor anticipated--one of the grounds for Common Good's proposal--New Jersey already makes it mandatory that the attorney offer the client the option of paying only for the time involved.

Aside from the protections already in place in New Jersey, Common Good's proposal is based on flawed assumptions. The proposal assumes the existence of cases in which no risk of non-recovery exists. It further assumes that the attorney can identify those cases at an early stage of the litigation and know with certainty that only minimal attorney time will be required. Also, the proposal assumes that insurers or self-insurers will pay such claims on demand and that they will pay the claims without the proof that the discovery phase of litigation develops. Carriers often delay settlement as a business decision to gain investment income. Carriers are also aware that they are economically more able to absorb litigation costs than are plaintiffs. Notably, the proposal contains no mechanism to penalize an insurer that fails to pay a fair amount at an early stage.

In short, New Jersey's current rules protect the clients addressed by Common Good's proposal. The PRRC believes that the proposal is not appropriate in this State.

- Proposal by Lawrence Cherchi, based presumably on RPC 1.8, to implement the use of a disclosure form on which an attorney holding a non-court related municipal appointment must list the developers that he or she represents. In the alternative, Mr. Cherchi recommends that the rules bar non-court related municipal appointees from representing private clients before Planning Zoning Boards in the counties in which they hold municipal appointments. The PRRC notes that the Court adopted on November 17, 2003, amendments to the Rules of Professional Conduct that sufficiently address such conflict-of-interest issues. Specifically, the Court adopted a new subsection (k) to RPC 1.8, which states that "a lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client."

CONCLUSION

The proposed amendments are offered in an attempt to address particular issues on which the Court has expressed concerns during the past two years or to address conflicts or omissions in the rules that were discovered through their application to specific situations. The PRRC believes that these amendments will improve the process currently provided by the rules.

For the foregoing reasons, it is respectfully requested that the Court approve the proposed rule amendments.

Respectfully submitted,

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