

GUAM

REPORT ON THE LAWYER DISCIPLINE SYSTEM

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Bar Association Standing
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Regulation

**GUAM LAWYER DISCIPLINE SYSTEM
CONSULTATION TEAM**

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I. INTRODUCTION

A. History of the Regulation of the Legal Profession by the Judicial Branch of Government

The judiciary has long been responsible for the admission of applicants to the practice of law and the regulation of lawyers after they have been admitted to the bar. Since the thirteenth century, lawyers have been held accountable for their professional conduct by the judges before whom they practiced.¹ By the late 1800's, the courts were claiming their inherent and exclusive power to regulate the legal profession.² Today, in each jurisdiction the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.³ This includes Guam.⁴

It has long been the policy of the American Bar Association that the judicial branch of government is best suited to regulate the legal profession. Regulation by either the legislative or executive branch thus jeopardizes the independence of the legal profession and the judiciary. In the United States, an independent judiciary is crucial to maintaining citizens' rights and freedoms, and the rule of law. As noted in the Preamble to the *ABA Model Rules of Professional Conduct*:

An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.⁵

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate and more effective. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee), issued its Report containing findings from a three-year comprehensive review of lawyer discipline in the United States.⁶ The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."⁷ The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory authority, should

¹ See, e.g., Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (Spring 1994); *In re Shannon*, 876 P.2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).

² COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], available at http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

³ See, e.g., *In re Attorney Discipline System*, 967 P.2d 49 (Cal. 1998).

⁴ Organic Act of Guam, 48 U.S.C.A. §1424-1 (a)(7); 7 GCA § 3107 (b) and § 3103(a).

⁵ MODEL RULES OF PROF'L CONDUCT pmbl. (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

⁶ Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, Problems and Recommendations in Disciplinary Enforcement xii (1970) [hereinafter CLARK REPORT], available at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

⁷ *Id.* at 1-2.

legislatures attempt to intervene.⁸ In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was “a far less desirable forum” for such reform to occur.⁹

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission), examined the implementation of the Clark Committee Report.¹⁰ The McKay Commission also studied the advantages and disadvantages of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.¹¹ The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.¹² The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.¹³ In February 1992, the ABA House of Delegates adopted the McKay Commission’s recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each U.S. jurisdiction. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer regulation in the world.

B. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline, now the Standing Committee on Professional Regulation (“Professional Regulation Committee”), initiated a national program to confer with United States lawyer disciplinary agencies, upon invitation by a jurisdiction’s highest court, and to make recommendations to increase the efficiency and effectiveness of their disciplinary systems. To date, because of this program, the Committee has completed 65 consultations. A number of courts have retained the Committee’s services multiple times.

The Professional Regulation Committee sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations, and procedures of a host jurisdiction’s lawyer discipline system. In addition to a Committee member and its counsel, team members typically include lawyers who represent other lawyers in disciplinary and professional responsibility matters, a disciplinary counsel, or judges/state supreme court justices. After its examination, the team develops recommendations for adoption by the full Professional Regulation Committee. Upon approval of those recommendations, the Committee issues to the highest court that retained its services a confidential report setting forth its findings and recommendations for improvement of the system. The consultation process allows participants in the state lawyer discipline system to understand the operation of their system not only in the context of ABA model disciplinary procedures, but national practice. Conversely, the consultation program provides an

⁸ *Id.* at 10-18.

⁹ *Id.* at 12.

¹⁰ MCKAY REPORT, *supra* note 2. Raymond R. Trombadore chaired the McKay Commission following the death of Robert McKay.

¹¹ *Id.* at 3.

¹² *Id.* at 4-5.

¹³ *Id.*

opportunity for the Professional Regulation Committee to learn about additional or alternative procedural mechanisms that may be considered for incorporation into ABA models.

In examining a jurisdiction's lawyer regulatory system, the Professional Regulation Committee uses criteria adapted from the *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE) as a guide. The MRLDE were adopted by the ABA House of Delegates in August 1989, and were amended in 1999 and 2002. The MRLDE identify best policies and procedures drawn from the collective experience of the nation's disciplinary agencies. The Committee also relies upon the Report and Recommendations of the McKay Commission, which reaffirm and expand upon the policies of the MRLDE.¹⁴ In addition, the Committee considers national practices, and carefully examines local factors and characteristics to ensure that its recommendations are tailored to meet specific or unique needs of the inviting jurisdiction. In this Report, those Recommendations appear at pages twenty through seventy-eight.

C. Persons Interviewed and Materials Reviewed

At the invitation of the Supreme Court of Guam, the Professional Regulation Committee's consultation team conducted the on-site portion of the consultation from January 7 through January 10, 2019. The Court, the Guam Bar Association and the Office of the Ethics Prosecutor hosted the consultation team. The team's interviews included the Interim and Immediate Past Ethics Prosecutor, members of the Ethics and Hearing Committees, judges, complainants, respondents, and lawyers who represent respondents and complainants in lawyer disciplinary matters. The team spoke with current and incoming Guam Bar Association leadership. The team also met with Supreme Court of Guam.

In conducting its study, documents reviewed by the team included:

- (1) the Guam Rules of Professional Conduct;
- (2) the Supreme Court of Guam Rules for Discipline of Attorneys;
- (3) the Bar of Guam Ethics Committee Rules of Procedure: Disciplinary Proceedings;
- (4) the Proposed Guam Rules for Lawyer Disciplinary Enforcement and Disability Proceedings;
- (5) the Guam Bar Association's comments on the Proposed Guam Rules for Lawyer Disciplinary Enforcement and Disability Proceedings;
- (6) Supreme Court of Guam Promulgation Orders of Interim Rules;
- (7) Rules of the Guam Bar Association;
- (8) caseload and other statistics compiled by the Office of the Ethics Prosecutor regarding the operation of the Guam disciplinary system;
- (9) relevant case law;
- (10) relevant rules and statutes including the Organic Act and Guam Code;
- (11) financial reports of the Guam Bar Association and annual budgets for the Office of the Ethics Prosecutor;
- (12) the Supreme Court of Guam and Guam Bar Association websites, including pages relating to the disciplinary system;
- (13) job descriptions for the Office of the Ethics Prosecutor;

¹⁴ MCKAY REPORT, *supra* note 2.

- (14) Judiciary of Guam Annual Reports; and
- (15) case files.

The Consultation Team is appreciative of and thanks the President and Vice President of the Guam Bar Association for their graciousness and hospitality throughout its stay. They went above and beyond in their efforts to make the Team's visit comfortable and productive. The Professional Regulation Committee thanks the Interim Ethics Prosecutor for his assistance, especially with regard to scheduling interviews. The Team is grateful to the Justices of the Supreme Court of Guam and all other participants for their time, candor, and efforts in preparing for and participating in this study of the Guam lawyer disciplinary system.

II. OVERVIEW

A. Strengths of the Guam Lawyer Disciplinary System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Regulation's collective knowledge and experience in lawyer regulation issues. This Report generally will exclude from discussion those areas of the system that are operating effectively. However, the Professional Regulation Committee believes it is important to recognize the system's strengths. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note are described elsewhere in this Report.

The Supreme Court has demonstrated its commitment to effective, fair, and transparent lawyer regulation in Guam. The Court continues to do so through the transparent work of its Subcommittee on Attorney Discipline, which developed the Proposed Guam Rules for Lawyer Disciplinary Enforcement and Disability Proceedings discussed in this Report. In addition, while the Proposed Rules were out for comment, the Court issued a Promulgation Order implementing on an interim basis a rule relating to proceedings for when a lawyer is declared or alleged to be incompetent. That the Court remains committed to ensuring adequate funding and resources for the system is extremely important and laudable.

The Guam Bar Association has similarly long been committed to an effective, fair, and transparent lawyer disciplinary system. It remains so. Members of the Bar who serve on the current Ethics and Adjudication Committees take their responsibilities seriously and devote significant time to their duties in the interest of the public. The Bar's support of this consultation further evidences the commitment of its leaders to optimizing lawyer regulation in Guam. That the Bar has expressed an interest in providing proactive services to its members to help them avoid complaints and become better practitioners, through alternatives to discipline programs, is highly laudable. As has been, and is, the Bar Association's continued provision of additional monies to the Office of the Ethics Prosecutor to allow that individual to conduct necessary investigation and discovery.

B. Description of the Guam Lawyer Disciplinary System

The Supreme Court of Guam possesses the authority to regulate the legal profession in the Territory.¹⁵ Specifically, the Organic Act of Guam states that the Supreme Court of Guam, the highest court of the judicial branch, shall: “govern attorney and judicial ethics and the practice of law in Guam, including the admission to practice law and the conduct and discipline of persons admitted to practice law.”¹⁶ In addition, the Guam Code provides that the Court has “original and appellate jurisdiction over attorney disciplinary matters including but not limited to admissions, qualifications, and standards of practice...”¹⁷ All lawyers admitted to or engaged in the practice of law in Guam, or who render any legal services there, are subject to the disciplinary jurisdiction of the Court. Guam law enforcement agencies are required to assist the Court and its delegates in any investigation relating to the conduct of lawyers authorized to practice in Guam, including reinstatement to the practice of law or those accused of the unauthorized practice of law.¹⁸ The Supreme Court of Guam Rules for the Discipline of Attorneys, complemented by the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings govern discipline, disability, and reinstatement proceedings. Over the past two years, the Court’s Subcommittee on Attorney Discipline developed and recommended that the Court approve proposed Guam Rules for Lawyer Disciplinary Enforcement and Disability Proceedings (“Proposed Rules”). The Proposed Rules are modeled on the ABA Model Rules for Lawyer Disciplinary Enforcement. The Court released the Proposed Rules for comment and received formal comment by the Guam Bar Association in April 2019. The Court provided the Guam Bar Association additional time in which to prepare and file its comments.

Guam is a unified bar.¹⁹ The Guam Bar Association is a public body corporate, and its governance is vested in its Board of Governors.²⁰ Consistent with the operation of some other unified bars, the Court has delegated the investigative, prosecutorial functions, and some adjudicative functions to the Ethics Committee of the Guam Bar Association.²¹ The Guam Bar Association, through the Ethics Committee, acts as the Court’s agent regarding lawyer discipline.

¹⁵ *Supra* note 4. Prior to the creation of the Supreme Court of Guam in 1993, the Superior Court possessed the regulatory authority over the Guam legal profession, including lawyer discipline. *See, e.g.*, P.L. 14-102 (effective Feb. 10, 1978), codified as Title 7 Guam Code Annotated (G.C.A.) Chapter 9A. Pursuant to P.L. 21-147, codified as 7 G.C.A. § 9104, regulatory authority would transfer to the Supreme Court only after it began operating and adopted its own Rules for admission and discipline. In 1996, the Supreme Court, via promulgation order, adopted the existing Rules as its interim rules and has subsequently amended the Rules Governing Admission to the Practice of Law and the Rules for the Discipline of Attorneys on occasion. The Court has not by order, however, repealed the other admission and disciplinary Rules previously in effect. As a result, each section of the prior Rules, which remain in the Guam Code, must be cross-referenced with the current Rules to determine whether an earlier provision has been repealed.

¹⁶ Organic Act of Guam, 48 U.S.C.A. §1424-1 (a)(7).

¹⁷ 7 G.C.A. § 3107 (b); *see also* 7 G.C.A. § 9101.

¹⁸ 7 G.C.A. § 9106.

¹⁹ *See* 7 G.C.A. § 9102.

²⁰ *See* GUAM BAR ASSOCIATION ABOUT US, <https://guambar.org/about-us> (last visited May 15, 2019).

²¹ GBA Rules, R. 1 § 2.

1. Funding

The Supreme Court of Guam funds the salaries of the Ethics Prosecutor and the Executive Secretary, as well as general office expenses, from government funds appropriated to the judiciary. In the past, based upon a contractual relationship between the Guam Bar Association and the Court, the Ethics Prosecutor also served as the Bar's Executive Director. The Consultation Team was advised that this relationship came about to reduce the administrative responsibilities of the Bar President and encourage more solo practitioners to run for that office. Currently, the President of the Guam Bar Association functions as the Executive Director. Upon request, other investigative and prosecutorial expenses, such as depositions, are funded by the Guam Bar Association from monies it receives as dues.

The Guam Bar Association has three classes of membership — active, inactive, and associate. Only active members are authorized to practice law. Each lawyer authorized to practice law in Guam pays \$300 in dues each year, which is the amount fixed the Board and approved by the Court.²² The fee for inactive lawyers and associate members is \$75 per year.²³ Data provided to the Consultation Team indicates that in 2017, the Guam Bar Association received \$123,576 in dues. In 2016, that amount was \$108,232.

Data provided to the Consultation Team showed that in 2018 there were 471 lawyers admitted to practice law (active, temporary active, inactive, and judicial members) in Guam, with 312 of those lawyers actively engaged in the practice of law. In 2017, those numbers were 471 and 310 respectively. Each year, Guam lawyers must complete a registration statement that includes the lawyer's admission date, mailing address, date of birth, email address, jurisdictions admitted, current employer, educational history, and class of membership.²⁴ The registration statement requires lawyers to certify their compliance with Guam Rule of Professional Conduct 1.15 and Rule 6 of the Supreme Court of Guam's Rules for the Discipline of Attorneys, and to list information identifying all client trust accounts.²⁵ Guam lawyers are also required, under the Supreme Court's Pro Bono Program Guidelines to submit a form every year that certifies the number of pro bono hours completed the previous year.²⁶ Lawyers are required to update their information when it changes.²⁷ Lawyers who fail to submit the required registration forms may be summarily suspended and ineligible to practice law until they do so.²⁸

While lawyers originally tendered their annual dues payments and registration statements to the Guam Bar Association, the Court recently determined that the Clerk of Court should collect the

²² Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 5; GBA Rules, R. 2 § 5 & R. 9 § 2.

²³ *Id.*

²⁴ GBA Rules, R. 2, § 5; *see also* GUAM BAR ASSOCIATION 2019 GBA REGISTRATION STATEMENT, <https://guambar.org/2019-gba-registration-statement> (last visited May 15, 2019).

²⁵ *Id.*

²⁶ GUAM BAR ASSOCIATION 2019 PRO BONO AND LRS FORM, <https://guambar.org/2019-pro-bono-and-lrs-form> (last visited May 15, 2019).

²⁷ SUP. CT. OF GUAM RULES FOR THE DISCIPLINE OF ATTORNEYS R. 5(a); *see also* 2019 GBA MEMBERSHIP STATUS UPDATE FORM, <https://guambar.org/2019-gba-membership-status-update-form> (last visited May 15, 2019); GUAM BAR ASSOCIATION 2019 GBA CHANGE OF ADDRESS UPDATE FORM, <https://guambar.org/2019-gba-change-of-address-update-form> (last visited May 15, 2019).

²⁸ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 5(b).

dues payments and disburse them to the Bar. The Clerk also now collects the annual registration statements and maintains the master roll of lawyers in the Territory. The Clerk is to provide the Bar with access to the master roll so that the Bar Association can know who its members are and properly serve them and operate. This was the practice in place during the Consultation Team's visit.

Data provided to the Consultation team indicates that the total 2018 budget for the disciplinary system was \$224,612. In 2017, that amount was \$207,961. Of these amounts, the Guam Bar Association paid \$2,012.18 and \$4,667.52 respectively from its dues monies to help fund investigative and prosecutorial expenses of the Office of the Ethics Prosecutor.

2. Facilities and File Maintenance/Location

The Office of the Ethics Prosecutor, which serves as disciplinary counsel for the lawyer and judicial disciplinary systems in Guam, is located on the second floor of the Guam Judicial Center at 120 West O'Brien Drive, in Hagåtña. The office space consists of approximately 450 square feet that is divided into a reception area where the Executive Secretary sits, and the Ethics Prosecutor's Office. The Office is open to the public, and parking is available. Equipment includes two computers, a copier/printer/fax, and a laptop. The office uses Microsoft Office 2010. There is a conference room outside of that space that is available to the Guam Bar Association, as the Bar has no permanent office space. The law office of the President of the Bar Association serves that function.

The Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings provide that the Ethics Committee is responsible for keeping complete documentation of disciplinary matters.²⁹ These files are now maintained in the Office of the Ethics Prosecutor in file cabinets and boxes throughout the office. The Rules provide that records and files in matters in which no discipline is imposed *may* be destroyed after five years.³⁰

3. Components of the Guam Lawyer Disciplinary System

a. The Ethics Committee of the Guam Bar Association

Until 2009, the Guam Bar Association's Committee on Professional Ethics and Unauthorized Practice of Law ("Ethics Committee") was responsible for the screening, investigation, prosecution, and initial adjudication of complaints of violations of the Guam Rules of Professional Conduct.³¹ On March 25, 2009, the Court created the Adjudicative Committee to separate the investigative/prosecutorial functions from the adjudicative ones.³² The Ethics Committee is now responsible for investigating and prosecuting, through the Ethics Prosecutor, complaints brought

²⁹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 5.

³⁰ *Id.*

³¹ SUP. CT. OF GUAM RULES FOR THE DISCIPLINE OF ATTORNEYS R. 1; Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 3.

³² SUP. CT. OF GUAM PROMULGATION ORDER PRM08-003-01; Rule 3 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings incorporates the provisions of the Promulgation Order.

before it by any source or on its own motion, and to make recommendations to the Court for Discipline.³³ Complaints need not be verified or in writing.³⁴ The Ethics Committee is also involved in incapacity proceedings, summary suspensions, reciprocal discipline, and reinstatements.³⁵ The Adjudicative Committee receives specifications of charges and acts as the trier of fact in those matters.³⁶ The Consultation Team was advised that there has not been a contested disciplinary hearing in Guam for approximately 10 years.

The President of the Guam Bar Association appoints the members of the Ethics Committee and the Adjudicative Committee with the approval of the Court.³⁷ At the time of the Consultation Team's visit, the website of the Guam Bar Association showed that the current Ethics Committee consisted of nine members, but that information seems to have been removed from the site.³⁸ Seven members comprise the Adjudicative Committee, with the presence of four members constituting a quorum.³⁹ The Adjudicative Committee can only act upon the concurrence of four members. Ethics Committee members cannot serve on the Adjudicative Committee.⁴⁰ Ethics and Adjudicative Committee members are not subject to term limits. Public members do not serve in the Guam lawyer disciplinary system.

Pursuant to the Supreme Court of Guam Rules for Attorney Discipline and Rule 19 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings, the Ethics Committee may issue private reprimands upon agreement of the parties or after a hearing on specifications of charges.⁴¹ While the Supreme Court Rules contain no such provisions, Rules 3(c), 16(b), and 19 of the Bar of Guam Ethics Committee provide that the Ethics Committee and Adjudicative Committee may also issue public reprimands.

The Ethics Committee is required to notify the public of its existence and how a member of the public may complain about a lawyer at least four times per year, in a newspaper of general circulation or by other means.⁴² The Consultation Team was informed such notices are provided. The Committee is also to regularly inform the public about the imposition of public discipline.⁴³

b. The Ethics Prosecutor

At the direction of the Ethics Committee, the Ethics Prosecutor (also referred to in the Rules as the Prosecuting Counsel and Hearing Counsel) conducts investigations, reports the results of those

³³ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 3 & 10.

³⁴ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 11.

³⁵ See, e.g., Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 13, 14, 16 & 20.

³⁶ *Supra* note 33.

³⁷ 7 G.C.A. § 9A202; *supra* note 15.

³⁸ <https://guambar.org/category/committee-members>; 7 G.C.A. § 9A202, which has not been repealed as a result of the Supreme Court adopting its own Rules for Attorney Discipline, except regarding the shift of regulatory authority from the Superior to the Supreme Court, provides that the Ethics Committee shall consist of seven members, and that four members constitutes a quorum.

³⁹ *Supra* note 33.

⁴⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 3.1(a).

⁴¹ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 2-2.

⁴² Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 6.

⁴³ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 6(b).

investigations to the Committee, makes recommendations to the Committee for action, and prosecutes specifications of charges before the Adjudicative Committee.⁴⁴ The Ethics Prosecutor also argues cases on behalf of the Ethics Committee before the Supreme Court, and handles reciprocal disciplinary matters, summary suspensions, incapacity proceedings and reinstatements.⁴⁵ In addition to investigating new and pending matters, the interim Ethics Prosecutor, who started work in mid-2018, has necessarily had to focus his efforts on reviewing and reconstructing appropriately pending matters in the Office and working with the Ethics Committee to resolve them.

In FY 2018, twenty-four complaints were filed with the Office of the Ethics Prosecutor; fifty-one matters were opened in 2017, with twenty-seven open matters pending from the previous year.⁴⁶ Of the complaints filed in 2018 and 2017, five and sixteen respectively did not allege misconduct that would fall under the Committee's jurisdiction. In 2018, data provided indicates the Ethics Committee dismissed one complaint after investigation; in 2017 it dismissed eleven matters. The data set forth in the 2017 Judiciary of Guam Annual Report indicates thirty-eight matters were brought to conclusion that year, but the Report does not describe how they were resolved (e.g., dismissal, discipline on consent, imposition of other discipline). It appears that in 2018, one matter filed in 2016 resulted in the filing of a specification of charges and is still pending; in 2017, one matter filed in 2014 appears to have resulted in the filing of a specification of charges. The team was advised that there have been no hearings on specifications of charges in many years. There were no reciprocal disciplinary matters in 2018 and 2017, nor were there any reinstatement matters or incapacity proceedings according to data provided to the Consultation Team.

The Ethics Prosecutor's Office retains some spreadsheets begun by his predecessor that have some information about lawyers' disciplinary histories. The Office has no electronic caseload management system and lacks a modern diary and tickler system that tracks progress of a case and prompts the Ethics Prosecutor to act at designated times. Files are not kept electronically. The Court's IT Department addresses the hardware and software needs of the Office. The Ethics Prosecutor does not have trust account, investigative or litigation software, but does have electronic access to the court system's records and to federal court documents.

The Office of the Ethics Prosecutor does not have its own, stand-alone website. Rather, there is a general information page on the Judiciary of Guam's website.⁴⁷ Additional general information about Guam's lawyer disciplinary system is available on the Guam Bar Association website under the "About Us" tab, and the item titled "Discipline" in that drop-down menu.⁴⁸ That page appears

⁴⁴ See, e.g., SUP. CT. OF GUAM RULES FOR THE DISCIPLINE OF ATTORNEYS R. 9; Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 12, 13 & 20.

⁴⁵ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 9; *supra* note 32.

⁴⁶ This information reflects a review by the Interim Ethics Prosecutor of available spreadsheets and files in the Office by that individual. These numbers for 2017 include complaints initiated by the Ethics Committee (approximately ten) as opposed to complaints filed by others. See also JUDICIARY OF GUAM ANNUAL REPORT (2017), <http://www.guamcourts.org/Annual-Report/images/2017AR.pdf>.

⁴⁷ JUDICIARY OF GUAM OFFICE OF THE ETHICS PROSECUTOR, <http://www.guamcourts.org/Ethics-Prosecutor/Ethics-Prosecutor.html> (last visited May 16, 2019).

⁴⁸ GUAM BAR ASSOCIATION DISCIPLINE, <https://guambar.org/gba-discipline> (last visited May 16, 2019).

to have been last updated in 2010.⁴⁹ Both pages link to a complaint form. The complaint form on the Judiciary’s site is dated 2017.⁵⁰ The link on the Bar’s website to the complaint form was broken at the time this Report was prepared⁵¹, but appears to direct the site user to the Judiciary’s webpage. The Bar’s webpage relating to the lawyer disciplinary system also advises users that they may view past disciplinary orders by the Court by clicking a link to the Judiciary of Guam website.⁵² That link was active. The Bar’s website homepage has a red banner running in the middle of the page that provides the Interim Ethics Prosecutor’s email address and a “Confidential Hotline” telephone number for “Ethics Information and Complaints.”⁵³ The Rules of Professional Conduct, Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings, and Supreme Court of Guam Rules for the Discipline of Attorneys are not available on the Bar Association’s website. They are available on the Supreme Court’s website.⁵⁴

In addition to the responsibilities for lawyer disciplinary enforcement, the Ethics Prosecutor serves as judicial disciplinary counsel.⁵⁵ In that capacity this individual is responsible for investigating allegations of judicial misconduct at the direction of the Committee on Judicial Discipline and to make recommendations on the disposition of those matters.⁵⁶ Among other duties, the Ethics Prosecutor is responsible for prosecuting formal judicial disciplinary matters before the Special Court, and for formulating the disciplinary counsel’s budget for submission to the Committee on Judicial Discipline.⁵⁷ The Special Court is also allowed, under the Rules to employ a Commission Counsel to assist it in the discharge of its duties.⁵⁸ The 2017 Annual Report for the Guam Judiciary noted that three new judicial disciplinary complaints were opened in 2017, with one pending from a prior year. Three matters were resolved without the imposition of discipline.

c. Guam Supreme Court

As noted above, the Supreme Court of Guam has delegated investigative, prosecutorial, and some adjudicative functions to the Ethics Committee and the Adjudicative Committee.⁵⁹ Upon the conclusion of a hearing on formal charges, the respondent and Ethics Prosecutor have ten days in which to submit proposed findings of fact and conclusions of law.⁶⁰ The Adjudicative Committee then has thirty days in which to prepare, sign and send its recommendations to the Supreme

⁴⁹ *Id.*

⁵⁰ Supreme Court of Guam Office of the Ethics Prosecutor, *Complaint Against an Attorney*, [http://www.guamcourts.org/Ethics-Prosecutor/images/Lawyer-Ethics-Complaint-Form-\(May2017\).pdf](http://www.guamcourts.org/Ethics-Prosecutor/images/Lawyer-Ethics-Complaint-Form-(May2017).pdf) (updated May 15, 2017).

⁵¹ Link last checked June 4, 2019.

⁵² Guam Bar Association Discipline, *supra* note 48.

⁵³ GUAM BAR ASSOCIATION, <https://guambar.org/> (last visited May 16, 2019).

⁵⁴ *Supreme Court Rules of Procedure*, JUDICIARY OF GUAM, <http://www.guamcourts.org/Rules-of-Procedure/Supreme-Court-Rules-of-Procedure.html> (last visited May 16, 2019).

⁵⁵ Guam Rules for Judicial Disciplinary Enforcement R.4, *available at* <http://www.guamcourts.org/CompilerofLaws/CourtRules/GRJDE%20Final%2020130221.pdf> (Dec. 28, 2012).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Guam Rules for Judicial Disciplinary Enforcement R. 5.

⁵⁹ *Supra* note 21.

⁶⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 29.

Court.⁶¹ The Clerk of the Court then provides notice to the parties of that submission, and the respondent has twenty days from that notice to file any objections to the Ethics Committee's findings of fact, conclusions of law, and recommended discipline.⁶² If no objection is filed, the Court enters the Adjudication Committee's recommendation as its final judgment.⁶³

If objections are filed, the next step is the preparation of transcripts and documents to be submitted to the Court.⁶⁴ Thirty days after the filing of the record, the respondent's brief is due, to be followed twenty days later by the Ethics Prosecutor's brief.⁶⁵ The Court reviews these matters *de novo*.⁶⁶ The Court may grant oral argument. The Court may approve, reject or modify the Ethics Committee's recommendations.⁶⁷ The Court's decision is final, unless a timely motion for reconsideration is granted.⁶⁸

4. Intake and Screening Procedures

As noted above, minimal information about the Guam lawyer disciplinary process is available on the Judiciary's and Bar's websites.⁶⁹ A person wishing to complain about a Guam lawyer may do so by downloading and completing the online form, going to the Office of the Ethics Prosecutor to obtain a form, or by calling the Ethics Prosecutor's Office to have a form sent to them for completion. The Office of the Ethics Counsel assists complainants in the process. Complaints need not be signed, verified or written in any form.⁷⁰ The Ethics Committee may also initiate complaints on its own motion.⁷¹ There are no pamphlets describing the system and informing people where to file a complaint against a lawyer placed in courthouses, libraries or other locations frequented by the public.

The "Complaint Against Attorney" form is available in English only and allows individuals to submit pertinent information, including supporting documents, in-person or by U.S. mail.⁷² The form advises complainants not to submit original documents. Consumers are alerted on the form that lawyer disciplinary proceedings are confidential, and they are asked to respect that confidentiality.⁷³ The form also notifies them that matters may become public, and consequently so may the information that they provided to the Office of the Ethics Prosecutor. The form also contains an optional waiver. That waiver consists of a consent allowing the Office of the Ethics Prosecutor to obtain copies of any documents necessary to its investigation, including from any lawyers who have represented the consumer.⁷⁴ The consumer, by signing, agrees to waive any

⁶¹ *Id.*

⁶² Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 2.

⁶³ *Id.*

⁶⁴ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 2-1.

⁶⁵ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 3(a).

⁶⁶ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 3(b).

⁶⁷ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 3(f).

⁶⁸ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 4.

⁶⁹ *Supra* notes 33 – 39.

⁷⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 11.

⁷¹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 10.

⁷² *Supra* note 50.

⁷³ *Id.*

⁷⁴ *Id.*

right to confidentiality regarding those materials. Finally, the form contains language advising consumers of the limits of the Ethics Committee’s jurisdiction and that it and the Ethics Prosecutor’s Office cannot provide them with legal advice.⁷⁵

5. Investigations

Upon receipt of a complaint against a Guam lawyer, the Ethics Prosecutor opens a file. The Consultation Team was advised that under the former Ethics Prosecutor, files were numbered according to the year and order in which the complaint was received. For example, the first file opened in 2017 would be numbered EC2017-001. The Interim Ethics Prosecutor follows that practice. The former Ethics Prosecutor would then enter the new file number on a spreadsheet, along with the names of the lawyers involved, the identity and contact information of the complainant, the status of the case and the identity of any Ethics Committee members who were disqualified from handling the matter. The Consultation Team learned that the spreadsheet did not track how long cases were pending at any given stage of the process. The Interim Ethics Prosecutor also maintains a spreadsheet and is working to track the length of time cases pend.

Until he has received the approval of the Ethics Committee, the Ethics Prosecutor cannot begin to screen a complaint to determine if it relates to a lawyer authorized to practice in Guam and whether it alleges facts that, if true, would amount to misconduct.⁷⁶ Upon completion of such screening, the Ethics Prosecutor must report his findings to the Ethics Committee, which will determine whether to dismiss the matter or authorize an investigation.⁷⁷

If the Ethics Committee determines that further investigation is appropriate, it instructs the Ethics Prosecutor to conduct that inquiry.⁷⁸ The Ethics Committee may issue a subpoena to allow the Ethics Prosecutor to obtain documents and testimony under oath.⁷⁹ The Ethics Prosecutor is required to notify the Ethics Committee of exculpatory evidence and recommend dismissal.⁸⁰ The Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings do not require that the respondent receive notice of a complaint upon its filing or during the course of an investigation. The Consultation Team was advised of and observed instances where complaints were pending against some respondents for periods of years before they were notified that they were under investigation or had been the subject of an investigation that was closed. It appears that under the Bar of Guam Ethics Committee Rules, the Ethics Committee could dismiss a complaint without ever notifying the respondent of the matter. Under Rule 14 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings, the Ethics Prosecutor cannot recommend that the Ethics Committee take any action other than dismissal or stay without notifying the respondent by letter of the substance of the complaint and allowing him or her the opportunity to respond. Respondents have thirty days from the time they receive the “Rule 14 letter” to present their position to the Ethics Prosecutor orally or in writing.⁸¹

⁷⁵ *Id.*

⁷⁶ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 12(a).

⁷⁷ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings Rule 12(b).

⁷⁸ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 13.

⁷⁹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 27.

⁸⁰ *Supra* note 74.

⁸¹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 14.

Rule 15 requires the Ethics Prosecutor to make an initial recommended disposition to the Ethics Committee within sixty days after receiving the respondent's response to the "Rule 14 letter." The Ethics Prosecutor does so by means of a memo to the Ethics Committee and providing relevant documentation to the Committee members from the file. Upon completion of an investigation, the Ethics Committee may:

- 1) Dismiss the matter;
- 2) Issue a private or public reprimand if there is probable cause to believe that minor misconduct occurred;
- 3) Initiate formal disciplinary proceedings if probable cause exists to believe that the respondent committed misconduct that is not minor or isolated or if the respondent does not agree to be reprimanded⁸²; or
- 4) Issue a stay in cases where there is a pending civil or criminal matter in appropriate and extraordinary circumstances.⁸³

The Committee may also require the Ethics Prosecutor to further investigate a matter.⁸⁴ The Ethics Prosecutor is not permitted to vote on a disposition; only Ethics Committee members may do so.⁸⁵

The Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings require that complainants be notified of the disposition of their complaints within a reasonable time of a disposition.⁸⁶ The Ethics Prosecutor need not provide the complainant with a copy of a respondent's response to a "Rule 14 letter," but may exercise discretion and do so. It was not clear to the Consultation Team whether the complainant would be permitted to reply to a respondent's response. The Rules do not provide for such reply.

6. Formal Proceedings

If the Ethics Committee determines that there is probable cause to initiate formal proceedings, it directs the Ethics Prosecutor to file a specification of charges.⁸⁷ The specification of charges is filed with the Chair of the Adjudicative Committee and is captioned in the name of the Guam Bar Association.⁸⁸ Upon the filing of the specification of charges, the Ethics Committee loses its exclusive jurisdiction over the matter and the Adjudicative Committee acquires jurisdiction.⁸⁹ Specifications of charges must set forth concise and plain statements of the allegations, the provisions of the Guam Rules of Professional Conduct or other rules/statutes alleged to have been violated, and the names and addresses of all known witnesses.⁹⁰ Notice to the respondent of the filing of the specification of charges shall include service of that pleading, as well as the identity

⁸² Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 19.

⁸³ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 16.

⁸⁴ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 17.

⁸⁵ *Id.*

⁸⁶ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings, R. 18.

⁸⁷ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings, R. 20.

⁸⁸ *Id.* See also Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 3.

⁸⁹ Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings R. 3.

⁹⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 20(b).

of the Adjudicative Committee and its Chair.⁹¹ The notice must also inform the respondent that he or she has the right to file an answer to the charges, that if no answer is filed that the allegations will be deemed admitted, that the respondent has the right to be represented by counsel and to discovery (including the issuance of subpoenas), and to file requests to disqualify any Committee members where appropriate.⁹²

The respondent's answer is due twenty days after service of the specification of charges.⁹³ In addition to admitting or denying the allegations set forth in the specification, the respondent must raise in the answer any mitigating evidence relating to admissions, the names and addresses of witnesses that the respondent plans to call on his or her behalf, and the address to which subsequent notices should be served.⁹⁴ The Rules provide for an alternate form of answer that is more general in nature.⁹⁵

The Committee is required to enter a default order against the respondent, in the same form as in civil actions in Guam, if the respondent does not answer or request and receive an extension of time.⁹⁶ The respondent is not entitled to further notice or to have the right to appear at subsequent proceedings.⁹⁷ In default matters the only issue to be considered by the Adjudicative Committee is the recommended discipline upon consideration of any mitigating and aggravating evidence.⁹⁸ For good cause shown, the Adjudicative Committee may set aside its default order.⁹⁹

Pleadings may be amended to conform to the proof at any time upon permission of the Adjudicative Committee.¹⁰⁰ Discovery includes depositions and the production of documents, including expert witness reports. Prehearing conferences are scheduled at the discretion of the Adjudicative Committee Chair, and prehearing motions must be filed no later than fifteen days before trial.¹⁰¹ Stipulations between the parties are permitted and encouraged.¹⁰²

The Chair of the Adjudicative Committee must schedule the hearing date within thirty days after the time for filing an answer to the specification of charges has expired.¹⁰³ The hearing must take place no more than sixty days after the time for filing and answer has lapsed, unless such time is extended for good cause.¹⁰⁴ The Chair is responsible for ensuring that the hearing is recorded and the cost of that is borne by the Adjudicative Committee. If discipline is imposed, the cost of the record may be assessed against the respondent.¹⁰⁵ The burden of proof is clear and convincing

⁹¹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings, R. 20(c).

⁹² *Id.*

⁹³ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 21.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 21(d).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 21(e).

¹⁰⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 22.

¹⁰¹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 25.

¹⁰² Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 26.

¹⁰³ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 28.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See also Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 10.

evidence and the burden of persuasion is on the Ethics Prosecutor.¹⁰⁶ The Guam Rules of Evidence apply generally, but the Adjudicative Committee may “receive and consider any reasonably competent, cogent, and credible evidence.”¹⁰⁷ The complainant and respondent may be present throughout the hearing, but all other witnesses are excluded.¹⁰⁸

As noted above, after the conclusion of a hearing, the respondent and Ethics Prosecutor have ten days in which to submit proposed findings of fact and conclusions of law.¹⁰⁹ The Adjudicative Committee then has thirty days in which to prepare, sign and send its recommendations to the Supreme Court.¹¹⁰ All matters that proceed before the Adjudicative Committee are confidential until the Adjudicative Committee has filed its recommendation with the Court or has issued a public reprimand.¹¹¹

¹⁰⁶ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 28(d).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Supra* note 60.

¹¹⁰ *Id.*

¹¹¹ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 2.

III. STRUCTURE

The focus of the Standing Committee on Professional Regulation's consultation program is the effectiveness, fairness, and efficiency of the jurisdiction's disciplinary system. There are many factors and much data that inform the Committee's study of the structure and operation of a system. The Committee makes clear prior to and at the time of its engagement by a jurisdiction's supreme court, and to interviewees, that its evaluation does not address personnel matters. Its recommendations, by necessity, cannot be and are not guided by past, present, or future issues of that nature.

The Consultation Team and the Professional Regulation Committee understand, however, that the time leading up to this consultation has been one of stress and tumult for the system. Such times do happen on occasion in the Committee's experience, and system stressors vary in nature and severity. Particularly in smaller jurisdictions with more intimate bars, the impacts of systemic stressors can be more intense, and the duration during which they are felt and the time of recovery more prolonged. In the Professional Regulation Committee's experience, such times provide excellent motivation for all involved to enhance lines of communication and act together to achieve positive change as part of the recovery process. It is clear to the Committee that the Supreme Court of Guam and the Guam Bar Association have recognized this. There is clear and thoughtful engagement by both to see the Guam lawyer regulatory system evolve and to optimize its effectiveness, efficiency, and fairness. This commitment to bettering the system is also evidenced by the joint interest of the Bar and the Court in retaining the Professional Regulation Committee's consultation services.

Over two years, the Supreme Court of Guam Subcommittee on Attorney Discipline ("Subcommittee") drafted proposed Guam Rules for Lawyer Disciplinary Enforcement and Disability ("proposed Rules"). The Court released the proposed Rules for comment with an original deadline of April 6, 2018 for responses to be submitted. The Court allowed the Guam Bar Association additional time, through April 2, 2019, to file its comments. The Bar filed its comments on that date. The Recommendations set forth below address concerns raised during the Consultation Team's interviews and in those April 2019 comments submitted by the Guam Bar Association, including concerns expressed about the impact of certain of the proposed Rules on a bar the size of Guam's.

The Subcommittee's proposed Rules are modeled on the ABA Model Rules for Lawyer Disciplinary Enforcement, one of the ABA policies used by the Professional Regulation Committee as a guidepost for making consultation recommendations, along with the other policies described above, and national practices. The Professional Regulation Committee commends the Court and its Subcommittee for their leadership in taking steps to revise Guam's lawyer disciplinary procedural rules and to update Guam's lawyer regulatory processes.

The Professional Regulation Committee believes that the Court should adopt the proposed Rules to replace its current Rules and the Guam Bar Association Ethics Committee Rules, with the recommended changes described in this Report. The Committee believes that their adoption will enhance the system's transparency, effectiveness, efficiency, and fairness to the benefit of the public, Guam lawyers, and the Court. The Professional Regulation Committee also suggests, for

purposes of optimal clarity, that the Court issue appropriate orders repealing all disciplinary procedural rules currently in effect so that it is not necessary to cross-reference the different sets of Rules to determine whether an earlier provision has been repealed.¹¹²

Recommendation 1: The Guam Rules of Judicial Disciplinary Enforcement Should Be Amended to Eliminate the Role of the Lawyer Ethics Prosecutor in Judicial Disciplinary Proceedings

Commentary

The Ethics Prosecutor serves as lawyer and judicial disciplinary counsel.¹¹³ The Court asked the Professional Regulation Committee whether it should amend its Rules for Judicial Disciplinary Enforcement to eliminate this dual role and provide for the appointment of a separate judicial disciplinary counsel. The Professional Regulation Committee agrees with the Court's inclination to do so, as set forth in Rule 5(a) of the proposed Rules. The Committee recommends that the Court amend all applicable Rules for Judicial Disciplinary Enforcement accordingly.

The Ethics Prosecutor's dual duties arose several times during the Consultation Team's interviews. Several persons raised concerns that this dual role for the Ethics Prosecutor creates a perception of conflict of interest, and a perception that this person would not be able to act with requisite independence given their role in investigating and prosecuting judges and justices. The Consultation Team heard of no actual incidents, conflicts or lack of independence caused by the combined position. However, the fact that the perception exists is concerning. A few interviewees posited that having separate lawyer and judicial disciplinary counsel would not make sense given the small number of judicial disciplinary complaints that are filed in Guam and the limited resources available to the system.

The Consultation Team's review of available caseload data, files, the current backlog of cases, as well as the need for enhanced outreach to the public and bar are some of the reasons that the Ethics Prosecutor's focus should be limited to lawyer discipline. The Ethics Prosecutor already must determine how to prioritize a sizable lawyer discipline caseload for a one-lawyer office, where that individual is solely responsible for the investigation and prosecution of matters. That lawyer should not have to be concerned with how to prioritize judicial disciplinary cases too. The expressed concerns about perceived conflicts and risks to independence weigh in favor of eliminating the Ethics Prosecutor's role in judicial disciplinary enforcement. In addition, adoption of the proposed Rules, in whole or in part, will create additional work and adjustments for that office focused on lawyer discipline.

The Guam judicial disciplinary system should have and deserves its own counsel who is committed to its functions, and who has expertise in judicial conduct and discipline. This is consistent with national practice. While the judicial discipline caseload for 2017 was small, the numbers were larger in 2016 according the Annual Report of the Judicial of Guam. Six new matters were opened

¹¹² *Supra* note 15.

¹¹³ *Supra* note 55.

that year, plus eight matters were pending at the beginning of 2016.¹¹⁴ Two files remained open into 2017, one initiated in 2015 and the other in 2016.¹¹⁵ Twelve matters were resolved, including two consensual private admonitions imposed by the Committee on Judicial Discipline.¹¹⁶ According to the 2015 Judiciary of Guam Annual Report, five complaints were opened that year and three of them resulted in full investigations at the direction of the Committee on Judicial Discipline.¹¹⁷ Two of those were dismissed after a full investigation. At the end of 2015, five matters remained open.

In the Professional Regulation Committee's experience, it is not uncommon for jurisdictions to retain a lawyer to serve as judicial disciplinary counsel on a part-time basis when the caseload does not warrant retaining full-time counsel.¹¹⁸ Part-time judicial disciplinary counsel may make sense in Guam. The Professional Regulation Committee recommends that the Supreme Court amend Rule 4 of the Rules for Judicial Disciplinary Enforcement to eliminate the role of the Ethics Prosecutor and to provide that the Committee on Judicial Discipline is responsible for appointing the judicial disciplinary counsel in Guam.¹¹⁹ The Committee on Judicial Discipline can conduct a needs assessment to determine whether the system requires full-time or part-time counsel. The Professional Regulation Committee suggests that the Court also consider amending the Rule 4 of the Rules for Judicial Disciplinary Enforcement to provide that judicial disciplinary counsel may be removed from office only upon the concurrence of the Committee on Judicial Discipline and the Court.¹²⁰ The Commentary to the ABA Model Rules for Judicial Disciplinary Enforcement recognize that this may make it more difficult to terminate an unsatisfactory judicial disciplinary counsel, but to preserve requisite independence, the Committee on Judicial Discipline should not have sole control over the removal of that lawyer.¹²¹

¹¹⁴ JUDICIARY OF GUAM ANNUAL REPORT (2016), <http://www.guamsupremecourt.com/Annual-Report/images/2016AR.pdf>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ JUDICIARY OF GUAM ANNUAL REPORT (2016), <http://www.guamsupremecourt.com/Annual-Report/images/2015AR.pdf> (this report indicates that the information includes actions taken during January 2016).

¹¹⁸ *See, e.g.*, ABA Model Rules for Judicial Disciplinary Enforcement R. 4 Cmt.

¹¹⁹ ABA Model Rules for Judicial Disciplinary Enforcement R. 4(A).

¹²⁰ *Id.*

¹²¹ *Supra* note 117.

Recommendation 2: The Supreme Court’s Oversight and Control of the Disciplinary System Should Be Emphasized

Commentary

As noted above, the Supreme Court of Guam possesses the authority to regulate the legal profession.¹²² The Justices and the Guam Bar Association are committed to seeing that the lawyer disciplinary system operates fairly, efficiently, and effectively. Like other courts in unified bar jurisdictions, the Supreme Court of Guam delegated responsibility and general oversight of the Territory’s lawyer disciplinary system to the Guam Bar Association.¹²³

The President of the Bar appoints the members of the Ethics and Adjudicative Committees. That position also appoints the Ethics Prosecutor with the approval of the Court. Specifications of charges are filed in the name of the “Bar of Guam.” While the Court pays the salary and benefits of the Ethics Prosecutor and Executive Secretary, and funds and provides office space and technology, upon request of the Ethics Prosecutor the Guam Bar Association pays additional expenses of the system from its dues revenue. When asked which entity is associated with processing lawyer complaints in Guam, some interviewees, including several lawyers, pointed to the Guam Bar Association. Other interviewees, all lawyers, noted that authority for lawyer regulation was the Court’s.

Some interviewees, including several lawyers, noted that the Guam Bar Association’s involvement in lawyer discipline negatively affects the public’s perception of the system as independent and fair. This was in striking contrast to the view of most lawyer interviewees, who felt that there is absolutely no lack of public confidence in the current Guam lawyer disciplinary system. The Consultation Team disagrees with the latter view based on its interviews and review of files.

Most lawyer discipline imposed under the current system is private and consensual. The Consultation Team could not locate a Rule that provides for the publication of summaries of private reprimands, as opposed to non-disciplinary warning letters. The Team was advised by some interviewees that there exists a perception that because the bulk of lawyer discipline is private that the system operates to protect lawyers and not the public. It is important to note that the Consultation Team saw no evidence that system participants behaved in this manner. However, that this perception exists is notable. Many interviewees, lawyers and nonlawyers, agreed that there is insufficient public information about the system and its operation, which in the Professional Regulation Committee’s view likely contributes to this perception that the system is not optimally protective of the public. In the Professional Regulation Committee’s experience, a public that lacks sufficient information about a disciplinary system cannot realistically be said to be confident in its operations and fulfillment of its goals.

The Consultation Team also heard that some lawyers lack confidence in the current system, albeit for different reasons that include the lack of time guidelines for investigations, places where the current Rules lack precision, and lack of timely notice of the initiation and completion of investigations. Some concerns were raised to the Team about the completeness and fairness of

¹²² *Supra* notes 15 & 16.

¹²³ *Supra* note 21.

investigations pending before the Bar's Ethics Committee, which currently retains oversight over that process and the Ethics Prosecutor.

A hallmark of an optimally effective and fair lawyer disciplinary system is independence, which includes independence of the system from the actual or perceived influence of bar association politics, and appropriate separation of the prosecutorial and adjudicative functions of the system.¹²⁴

The Professional Regulation Committee agrees with the Consultation Team that the current system and how it operates enhances the risks of potential and actual conflicts of interest and feeds a perception that the system is not optimally fair, accessible, and protective of the public. When elected Bar officials control all or parts of the disciplinary process, an appearance of impropriety and conflict of interest is created, regardless of the actual fairness or impartiality of the system.¹²⁵

The Consultation Team heard from some interviewees who were adamant that the current system is well-structured, and that it only needs some operational and personnel improvements. Other interviewees expressed concern that while the spirit behind the proposed Rules was positive, the proposed structure is not appropriate for a bar the size of Guam. They felt that adoption of the proposed Rules would create a bureaucracy too large for Guam's small and tight-knit lawyer population. The size of the bar in Guam was also raised consistently in opposition to the provisions in the proposed Rules that would make specifications of charges public upon filing and service, disciplinary hearings public, and that would add public members to the system. Each of these concerns is addressed later in this Report.

The Professional Regulation Committee supports the proposed elimination of the Guam Bar Association's current regulatory responsibilities. While some disciplinary offices remain under the purview of the state bar association in unified bar states, the majority of the country's lawyer disciplinary agencies, in unified and voluntary bar jurisdictions, are physically separate from the state bar association and governed more directly by the highest court.¹²⁶ That the Office of the Ethics Prosecutor is already physically separate is helpful. As noted in Recommendations Six and Nineteen, the Professional Regulation Committee suggests that there are better and more appropriate ways for the Guam Bar Association to contribute to the overarching regulatory process that will add to the Bar's already excellent member service. This includes the Bar's creation of a Lawyers' Assistance Program and law practice management services to support the adoption of an alternatives to discipline program and rule.

The Professional Regulation Committee believes that it is in the best interest of the public and the profession for the Supreme Court of Guam's authority and control of the lawyer disciplinary system to be emphasized and strengthened. An independent lawyer disciplinary system, operated under the direct oversight of the Court and its designees, but separate from the Bar Association,

¹²⁴ ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 & Cmt; McKay Report, *supra* note 2, at 23 et seq.

¹²⁵ ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 Cmt.

¹²⁶ Excluding U.S. territories, there are 33 unified/mandatory bar jurisdictions. In 21 of those jurisdictions, the state bar association oversees lawyer discipline, and in 12 of those jurisdictions the court has appointed an independent agency to handle the lawyer disciplinary functions. There are 19 voluntary bar states where lawyer discipline is handled by an independent agency created by the state supreme court.

promotes the integrity of the judicially regulated legal profession. In the Professional Regulation Committee's experience, this enhances the public's perception that the system is fair, accessible and free from the appearance that internal politics of bar associations may somehow influence disciplinary proceedings.¹²⁷ In addition to the proposed Rules, the Court has already taken some steps in this direction, including its directive to the Clerk of the Court to collect annual dues and lawyers' annual registration statements.

The Professional Regulation Committee is aware of the sensitivity of its recommendations supporting the Court's proposed revision of the structure and administration of the system. It has made similar recommendations in other unified bar states with small, medium, and large lawyer populations. Importantly, the Committee's recommendations in this regard are not intended as a criticism of the Guam Bar Association or its system volunteers, past and present. The Bar's longstanding support of and commitment to the system's operations is laudable, and the Bar is no less dedicated to having an effective and efficient lawyer discipline system than the Court. However, as noted above, one of the hallmarks of such a system is independence, and the Court's proposed Rules provide for that.

While the recent litigation challenging the constitutionality of varying aspects of the unified bar in some jurisdictions is informative, the Professional Regulation Committee's Recommendations in this Report are not intended to suggest and should in no way be read as expressing any position on the unified or voluntary status of any jurisdiction's Bar. That is not the purpose of this or any other Recommendations in this Report. The ABA does not have policy favoring or disfavoring a unified or voluntary bar, and Association policy supporting judicial regulation of the profession is a separate issue. However, the U.S. Supreme Court's ruling in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), its concomitant remand of *Fleck v. Wetch* to the 8th Circuit Court of Appeals, the filing of similar cases in Oregon and Wisconsin, proposed legislation in Washington State, and the newly filed case of *McDonald v. Longley* in the U.S. District Court for the Western District of Texas, may provide the Court with additional insights.

A. The Court's Creation of The New Commission on Lawyer Regulation Makes Sense

For reasons described below, Recommendation Three suggests that the Court consider retitling the current Ethics Prosecutor as "Regulation Counsel." For ease of drafting this Report, going forward the Committee is utilizing the recommended term "Regulation Counsel" to reference this position in the current system and the system set forth in the proposed Rules. The Court, of course, will decide what terminology to adopt.

Currently, and as described above, administrative oversight authority for the system resides with the Ethics Committee of the Guam Bar Association.¹²⁸ To further clarify that oversight of the system falls under the purview of the Court, the Professional Regulation Committee supports the proposal to create the Commission on Lawyer Regulation (hereinafter "Commission") to assist the

¹²⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & Cmt.

¹²⁸ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 7; Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 3(e), 5 & 6.

Court in carrying out its discipline and disability functions makes sense.¹²⁹ This entity can serve an effective administrative role to help address delays and optimize the system's efficiency and timeliness, as well as outreach.

The Commission can work with the Regulation Counsel to identify where in the system delays occur and help develop a plan to address such concerns. Adoption of the recordkeeping provisions of proposed Rule 5(b)(11) will be very helpful in this regard. The caseload management technology described in Recommendation Eight will facilitate the collection and maintenance of that data. The Commission should regularly review with Regulation Counsel case management reports that include information about the type of misconduct alleged, whether the facts and evidence are complex in nature, the work already completed, the nature and extent of the investigation that needs to be performed, and an estimate of how long that will take. Case management reports should omit the names of respondent-lawyers. The Court and its Subcommittee have recognized in proposed Rule 2(a) that the Commission should not be substantively involved in any matters, and the Professional Regulation Committee agrees. Its purpose is administrative oversight. The Commission should also avoid micromanagement of the Regulation Counsel.

Consistent with the proposed Rules, the Professional Regulation Committee believes that the Court should appoint the members of the Commission with the term limits as set forth in the proposed Rules. The inclusion of term limits for Commission members, as well as for members of the proposed Investigative Committee and Hearing Panel, is important and laudable. Without term limits, participation in the system is restricted and that may enable the continuation of outmoded practices.¹³⁰ Term limits ensure that the system remains responsive to change and optimally accessible.¹³¹

The Committee commends the Court and its Subcommittee for recognizing that a combination of both public and lawyer volunteers results in a more balanced evaluation of complaints and increases the credibility of the disciplinary system in the eyes of the public.¹³² The proposed Rules call for public members on the Commission and for the Hearing Panel. Inclusion of the public is consistent with national practice. The Court should adopt these provisions and amend the proposed Rules to include public members on the Investigative Committee.¹³³

The Consultation Team heard from some that they disagreed with adding public members to the Commission and Hearing Panel. They expressed concerns that are consistent with those expressed in other jurisdictions of all sizes where the Professional Regulation Committee has recommended adding public members to the roster of system volunteers. Those concerns include the inability of nonlawyers to understand the law and procedures, or to be fair in judging lawyers. Other interviewees had no concerns about including members of the public in the Guam system. In the Professional Regulation Committee's thirty-plus years of experience conducting consultations and helping state supreme courts implement positive changes to their disciplinary systems, the worries

¹²⁹ ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 Cmt.

¹³⁰ ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 Cmt.

¹³¹ *Id.*

¹³² ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 & Cmt.

¹³³ *Id.*

of those opposed to including public members have not come to fruition. Members of the Committee's Consultation Teams hear uniformly from the volunteers and other participants in disciplinary systems nationwide that their public members are highly valued, fair, and thoughtful contributors to the process. They take their duties seriously and devote the necessary time to fulfilling their obligations pursuant to applicable rules and procedures. It is also notable that there are public members who serve on Guam's Committee on Judicial Discipline and the Special Court.¹³⁴ Public members comprise one-third of the membership on each of those entities.

The Professional Regulation Committee does note that some interviewed by the Consultation Team believe that a seven-member Commission is too large for a bar of Guam's size. In the Professional Regulation Committee's view, whether the Commission will be able to effectively perform its duties should guide the Court's decision about the size of its membership. It may be that five qualified members (three lawyers and two public members) or three qualified members (two lawyers and one public member) may suffice. The Committee believes that the Court is in the best position to make this determination with input from the Regulation Counsel and current system volunteers.

1. A Process for Selecting Commission Members Should Be Created

It is important for there to be a process for those interested in serving to apply and to be screened for appointment to the Commission. This process should also be used for the proposed Investigative Committee and Hearing Panel. This will allow the Court or its designee to vet and select appropriate candidates for appointment. It need not be a complicated process, but the Court, perhaps in consultation with the Bar Association, should set minimum requirements (including for training) for appointees of lawyer and public members. The Professional Regulation Committee suggests that all candidates should have to complete an application form and undergo a background check.¹³⁵

Regarding the Investigative Committee and Hearing Panel, the Court has already contemplated engaging the assistance of the Commission in those appointments as per proposed Rule 2(e)(3). The Professional Regulation Committee suggests that instead of having the Commission initiate contact with eligible members of the Guam Bar, that they instead first screen and vet voluntary applicants and make recommendations to the Court. If there are not enough applicants for any given appointment period, then the Court may direct the Commission to initiate contact with qualified lawyer and public members for the Investigative Committee and Hearing Panel. The Guam Bar Association should be able to make recommendations to the Court (and Commission) but should not have any role in the actual selection of system volunteers.

Publicizing the appointment process is important so as to broaden the pool of lawyer and public applicants. By developing and publicizing criteria for evaluating applicants, lawyers and public members interested in serving the system will be better able understand what their duties will be and the time commitment expected of them. Efforts to achieve balanced representation of all

¹³⁴ Guam Rules for Judicial Disciplinary Enforcement, R. 2.1(D) & 2.2(D).

¹³⁵ For example, in Louisiana, those wanting to serve on a Hearing Committee (the trier of fact akin to the District Court judge) must complete an application that asks for disclosure of all lawsuits, bankruptcies, state or federal tax liens and moving violations for the last five years, in addition to authorizing a criminal background investigation.

segments of the public and profession, including minorities, women, government lawyers, larger firm lawyers, small firm lawyers, and sole practitioners should be made.

The application and appointment process should be publicized not only on the Court's and Bar Association's website, but on the proposed new website for the Regulation Counsel (Recommendation Ten), and on websites of community organizations and in local print and online media. The Professional Regulation Committee believes that enhancing the outreach associated with the appointment process will help to address the concern some interviewees had about attracting qualified public members to serve.

2. The Court May Wish to Consider Whether the Commission Should Appoint Regulation Counsel, With the Court's Approval

Rule 5 of the proposed Rules, pursuant to which the Court would appoint the Regulation Counsel, is consistent with the Model Rules for Lawyer Disciplinary Enforcement and the McKay Commission Report.¹³⁶ While the role of the Guam Bar Association in appointing this individual with the Court's approval has been eliminated under the proposed Rules, the Professional Regulation Committee recommends that the Court continue to consider the Bar Association's recommendations for and comments about lawyers applying to serve in that position. Input to the Court should not be limited to the Bar Association. The Court should solicit and consider the views of civic groups and other interested parties.¹³⁷

In some jurisdictions, such as Louisiana, the Court has delegated the application and vetting process for that position to the administrative oversight entity, which in this case would be the Commission. Hiring occurs with the approval of the Court. This process is consistent with the ABA Model Rules.¹³⁸ It provides the Court with less direct involvement in the hiring process by allowing trusted delegates to conduct much of the administrative work associated with vetting applicants. This added separation from the hiring process may also make sense given that the Court pays for this position's salary from its legislatively allotted funds.

3. The Commission Should Not Issue Public or Private Advisory Opinions

Proposed Rule 2(e)(8) provides that the Commission's duties include issuing "public or private advisory opinions respecting matters within the scope of the Comprehensive Lawyer Regulatory System." It is unclear to the Professional Regulation Committee if this means that the Commission may issue public or private ethics opinions, public or private advisory opinions interpreting the proposed Rules and their application, or opinions on any other matter relating to the system, its operation and the actions of the various other participants. The Professional Regulation Committee strongly urges the Court to not adopt this provision of the proposed Rules.

¹³⁶ ABA Model Rules for Lawyer Disciplinary Enforcement R. 4 & McKay Report, *supra* note 2, Recommendation 6.

¹³⁷ ABA Model Rules for Lawyer Disciplinary Enforcement R. 4 Cmt.

¹³⁸ *Id.*

The Professional Regulation Committee recognizes that providing ethics opinions to lawyers that help them interpret and apply the rules of professional conduct is a valuable service, and there are several jurisdictions where regulatory counsel provides them upon request. Any services that help lawyers avoid violating the rules of professional conduct are in the best interest of the public and the profession. The question is, who are the appropriate persons to provide these opinions? In the Professional Regulation Committee's view, and consistent with national practice, it should not be Regulation Counsel nor should it be any other component of the disciplinary system.¹³⁹

The proposed Rule does not specify if these opinions, whether ethics opinions or advisory opinions interpreting the disciplinary procedural rules, are to be binding on the system's participants, thus creating ambiguity. Binding or not, the Professional Regulation Committee finds the ability of the Commission to issue these advisory opinions troubling. The risks posed by this practice are too great. Allowing the Commission to issue advisory opinions puts the members in danger of being called as witnesses in a proceeding against a lawyer who relied, or claims to have relied, on such advice, especially if private opinions are permitted.

Retaining this provision of the proposed Rules also would result in what the Professional Regulation Committee believes is the expansion of authority of an entity intended to perform administrative oversight duties into one with a quasi-adjudicatory role as to how rules should be interpreted. The Court should be the ultimate arbiter of whether conduct violates the Guam Rules of Professional Conduct and the interpretation of its procedural Rules. Just as there are times that the Court may disagree with findings of fact or conclusions of law made by the Ethics Committee or Adjudicative Committee (under the proposed Rules the Investigative Committee and Hearing Panel), there could easily be disagreement by the Court as to the correctness of a public or private advisory opinion issued by the Commission.

The Professional Regulation Committee suggests, consistent with national practice, that the Guam Bar Association is the appropriate entity to issue ethics opinions. The Bar Association may wish to constitute an ethics committee to draft and issue non-binding ethics advisory opinions. Members of the Guam Bar could submit requests for the issuance of such opinions. Creating this committee and issuing these opinions is, in the Committee's experience, a valuable member benefit.

B. Formal Proceedings Should Be Recaptioned

A final way in which the removal of the Guam Bar Association's involvement and oversight of the disciplinary process should be emphasized is the recaptioning of pleadings in disciplinary matters. Currently, specifications of charges are "instituted by the prosecuting counsel in the name of the Bar of Guam..."¹⁴⁰ The Professional Regulation Committee recommends that formal charges and other pleadings in disciplinary matters be captioned "In re [insert name of respondent]." This is consistent with national practice.

¹³⁹ ABA Model Rules for Lawyer Disciplinary Enforcement R. 4.

¹⁴⁰ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings, R. 20.

Recommendation 3: The Court Should Amend the Proposed Rules to Revise the Role and Responsibilities of the Regulation Counsel

Commentary

The proposed Rules suggest renaming the Ethics Prosecutor and calling that position “Disciplinary Counsel,” which is consistent with the ABA Model Rules for Lawyer Disciplinary Enforcement. The Professional Regulation Committee commends the Court for proposing the elimination of title “Ethics Prosecutor.” Over the years, based on the recommendations of the McKay Report, disciplinary systems nationwide have moved away from what was historically a prosecutorial model of lawyer discipline. The expanded system of lawyer regulation recommended by the McKay Commission, and adopted as a matter of national practice, contemplates an expanded role for counsel who are responsible for investigating and prosecuting allegations of lawyer misconduct. That role is one that includes the ability to take some remedial actions. This can occur whether through alternatives to discipline programs, attempting to resolve minor service-oriented complaints through informal mediation during the screening process or referring complainants to other appropriate component entities in the regulatory system. In addition, disciplinary agencies have also taken on more of an educational role for the profession to help lawyers avoid complaints, provide guidance relating to the ethical use of technology in their practices, and become more knowledgeable about the global legal regulatory developments that impact them.

Consistent with the spirit of the McKay Report, the proposed Rules provide for a comprehensive system of lawyer regulation and the Commission’s full title is “Commission on Lawyer Regulation.” Some jurisdictions have also begun to call their “Disciplinary Counsel” by the title of “Regulation Counsel” (e.g., Colorado). Indeed, these issues contributed to the Professional Regulation Committee changing its name from the Professional Discipline Committee. For these reasons, the Professional Regulation Committee suggests that the Court may want to consider using “Regulation Counsel” in lieu of “Disciplinary Counsel.” As noted above, to avoid using multiple terms, this Report is using “Regulation Counsel.”

The provisions in Rules 5(a) and (b)(5) of the proposed Rules that provide Regulation Counsel should not engage in the private practice of law and is responsible for supervising “staff and investigators needed for the performance of prosecutorial functions” are laudable. In addition, the Committee suggests that this individual, and not the Commission, should be able to hire staff to assist them, and that the term “prosecutorial functions” be changed to “the duties of the office.” As is clear from the proposed Rules and the Recommendations in this Report, Regulation Counsel’s duties extend beyond prosecutorial functions.

A. Regulation Counsel Should Be Able to Screen Complaints and Dismiss Them for Lack of Jurisdiction Without System Volunteers’ Permission

Rule 3 of the Proposed Rules provides for the creation of an Investigative Committee to “oversee the substantive investigative component” of the Guam lawyer disciplinary system. The proposed Rules create within the Investigative Committee a central intake mechanism to receive and *screen* complaints submitted to it about lawyer conduct, and to dismiss them or refer them to other

appropriate agencies. Proposed Rules 3(e)(6) and 11(a) seem to indicate that a screening dismissal must be approved by a Rule 4(e)(1) member.

Rule 3(e)(1) and (2) of the proposed Rules provides that the Investigative Committee has the power to authorize and oversee Regulation Counsel's *full investigation* of complaints and to dismiss a matter after a full investigation. Proposed Rule 3(e)(6) provides that before any such dismissal becomes final, a member of a Hearing Panel must approve it under proposed Rule 4(e)(1). Proposed Rule 3 does not specifically reference the involvement of Regulation Counsel in the screening of complaints, which involves determining whether a complaint alleges sufficient information to determine whether it relates to a lawyer subject to the Court's disciplinary jurisdiction.¹⁴¹ However, Rule 5(b)(1) of the proposed Rules states that Regulation Counsel's powers and duties include evaluating "all information coming to the attention of the Investigative Committee to determine whether it concerns a lawyer subject to the jurisdiction of the Court..."

Proposed Rule 11(a) begins by noting the Regulation Counsel "shall evaluate all information coming to *his or her attention* by complaint or from other sources alleging lawyer misconduct or incapacity." Under this proposed Rule it is reasonable to conclude that Regulation Counsel has the authority to screen complaints upon receipt. But given the proposed Rules described above, there is some ambiguity as to the ultimate role of Regulation Counsel in screening complaints. The Court should resolve that ambiguity.

While under proposed Rule 3 complaints are to be filed with the Investigative Committee, in practice they are currently filed with Regulation Counsel's office. This appears consistent with the intent of proposed Rule 11(a). The current complaint form is captioned "Supreme Court of Guam, Office of the Ethics Prosecutor."¹⁴² Regulation Counsel's office, and not one of the volunteer components of the system, is the appropriate venue for complainants to file their grievances. This is consistent with national practice. As a result, the Professional Regulation Committee suggests that the Court amend the proposed Rules to provide that complaints about lawyer conduct should be filed with Regulation Counsel's office, and that office should assist complainants in stating their complaints, instead of the Investigative Committee.

In addition, the Professional Regulation Committee recommends eliminating the role of the Investigative Committee (the current Ethics Committee) in the screening of complaints and in their dismissal for lack of jurisdiction. The professional who occupies the role of Regulation Counsel is expected to be an expert in the rules of professional conduct and their application, as well as in the disciplinary procedural rules. They are the appropriate person to determine whether a complaint against a lawyer falls under the Court's disciplinary jurisdiction and should be investigated further. The Professional Regulation Committee understands that most interviewees prefer that the Regulation Counsel remain subject to strict oversight by a volunteer component of the system, in part because that has traditionally been the case and because of concerns about abuse of prosecutorial discretion. While greater oversight of that position may be appropriate during other phases of the disciplinary process, the basic screening of complaints is one area where Regulation Counsel should have the authority to dismiss complaints that do not fall under the Court's jurisdiction without having to secure approval from volunteers, including the proposed Rule

¹⁴¹ Proposed Guam Rules for Lawyer Disciplinary Enforcement & Disability Proceedings, R. 3.

¹⁴² *Supra* note 50.

4(e)(1) member. The Committee suggests that the Court amend the proposed Rules accordingly. The Review process by the Rule 4(e)(1) member in other contexts is addressed in Recommendation Five.

B. Regulation Counsel's Authority to Investigate and Dismiss Complaints Post Screening

The Regulation Counsel must currently, and under the proposed Rules, receive permission to investigate a complaint that falls under the Court's disciplinary jurisdiction. Regulation Counsel lacks authority to dismiss complaints after investigation. The proposed Investigative Committee possess that dismissal authority subject to a proposed Rule 4(e)(1) review.

The Consultation Team asked interviewees whether the Regulation Counsel should have the authority to investigate and dismiss complaints without first obtaining permission from system volunteers. The Team clarified that its question was not about whether Regulation Counsel should have the authority to make decisions as to whether probable cause exists to warrant the filing of a specification of charges. That is a separate issue. Most interviewees felt that Regulation Counsel's office should not be granted authority to investigate or dismiss complaints after completion of an investigation absent volunteer involvement. They cited local tradition, the small size of Guam's bar, and concerns about the risks of having too much power reside with one individual as reasons for denying Regulation Counsel such authority. They preferred that the current and proposed Rules retain such oversight on Regulation Counsel for these activities. When questioned further, interviewees indicated that they felt such oversight was appropriate regardless of the specific person holding that position.

The Consultation Team understood this reticence to provide Regulation Counsel with authority to investigate a complaint (or initiate an investigation) absent permission to do so, even though in the Professional Regulation Committee's experience instances of abuse of that authority are rare and addressed by other safeguards in the system. The Team found concerns from lawyers about potential abuse of power in the context of Regulation Counsel's ability to dismiss a matter without permission from system volunteers a little curious, but given recent experience, also understandable. In the Professional Regulation Committee's experience, such concerns typically come from complainants.

The Professional Regulation Committee recognizes the unique contextual concerns in Guam, which appear to have carried through into the proposed Rules developed by the Court's Subcommittee. The Professional Regulation Committee would typically urge that Regulation Counsel be given the full authority to investigate and independently dismiss complaints that fall under the Court's disciplinary jurisdiction, with such dismissals subject to a limited appeal by complainants. That is consistent with national practice and ABA policy.¹⁴³ However, given the systemic stressors preceding the Consultation Team's visit, it refrains from doing so in this instance. Its decision is not related to the size of the Guam bar. Small jurisdictions or jurisdictions with a significant rural lawyer population grant their Regulation Counsel such authority.¹⁴⁴ Rather,

¹⁴³ *Supra* note 139.

¹⁴⁴ *See, e.g.*, Wyo. Rules of Disciplinary Procedure, R. 10.

the Professional Regulation Committee appreciates that there may be a need in Guam for some additional time to allow for the rebuilding of confidence by members of the public and the bar.

However, the Committee urges the Court, within a reasonable time after implementing any changes to the system, to revisit whether such volunteer oversight over dismissals remains necessary, especially given the enhanced oversight of Regulation Counsel by the proposed Commission. As discussed below, the proposed Investigative Committee should remain responsible for making probable cause determinations, which acts as another safeguard against prosecutorial abuse. The Committee also, as set forth in Recommendation Sixteen, urges the Court to adopt a rule allowing complainants a limited appeal of the dismissal of their complaints.

Recommendation 4: The Chair and Vice-Chair of the Investigative Committee Should Be Subject to Term Limits

Commentary

As noted above, Rule 3 of the Proposed Rules provides for the creation of an Investigative Committee to “oversee the substantive investigative component” of the Guam disciplinary system. As with the Commission, the Professional Regulation Committee recommends that the Court, or Commission should the Court desire, use the appointment process set forth in Recommendation Two to select qualified members of the Investigative Committee. Input from the Guam Bar Association and the public should be sought and considered, but the Bar should not have a role in appointing members. As noted also in Recommendation Two, the Committee recommends that the Court amend the proposed Rules to include public members on this body. It is preferred that public members comprise one-third of the Investigative Committee.¹⁴⁵

As it does in Recommendation Two, the Professional Regulation Committee suggests that the Court consider whether a seven-member Investigative Committee is sufficient to perform its duties effectively and efficiently given the size and complexity of the system’s caseload. That proposed Rule 3(b) provides for the appointment of *pro tempore* members is helpful. The lawyer population of Guam should not, in the Committee’s view, factor into the decision as to the appropriate size of the volunteer components of the system.

The Professional Regulation Committee suggests that the Court consider eliminating proposed Rule 3(c), which states that Court shall appoint members of the Investigative Committee to serve as chair and vice-chair, and that these positions are not subject to term limits. The Committee recommends that the language about the Court appointing a chair and vice-chair from among the Investigative Committees membership be moved to proposed Rule 3(b). The Court may wish to specify that such positions are to be held by lawyers. However, all members of the Investigative Committee, including the chair and vice-chair, should be subject to term limits for the reasons set forth in this Report. In the Professional Regulation Committee’s view, there is no reason to exempt these positions from such term limits, which should be staggered for continuity as with the other Committee members.

¹⁴⁵ *Supra* note 132.

Recommendation 5: The Court Should Consider Eliminating the Role of the Rule 4(e)(1) Member

Commentary

Proposed Rule 4 provides for the establishment of the Hearing Panel, which performs the adjudicative functions of the system. As with the current Adjudicative Committee, the Hearing Panel would consist of seven members. The current Adjudicative Committee is comprised only of lawyers. The Professional Regulation Committee commends the Court's Subcommittee for including public members on the proposed Hearing Panel too, for the reasons described earlier in this Report.

The Professional Regulation Committee recommends that, as with the proposed Commission and Investigative Committee, the proposed selection process for lawyer and public members discussed in Recommendation Two should also apply to appointment of Hearing Panel members. In addition, as set forth in Recommendation Four, term limits also apply to the chair and vice-chair of the Hearing Panel. This would require the Court to amend the proposed Rules to move the first sentence of proposed Rule 4(c) into Proposed Rule 4(b) and delete the second sentence of proposed Rule 4(c).

Many jurisdictions utilize Hearing Panels comprised of two lawyers and one public member per panel, as recommended in the Model Rules for Lawyer Disciplinary Enforcement. The proposed Rules differ from the Model Rules in that regard. The Professional Regulation Committee was asked to provide additional information about the several jurisdictions in the U.S. that have chosen alternate means by which to hear formal disciplinary proceedings. For example, Colorado has instituted a system that employs a Presiding Disciplinary Judge. The Presiding Disciplinary Judge works in concert with two volunteers to handle disciplinary trials and hearings.¹⁴⁶ The Presiding Disciplinary Judge rules on all motions, objections, and other matters presented after a formal complaint is filed and in the course of a hearing. The opinions of the Presiding Disciplinary Judge and hearing board are final orders in that case and may be appealed to the Supreme Court of Colorado. Arizona also utilizes a Presiding Disciplinary Judge. Arizona adopted this mechanism in 2011 for hearing disciplinary matters.¹⁴⁷ The Arizona system is modeled on that in Colorado and operates similarly. The Professional Regulation Committee understands that both Arizona and Colorado have found the use of a Presiding Disciplinary Judge effective in meeting their specific needs. California is the only state that has a separate court, staffed by independent judges to handle formal disciplinary matters. The State Bar Court¹⁴⁸ has been in existence for decades. California also has the largest lawyer population in the United States. If the Court is interested in further exploring the use of a Presiding Disciplinary Judge and reducing the size of the proposed Hearing Panel, the Professional Regulation Committee recommends contacting the

¹⁴⁶ See, e.g., *Office of the Presiding Disciplinary Judge*, COLORADO SUPREME COURT, http://www.coloradosupremecourt.us/PDJ/PDJ_Decisions.asp (last visited Jan. 6, 2014).

¹⁴⁷ See, e.g., *Presiding Disciplinary Judge*, ARIZONA JUDICIAL BRANCH, <http://www.azcourts.gov/pdj/Home.aspx> (last visited Feb. 14, 2017).

¹⁴⁸ See, e.g., *General Information*, STATE BAR OF CALIFORNIA, <http://www.statebarcourt.ca.gov/> (last visited Feb. 14, 2107).

Chief Disciplinary Counsel in Colorado and Arizona, as well as the Presiding Disciplinary Judges in those states.

The Professional Regulation Committee strongly urges the Court to not adopt proposed Rule 4(e)(1), and to make concomitant deletions in the proposed Rules where reference to the Rule 4(e)(1) member and its duties are made. Proposed Rule 4(e)(1), along with provisions in proposed Rules 3 and 11, provides that the Hearing Panel chair, vice-chair or a lawyer-member designee serves on a rotating basis as the “Rule 4(e)(1) member.”¹⁴⁹ The Rule 4(e)(1) Hearing Panel member is responsible for approving confidential preliminary dispositions by the Investigative Committee. This means that the Investigative Committee cannot dismiss a matter at the screening level absent approval from the Rule 4(e)(1) member.¹⁵⁰ Similarly, under this proposed Rule the Investigative Committee’s decision to dismiss a matter after full investigation (with or without a letter of caution) or to resolve a matter by stipulation requires approval from the Rule 4(e)(1) member. The Investigative Committee would need a Rule 4(e)(1) member’s approval to issue a private admonition. The proposed Rules do not seem to contemplate approval by a Rule 4(e)(1) member for the Investigative Committee to direct Regulation Counsel to file formal charges. The Professional Regulation Counsel believes that the probable cause finding function should remain solely with the Investigative Committee.

The Rule 4(e)(1) member can also modify or reject the recommendations of the Investigative Committee. If the Rule 4(e)(1) member rejects or modifies the recommendation of the Investigative Committee, the Investigative Committee may appeal that decision to the full Hearing Panel, whose decision is final. The Rule 4(e)(1) member who reviews a matter is disqualified from serving as an adjudicator of that matter should it proceed to formal charges.

It was unclear to the Consultation Team why this extra step has been added in the proposed Rules, as the current process does not require the Ethics Committee to obtain such approval from a member of the Adjudicative Committee. The Consultation Team was provided with no information indicating that such a check on the proposed Investigative Committee is necessary.

The Professional Regulation Committee believes that implementing the proposed Rule 4(e)(1) member’s role in the system would add unnecessary delay, especially regarding screening dismissals. As recommended above, the Regulation Counsel should be able to dismiss those matters on his or her own. The Professional Regulation Committee believes that the appointment of qualified individuals to serve on the Investigative Committee, coupled with the training recommended below and the addition of a Rule allowing complainants a limited appeal of the dismissal of their complaints, will provide adequate protection to the public and lawyer.

¹⁴⁹ Proposed Guam Rules for Lawyer Disciplinary Enforcement & Disability Proceedings, R. 3, 4(e)(1), and 11.

¹⁵⁰ *Id.*

Recommendation 6: Guam Should Have a Lawyer Assistance Program Operated by the Guam Bar Association

Commentary

Alcoholism, substance abuse, gambling disorders, and other mental health issues impact the legal profession at higher rates than the general population and some other professions. These issues not only negatively impact and can cause harm to clients and the justice system, but they impact lawyers' families and those with whom they practice law.

The organized bar and the profession have long recognized the need for resources, strategies, and support for lawyers, judges, and law students. In response, in the 1990's the ABA created the Commission on Lawyer Assistance Programs. The Commission's mission is to ensure that lawyers, judges, and law students have access to support and assistance when confronting these issues so that they can recover and clients and the public are protected.¹⁵¹ As a result, each U.S. jurisdiction, as well as Puerto Rico and the Virgin Islands, has a Lawyer Assistance Program ("LAP"), as do some other countries.¹⁵² In some jurisdictions there is more than one such resource.

A 2016 study by the Hazelden Betty Ford Foundation, in collaboration with the ABA Commission on Lawyer Assistance Programs, provided for the first time since the 1990's, national data regarding alcohol use, substance abuse, mental health issues and help-seeking behaviors of lawyers. The implications for the legal community are multifaceted and far reaching.¹⁵³ The data derives from responses from nearly 13,000 licensed and employed lawyers and judges throughout the United States. As a result of this study, the Commission on Lawyer Assistance Programs joined with others to form the National Task Force on Lawyer Well-Being. In August 2017, the Task Force issued a report calling for widespread changes in the legal profession's culture.¹⁵⁴

Guam does not have a LAP. During its onsite visit, the Consultation Team discussed the LAP concept with interviewees, and with the Court and Guam Bar Association. All recognized that the substance abuse, mental health, and other disorders exist in Guam's legal profession. They agree that creation of a LAP is important, and it is needed as a stand-alone entity as well as part of the alternatives-to-discipline program discussed in Recommendation Nineteen. The Professional Regulation Committee urges the Court and Bar Association, along with Regulation Counsel's office, to work together to create and implement a LAP program to be funded and operated by the Guam Bar Association.

¹⁵¹ See *About Us*, ABA LAWYER ASSISTANCE PROGRAMS, https://www.americanbar.org/groups/lawyer_assistance/about_us/# (last visited May 17, 2019).

¹⁵² See Directory of Lawyer Assistance Programs, ABA LAWYER ASSISTANCE PROGRAMS, https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/ (last visited May 17, 2019).

¹⁵³ Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MEDICINE (Jan./Feb. 2016). https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

¹⁵⁴ See Report from the National Task Force on Wellbeing, ABA LAWYER ASSISTANCE PROGRAMS (2018), https://www.americanbar.org/groups/lawyer_assistance/task_force_report/.

To assist in doing so, the Professional Regulation Committee is appending to this Report the ABA Model LAP. As noted in this ABA policy document, different jurisdictions have different legal structures for their LAPs. Some are programs that reside in bar associations. Others are independent corporations, either with or without tax exempt status, or are under the umbrella of their court system. The LAP structure will influence the structure of the governing body. The Model LAP was drafted broadly to assure that the governing body has authority to provide oversight, establish goals and policies, raise funds, advocate for the needs of the program and its clients, and be accountable for fiscal matters. As noted in the Model LAP, members of the LAP governing body should include those with knowledge and experience in the fields of substance abuse and mental health disorders.

The ABA Commission on Lawyer Assistance Programs provides technical assistance to jurisdictions and is the entity best positioned to provide resources to the Court and Guam Bar Association regarding the creation and implementation of a successful LAP. The Professional Regulation Committee will provide to the Court contact information for the Commission on Lawyer Assistance Programs under separate cover.

IV. RESOURCES

Recommendation 7: The Professional Regulation Committee Supports the Court's Efforts to Adequately Fund the Disciplinary System

Commentary

The Supreme Court of Guam, with government monies appropriated to the judiciary, currently funds the salaries of the disciplinary staff, as well as general office expenses. The Professional Regulation Committee understands that the Court is seeking an appropriation to continue that funding for the upcoming fiscal year and intends to continue to do so under the proposed Rules. In addition, and upon request, the Guam Bar Association has funded from its dues revenue other investigative and prosecutorial expenses, such as depositions. Budget information from the Guam Bar Association indicates that in 2017, the Guam Bar received \$123,576 in dues. In 2016, that amount was \$108,232. The Guam Bar Association, in the exercise of sound fiscal management and to be able to help fund these disciplinary expenses, also has additional assets in the form of timed certificates of deposit.

Proposed Rule 8 provides for the Court to collect a new disciplinary assessment, to be paid by Guam lawyers in addition to their Guam Bar Association dues. The Court has not determined the amount of this disciplinary assessment, referred to as an “annual fee” in the proposed Rules. The Professional Regulation Committee understands that the Court intends for the proposed disciplinary assessment to be used to fund the types of disciplinary expenses that the Bar has paid for, and also intends for those monies to pay for enhanced technology and training for disciplinary system participants, and the use of an investigator when needed. The proposed new Commission would be charged with administering the new disciplinary assessment. The Professional Regulation Committee also understands that the Court intends to have the Guam Bar Association, consistent with the recommendations in this Report and the McKay Commission, create, fund and operate a LAP and diversion program.

The Professional Regulation Committee knows that the Court and the Bar are sensitive to the financial constraints faced by Guam lawyers. The Court clearly took this under consideration in determining how to best proceed to ensure an optimally effective, efficient, and resourced system. The Professional Regulation Committee understands that the Court and the Bar are engaged in discussions about system funding and the creation and funding of a LAP and alternatives-to-discipline program.

The Professional Regulation Committee agrees that the Court's approach to funding the system makes sense for Guam. It provides a mechanism for the Court, under its regulatory authority, to adequately fund system expenses and will provide the Guam Bar Association with enhanced certainty and predictability about its own finances. The Committee offers some additional suggestions regarding proposed Rule 8. For example, the Professional Regulation Committee suggests that the Court clarify in proposed Rule 8 that this sum is an annual “regulatory fee” which is in addition to and distinct from Guam Bar Association dues. The Professional Regulation Committee agrees that this regulatory fee should be paid to the Court's Clerk as part of the annual registration process. If permitted by law, those funds should be maintained in a separate earmarked

account for these regulatory purposes. Segregating these non-taxpayer monies in a designated regulation system account should help the Court ensure that these funds are not subject to capture by other branches of government.

The Professional Regulation Committee observes that the proposed Rules do not address the payment and collection of Guam Bar Association dues, which would be separate from the new regulatory fee. Currently, the Clerk collects those monies and disburses them to the Bar. The Professional Regulation Committee offers no opinion on whether that practice should continue with respect to the collection and disbursement of Guam Bar Association dues, or whether under the proposed revised financing of the system, the Bar should be responsible for collecting those funds. The Committee does, however, suggest that the Court take under consideration the ongoing and growing litigation regarding unified bars identified at page twenty-five above.

Finally, the Professional Regulation Committee suggests that the Court consider, in proposed Rule 8(e) and elsewhere, deleting the term “fully integrated” when referencing the Guam bar. The use of the term “integrated” to describe unified bars is dated and carries with it certain negative connotations. The Committee suggests that use of that term in the proposed Rules is not necessary.

Recommendation 8: The Guam Lawyer Disciplinary System Needs Enhanced Technology Tools

Commentary

As discussed in the description of the Guam disciplinary system there is no technology-based caseload management system, and Regulation Counsel's office lacks a modern diary and tickler system that tracks progress of a case and prompts the staff to act at designated times. The office does not have trust account, investigative or litigation software, but Regulation Counsel has electronic access to the court system's records and to federal court documents. Files are not kept electronically; they are maintained in the office in file cabinets and boxes stacked on top of them and elsewhere in the office. The Court's IT Department addresses the hardware and software needs of the Office.

Effective use of technology, not only to investigate and prosecute cases, but also to track their progress through the system, improves efficiency at all stages of the proceedings, optimizes resource allocation, and saves time and money. The Court recognizes the need for the system to have enhanced technology tools and understands that those tools will be required for the system to comply with the new recordkeeping and data collection provisions of the proposed Rules. This is one purpose for which the new annual regulatory fee might be used.

The Professional Regulation Committee urges the purchase of a modern technology-based caseload management and docketing system tailored to the unique functions of Guam's system, and that has security. In addition to being able to maintain the type of information described in proposed Rule 5(b)(11), this comprehensive technology-driven caseload management system should keep track of the dates that correspondence is received and sent, and the dates and nature of other actions taken, and should have diary and tickler functions. The system should be used to create and maintain pleadings and correspondence related to a case.

An appropriate caseload management system,¹⁵⁵ properly and consistently used by Regulation Counsel's office, optimizes resource allocation and saves time and money that would otherwise be spent having individuals do certain tasks manually. It also allows the office to promptly identify and address caseload management and resource allocation problems. An electronic caseload management system also will aid in the dissemination of accurate public information.

The Professional Regulation Committee recommends that the Regulation Counsel contact other disciplinary agencies to investigate the types of systems they use. Colorado, Illinois, North Dakota, South Carolina, and Massachusetts may be optimal starting places. The case management software used by these jurisdictions allows regulation counsel and the adjudicative part of the system to track all aspects of pending matters, retrieve related documents, diary matters for deadlines and maintain templates for letters, pleadings, and other documents. Having a system

¹⁵⁵ JustWare is one example of a case management software program utilized, or, in the process of implementation, by at least eight state disciplinary jurisdictions. Time Matters® is another case and document management system used by other disciplinary agencies. The Discipline Committee is not recommending one software program over another.

with templates for correspondence and pleadings will reduce the amount of time staff takes to prepare these documents.

The Regulation Counsel should also be provided with other technological resources routinely utilized by disciplinary agencies. For example, Regulation Counsel should have trust accounting software, and steps should be taken to identify, evaluate and purchase software that would help counsel to evaluate financial cases and assist in auditing lawyer trust accounts. Regulation Counsel should also have access to other investigatory databases to enhance the accuracy and speed at which investigations and discovery are conducted.

The Professional Regulation Committee recommends that Regulation Counsel, in consultation with the new Commission, develop a plan for reducing current paper files to electronic format. This will assist the agency in reducing paper files and maintaining accurate and complete records of cases. The office will require at least a scanner for this purpose. Further the Committee recommends that a secure location be provided to Regulation Counsel to store closed files that are awaiting destruction after three years or which must be permanently kept. There is not enough room in Regulation Counsel's office and this detracts from the professionalism of the office. The current number of boxes stored there also raises safety concerns, including risk of fire.

Recommendation 9: The System Would Benefit from a Part-Time Investigator

Commentary

Regulation Counsel's duties include conducting witness interviews, and obtaining, reviewing and analyzing relevant records, including financial documents and court files. Not all of these records can be obtained electronically. The secretary in the office does not and is not trained to perform investigatory duties and related evaluative tasks. The office does not employ the services of a paralegal or investigator.

Most disciplinary agencies, large and small, either employ or contract with professional investigators to assist with the gathering of evidence and efficient evaluation of cases. For example, trained professional investigators interview witnesses, undertake review and analysis of financial information and bank records, and analyze documents to increase the efficiency and effectiveness of investigation and trial preparation. Having an investigator able to take witness statements instead of Regulation Counsel also eliminates the risk that a respondent will seek to call Regulation Counsel as a witness in a case.

The Professional Regulation Committee recommends that, and understands that, the Court plans for some of the funds generated by the new annual regulatory to fee be used to permit Regulation Counsel to retain the services of a professional investigator to assist in the investigation and prosecution of cases. The Professional Regulation Counsel should be able to determine when the services of the investigator are necessary for this purpose and the contemplated oversight by the new Commission should ensure that these expenditures are reasonable.

The scope of the investigations would still be determined by the Regulation Counsel and the investigator would work under his or her supervision. Many jurisdictions retain former police law enforcement to act as investigators for the disciplinary system. This means that the investigators are skilled in interview techniques, review and analysis of financial records, and can act with some autonomy.

V. PUBLIC ACCESS AND OUTREACH

Recommendation 10: The Guam Disciplinary System Should Be More Accessible and Visible to the Public

Commentary

The purpose of lawyer discipline is to protect the public and the administration of justice. To accomplish these goals, the lawyer disciplinary system must be easy to find and accessible to the public, physically and electronically. The Consultation Team learned that, contrary to the impression of many of the lawyers interviewed, the public lacks sufficient information about Guam's lawyer disciplinary system. A number of nonlawyer interviewees informed the Consultation Team that they were unaware of the existence of the system until someone told them about it or they conducted their own research. They had little information about its functions and knew little or nothing about the disciplinary process.

Currently, there is some information available to the public on the Court's and Bar's websites. In order to access this information, those looking for it need to know where to find it and the information available is general in substance. Information on the Guam Bar Association's website appears to have been last updated in 2010, and the link to the complaint form was broken as of the time of writing of this Report.¹⁵⁶ The Rules of Professional Conduct, Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings, and Supreme Court of Guam Rules for the Discipline of Attorneys are not available on the Bar Association's website. They are available on the Supreme Court's website, but not on the page relating to the disciplinary system.¹⁵⁷

That the Ethics Committee is currently required to inform the public no less than four times annually in a newspaper or by other means of the existence of the system and how a complaint may be made is laudable.¹⁵⁸ The Court's proposed Rules include and expand slightly on this requirement, which would fall to the new Commission on Lawyer Regulation. The Professional Regulation Committee believes that more can and should be done to engage the public, and that there are several ways this can be accomplished.

A. Regulation Counsel's Office Should Have Its Own Website

The Professional Regulation Committee strongly recommends that Regulation Counsel's Office have a stand-alone consumer-friendly web presence. Optimally, the website should be "hosted" by that Office to serve as a primary portal for the public and lawyers to learn about the disciplinary system in Guam, but it may be necessary for resource reasons for the site to be hosted by the Court. If that is the case, the site should still be separate from that of the Guam judiciary's site. The Regulation Counsel's site should provide detailed information about the functions of each component of the system, as well as their limitations, in a consumer-friendly manner. This includes

¹⁵⁶ Link last checked June 4, 2019.

¹⁵⁷ *Supreme Court Rules of Procedure*, *supra* note 54, <http://www.guamcourts.org/Rules-of-Procedure/Supreme-Court-Rules-of-Procedure.html>.

¹⁵⁸ Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 6.

information about the new Commission, as well as the Investigative Committee and Hearing Panel and should include rosters of those entities' membership. The website, as well as the Guam Bar Association's website, should also include information about the new alternatives-to-discipline program and LAP upon adoption and implementation of those components of the system. Regulation Counsel and the Bar should coordinate content about these programs to ensure consistency in how they are described.¹⁵⁹

The new web presence for the Regulation Counsel should include links to the Guam Rules of Professional Conduct, the Court's disciplinary procedural rules, and any internal system procedural policies, as well as to the disciplinary opinions of the Court and summaries describing private sanctions. The descriptions of these private sanctions should include past private reprimands under the current system and any private sanctions adopted by the Court based on its proposed Rules. The Professional Regulation Committee recommends that the Regulation Counsel's stand-alone website be updated regularly and amendments to any disciplinary procedural rules be posted promptly.

The Regulation Counsel's new website should include the most current iteration of downloadable "Complaint Against Attorney" form. Currently that form is only available in English. The Professional Regulation Committee recommends that consideration be given to making that form available in other languages commonly used on Guam, including Chamorro. Regulation Counsel may continue to advise complainants on the "Complaint Against Attorney" form that lawyer disciplinary investigations are confidential. However, for the reasons described in Recommendation Fourteen, the Professional Regulation Committee recommends deleting the request that complainants respect that confidentiality as that may chill their inclination to file a complaint.

The Committee recommends deleting the "optional waiver" set forth on the form, as it is not necessary and overbroad, risks causing confusion for complainants, and is inconsistent with national practice. If the proposed Rules are adopted, as the Professional Regulation Committee recommends, a lawyer's failure to cooperate with the disciplinary agency would be a ground for discipline under proposed Rule 9. The Professional Regulation Committee reads that to include the failure to provide Regulation Counsel with documents necessary to conduct and complete the investigation.¹⁶⁰ That proposed Rule, consistent with the ABA Model Rules for Lawyer Disciplinary Enforcement, would not require disclosure of information otherwise protected by confidentiality. However, Guam Rule of Professional Conduct 1.6, as an exception to confidentiality, allows a lawyer to reveal information relating to the representation of a client "to respond to allegations in any proceeding concerning the lawyer's representation of the client."¹⁶¹ Regulation Counsel currently retains the right to subpoena such documents, and that ability would carry through under the proposed Rules.

¹⁵⁹ The Guam Bar Association should continue to maintain information about the system on its website in a location easily found by the public that directs users to the Regulation Counsel's site and explains the Bar Association's role in lawyer discipline. That information will need to be amended based on the form of the proposed Rules adopted by the Court, and the Bar Association should strive to maintain currency of that information.

¹⁶⁰ Under the current Guam Bar Association, a lawyer's failure to cooperate with the Ethics Committee is a factor in aggravation for purposes of determining the appropriate sanction. Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 9(c).

¹⁶¹ Guam Rules of Prof'l Conduct R. 1.6(b).

Once the system has adequate technology resources, Regulation Counsel and the new Commission should discuss whether to allow complaints to be submitted electronically. Currently, some jurisdictions permit that to happen, but the majority do not yet allow complainants to do so. In a jurisdiction the size of Guam, it may be more feasible than in larger jurisdictions to allow electronic filing.

B. Licensure Status and Disciplinary Precedent Should Be Available Online And Easily Searchable

The Professional Regulation Committee recommends that information about a Guam lawyer's licensure status should be readily available and searchable online from the Regulation Counsel's new website. At the time of the Consultation Team's visit, the Court had directed the Clerk of the Supreme Court to collect annual registration statements and to maintain the master roll of Guam lawyers.¹⁶² That would continue under the proposed Rules. Under proposed Rule 8(j), the Regulation Counsel is required to have access to the current information relating to all lawyers who are subject to the Court's jurisdiction. The Court may wish to add and adopt a provision to its proposed Rules stating that the Regulation Counsel should make some of this information available to the public electronically, on its website. That information should include the lawyer's date of admission in Guam, a current business address and telephone number, all names under which the lawyer is or has been admitted to practice, whether that lawyer is currently authorized to practice law, prior public discipline imposed against the lawyer with a link to relevant orders and pleadings, and, consistent with Recommendation Ten, information about pending public disciplinary and reinstatement/readmission cases (including links to pleadings and orders) and the date and location of hearings on formal proceedings. This type of information is generally available on the websites of disciplinary agencies nationwide.¹⁶³

The public and lawyers should have access to all disciplinary decisions resulting in the imposition of public discipline and all reinstatement/readmission decisions. Currently, the Court's public disciplinary decisions are available on its website.¹⁶⁴ Optimally, the Regulation Counsel's website would have a searchable library of the Court's disciplinary opinions and summary descriptions of

¹⁶² Currently, the Guam Bar Association maintains on its website a membership directory of active and inactive lawyers. See *Membership Directory*, GUAM BAR ASSOCIATION, <https://guambar.org/category/member-status/active> (last visited May 17, 2019).

¹⁶³ See, e.g., See, e.g., COLORADO SUPREME COURT ATTORNEY SEARCH & DISCIPLINARY HISTORY, <http://www.coloradosupremecourt.com/Search/AttSearch.asp>; DC BAR MEMBERSHIP, <https://www.dcbbar.org/membership/find-a-member.cfm>; STATE BAR OF GEORGIA MEMBERSHIP, <https://www.gabar.org/membership/membersearch.cfm>; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, <http://www.iardc.org/lawyersearch.asp>; LOUISIANA ATTORNEY DISCIPLINARY BOARD, <https://www.ladb.org/Search/>; MASSACHUSETTS BOARD OF BAR OVERSEERS, SEARCH FOR AN ATTORNEY BY NAME OR CITY, <http://massbbo.org/bbolookup.php>; NORTH CAROLINA STATE BAR MEMBER DIRECTORY, <http://www.ncbar.gov/for-the-public/finding-a-lawyer/member-directory/>; DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, LOOK UP A PA ATTORNEY, <http://www.padisciplinaryboard.org/look-up/pa-attorney-search.php>; and WISCONSIN COURT SYSTEM LAWYER REGULATION, LAWYER STATUS AND HISTORY SEARCH, <https://lawyerhistory.wicourts.gov/>.

¹⁶⁴ *Supra* note 52.

private sanctions.¹⁶⁵ Making available to the public and profession a searchable library of public disciplinary decisions and orders and summaries of private discipline enhances transparency, shows that the Court's disciplinary system is accountable, helps improve uniformity in the imposition of sanctions, and provides lawyers facing disciplinary charges with the precedent necessary to adequately prepare their defense or respond to complaints.

C. The Regulation System Should Produce an Annual Report

The current disciplinary procedural rules in Guam do not require that the system produce an Annual Report for the public and the profession that sets out the scope and nature of the system's work. Some information about the system is included in the Judiciary of Guam's Annual Reports in the section setting forth judicial statistics and division reports.¹⁶⁶ For example, the 2017 Judiciary of Guam Annual Report includes limited data on case filings before the Court, and limited information provided by the Regulation Counsel. That information takes up approximately one-third of one page in the Report.

The Professional Regulation Committee recommends, consistent with and as an expansion of the proposed Rules, that Court require the Commission and the Regulation Counsel to prepare and publish each year, on the Regulation Counsel's website, an annual report. The publication of an annual report is consistent with the practice of many state disciplinary agencies nationwide.¹⁶⁷ The report should include a description of the system and its operations, including caseload processing information for the year. Caseload processing data should include, along with time processing information: (1) the number of complaints filed; (2) the number of complaints screened out; (3) the number of complaints investigated; (4) the number of cases dismissed; (5) the number of specifications of charges filed and formal disciplinary hearings; (6) public disciplinary actions taken and private sanctions imposed; (7) diversionary dispositions, and such other information that may be helpful to the public and the profession in comprehending the operations of the system, as well as its efficiency and effectiveness.¹⁶⁸ The annual report can include new statistical information, such as the number of complaints submitted against lawyers broken down by lawyer practice area, the number of years in practice of lawyer who receive complaints and are formally charged, and the nature of the practice, including whether in solo/small firm, government, in-house or other practice settings. Publishing an annual report demonstrates accountability, allows the

¹⁶⁵ Currently, Rule 12(d) of the Supreme Court of Guam Rules for the Discipline of Attorneys provides that the Bar must publish a summary of any written warning letter (not discipline) without the subject lawyer's identity to provide guidance to the bar. The Professional Regulation Committee could not find any similar requirement in the current rules relating to private reprimands.

¹⁶⁶ <http://www.guamcourts.org/Annual-Report/images/2017AR.pdf>.

¹⁶⁷ See, e.g., OFFICE OF ATTORNEY REGULATION COUNSEL 2015 ANNUAL REPORT (2015), <http://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2015%20Annual%20Report.pdf>; ARDC ANNUAL REPORT (2015), <http://iardc.org/AnnualReport2015.pdf>; ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD & ANNUAL REPORT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY (2015), <http://lprb.mncourts.gov/AboutUs/Documents/2015%20Annual%20Report.pdf>; WASHINGTON STATE BAR ASSOCIATION DISCIPLINE SYSTEM ANNUAL REPORT (2015), [http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2015%20Discipline%20System%20Annual%20Report\(00212318\).ashx](http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2015%20Discipline%20System%20Annual%20Report(00212318).ashx).

¹⁶⁸ Rule 5(b)(11) of the proposed Guam Rules for Lawyer Disciplinary Enforcement will facilitate the compilation of this data for the annual report.

public and the bar to evaluate the performance of the system, and promotes increased public confidence in it and the Court. The annual report also offers an opportunity for the system to detail the accomplishments of its staff and volunteers, identify improvements in the system, explain any new initiatives, and summarize outreach efforts to the bar and the public, including speaking events, articles, and CLE presentations.

In addition, the Professional Regulation Committee suggests that pamphlets describing the system and that provide the web address for the new Regulation Counsel's web site should be developed, published, and disseminated in places frequented by the public (i.e., courthouses, libraries and consumer organizations) This should be coupled with enhanced in-person public outreach set forth in Recommendation Eleven.

Recommendation 11: Outreach to the Bar and the Public Should Be Enhanced

Commentary

During its visit, the Consultation Team learned that the Regulation Counsel engaged in some outreach efforts to the Guam bar by conducting limited educational programs and responding to lawyers who called the office seeking guidance. While these efforts are commendable, based on information conveyed to the Consultation Team, the volume of such outreach needs to be enhanced. In the Professional Regulation Committee's view, increased interaction between the Regulation Counsel and bar is crucial to ensuring that lawyers have accurate information about the system and how it operates. In addition, the lawyer in this position is optimally positioned to update Guam lawyers about developments in professional responsibility law. Helping lawyers in this manner is consistent with national practice and also helps the bar understand that the system can help them avoid disciplinary trouble.

The Professional Regulation Committee also recommends that the system volunteers and the Regulation Counsel undertake similar efforts to better inform the public about the disciplinary system. As noted above, the Consultation Team heard that members of the public are generally not aware of the existence of the system and lack an understanding of how the disciplinary process works. This is not, in the Committee's experience, an uncommon refrain from the public. The Professional Regulation Committee agrees with the sentiment expressed by interviewees that more can and should be done to engage the public about the accessibility of the system and its protection of the public.

By way of example, Regulation Counsel and the system's volunteer members can increase outreach to the public, civic organizations and consumer groups by seeking invitations to speak at meetings of these entities. Participation by the nonlawyer system participants that the Committee urges be added as described in Recommendation Eleven in this increased outreach is crucial.

VI. TRAINING

Recommendation 12: The Professional Staff and Volunteers Should Receive Training

Commentary

The Consultation Team was advised that there exists no formal training program or training manual for the Ethics Committee and Adjudicative Committee members. Training may best be described as “on the job.” In addition, there is no training regimen for the Regulation Counsel. A number of those interviewed by the Consultation Team were rightfully concerned about instances of delay not traceable to volunteers in the current system, and they raised questions regarding volunteer oversight of the Regulation Counsel’s prosecutorial discretion.

The Recommendations in this Report relating to enhanced technology resources, including a caseload management system and the need for an investigator, will help make the process of investigating and prosecuting matters more efficient. The Court’s inclusion in the proposed Rules of a requirement that the Regulation Counsel compile and maintain statistics relating to the movement of cases through the system and the time spent by that office on matters will also contribute greatly to increased efficiency, transparency about system operations, and the oversight duties of the proposed Commission.¹⁶⁹ The Court’s inclusion of such provisions in the proposed Rules is laudable. A necessary complement to these recommended and proposed changes to the system is regular and required training.

Disciplinary investigations and prosecutions involve increasingly complex and sophisticated issues, and that translates into increased pressure on current system resources in terms of skill and efficiency. In addition, many disciplinary agencies are seeing a rise in complaints involving lawyers who are struggling with substance abuse, mental health, and age-related impairment issues. The Consultation Team heard that this also is true in Guam. The staff and volunteers in all disciplinary agencies, Guam’s as well, need to be educated and otherwise equipped to address these cases, as well as cases that implicate technological advances impacting the practice of law. Individuals with varied expertise in these fields should be invited to speak at the training sessions, where necessary by video conference. In addition, the lack of formalized and required training on these and other issues leads to, in the Professional Regulation Committee’s experience, inconsistencies in investigations, prosecutions, and adjudications.

A. Enhanced Training for Office of Regulatory Counsel

The Court and the Bar Association of Guam have been generous in funding, when feasible, the ability of Regulation to attend meetings of the National Organization of Bar Counsel and the International Conference of Legal Regulators. Each of these meetings provides excellent, but ad hoc, opportunities to learn how to better perform the duties of the office. The individual in this position also can seek information from colleagues via the National Organization of Bar Counsel listserv. Even though the lawyers who have served as past Regulators have come to the role with years of practice experience and dedicated service, information provided to the Consultation Team

¹⁶⁹ Proposed Guam Rules for Lawyer Disciplinary Enforcement & Disability Proceedings, R. 5(b)(11).

indicates that enhanced and regular training would benefit not only that individual, but any investigator hired to assist the system.

In addition to training on issues relating to substance abuse and mental health, enhanced training should include conflicts checking, negotiation skills, and technology training, including online courses relevant to their work that also address technological advances being used by lawyers and law firms. Regulation Counsel should be required to attend continuing legal education programs focusing on areas of law commonly the subject of disciplinary complaints, including criminal law, domestic relations law, personal injury law. They should attend in-person and online courses regarding effective and current investigative techniques, including those relating to technology-driven investigative tools. They should seek out experts in the areas of substance abuse and addiction, mental health, and age-related impairments to provide online training and necessary written materials. These experts should also be invited to participate in training sessions for system volunteers.

Regulation Counsel should also develop and follow physical file organization and maintenance procedures. The Consultation Team's review of disciplinary files raised concerns that such protocols were not in place. Optimizing file organization and consistency in the how correspondence and evidence is kept in the office's physical files improves efficiency and lessens the opportunity for mistakes or inadvertent misplacing of papers or other evidence.

When financially feasible, the Regulation Counsel should continue to attend the meetings of the National Organization of Bar Counsel and the ABA National Conference on Professional Responsibility. Resources provided by the NOBC that should be leveraged which do not require in-person attendance include webinars tailored for regulatory counsel, briefs, pleadings and surveys of national practices.

The ABA National Conference on Professional Responsibility is the preeminent educational and networking opportunity in the field of ethics and professional responsibility. Attendees can formally and informally collect information and discuss current issues and problems in the area of professional responsibility and disciplinary enforcement with leading experts, scholars and practitioners from across the globe. Conference programs address recent trends and developments in legal ethics, professional discipline for lawyers and judges, professionalism and practice issues, and are intended to be informative on a level appropriate to a group with considerable knowledge of and familiarity with the subject area. The National Conference is held annually in conjunction with the National Forum on Client Protection, which offers programs on fee arbitration and an array of other client protection mechanisms.

B. The Court Should Require Training for System Volunteers

The Professional Regulation Committee recommends that the Court require training for the disciplinary system's volunteers. The Committee suggests that the Court consider adding a provision to Rule 2 of the proposed Rules to provide that the Commission on Lawyer Regulation be responsible for the development of a such a training program and materials, and that the Regulation Counsel should assist the Commission in doing so. A separate orientation session should be mandatory for all new appointees, with at one full day of ongoing training for all volunteers per year required.

Regular training is vital to the effective and efficient operation of the disciplinary system. Training helps to ensure consistency in, and the expeditious resolution of, disciplinary matters. Training also provides a forum for volunteers, staff, and respondents' counsel to discuss problems and exchange information about how to enhance the effectiveness and efficiency of this level of the process. As with Regulation Counsel, these training sessions should include medical experts to educate volunteers about substance abuse, gambling, mental health and issues relating to aging lawyers. Training should also address issues relating to the use of technology in the practice of law, including marketing.

Another component of the recommended required training should include education about the disciplinary process, its purpose, and the role the professional staff and volunteers serve in the system. For example, regarding the current Ethics Committee's or proposed Investigative Committee's role in making probable cause determinations, training should emphasize how at that stage of the proceedings the volunteers are not charged with determining the merits of a case. In the Professional Regulation Committee's experience, volunteer lawyers and nonlawyers who perform the probable cause finding role often confuse the probable cause finding function with that of adjudicating the merits of a case.

Consistent with Recommendation Twenty, the Professional Regulation Committee recommends that training sessions for all system volunteers, not just adjudicators, address how to apply the ABA Standards for Imposing Lawyer Sanctions. This will strengthen consistency in the how public and private sanctions are imposed in the Guam system. The soon to be published Second Edition of the *Annotated ABA Standards for Imposing Lawyer Sanctions* can assist the volunteers in enhancing the consistency with which they recommend sanctions.¹⁷⁰

All training materials should be made available to the volunteers electronically and should be updated regularly. Training materials should include all rules, statutes, policies and procedures of the disciplinary system, an organizational chart clearly identifying the volunteer members' roles within the system, samples of exemplary reports, sample scheduling and prehearing conference orders, applicable time guidelines for processing cases, and relevant court cases. In addition, as noted at page forty-six, an electronic and searchable library of all the Court's disciplinary opinions and summaries of private reprimands should be created and should be accessible publicly accessible. System volunteers should receive training regarding the new searchable library of disciplinary precedent, so that they can use it effectively. Regulation Counsel should update volunteers upon completion of any training by that individual to ensure relevant information and materials are conveyed to volunteers.

When financially feasible, system volunteers should attend National Organization of Bar Counsel meetings. Many jurisdictions send their system volunteers to these meetings for training, and this provides them with an excellent opportunity to learn first-hand from other regulatory counsel and volunteers who perform like functions.

¹⁷⁰ See <https://www.americanbar.org/products/>.

VII. PROCEDURES

Recommendation 13: Time Guidelines for Each Stage of the Disciplinary Process Should Be Developed, and Respondents Should be Timely Notified About the Pendency of Complaints

Commentary

One area of concern identified by interviewees at all levels related to the time that it takes for investigations to be completed. As there are not many formal disciplinary charges filed, and none have proceeded to hearing in many years, concerns about the timeliness of the process at this level were fewer. The Consultation Team's review of files and the docket of pending matters supports the concerns of interviewees about delay at the investigative level. It is important to note that some delay, in the Consultation Team's view, is attributable to the current lack of technology resources, and because Guam has only one Regulation Counsel who currently does not have the assistance of an investigator. In other cases, some is delay related to litigation about the appropriateness of Regulation Counsel's request or subpoenaing of information. As noted in Recommendations Eight and Nine, the Professional Regulation Committee recommends the addition of an investigator to assist the Regulation Counsel, as well as enhanced technology resources, including a technology driven case-management system.

There are places in the current and proposed Rules where certain actions are required to take place within a given time. Most relate to proceedings on specifications of charges/formal charges, and the filing of objections challenging the Adjudicative Committee's or proposed Hearing Panel's recommendation.¹⁷¹ Others relate to summary suspensions, reciprocal disciplinary proceedings, and duties of disciplined lawyers. It is, and should remain, possible for the parties to obtain extensions of time when appropriate. The inclusion of these requirements is laudable, but they are different than comprehensive caseload processing guidelines for the investigation and prosecution of matters.

A. The Commission and Regulation Counsel Should Develop Directory Time Guidelines for Matters

The Professional Regulation Committee recommends that the Court require the new Commission, in consultation with Regulation Counsel, to develop and publish comprehensive caseload processing guidelines for the investigation and prosecution of matters. Such guidelines should be directory, and the failure to abide by them should not impact the outcome of matters as a statute of limitations would. Rather, these guidelines are a means by which to gauge the efficiency of the system, identify systemic problems and develop solutions that will allow for optimal caseload processing. Such time standards will also assist the Commission in conducting Regulation Counsel's annual review as set forth in proposed Rule 2(e)(2).

The ABA Model Rules for Lawyer Disciplinary Enforcement suggest that evaluation, investigation, and the filing and service of formal charges for less complicated matters should generally be accomplished within six months; complicated matters should generally reach this

¹⁷¹ See, e.g., Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 21 and 29.

stage within twelve months.¹⁷² The resolution of formal charges should take no longer than six months (less time for matters that are not complex or are resolved by consent) from their filing to issuance of reports and recommendations. It is notable that the current and proposed Rules require the system's adjudicators to file their reports and recommendations within sixty days after the conclusion of a hearing.

B. Respondents Should Receive More Timely Notice of Complaints, and Regulation Counsel Should Better Inform Them and Complainants About the Status of Matters

The Consultation Team heard concerns about the timeliness of notice of complaints to respondents and follow-up communications with complainants about matters. The Team observed from files and heard from interviewees that respondents had not been timely notified of the pendency of an investigation into their conduct, sometimes for years. Their responses were sought close to the end of the investigation when the matter was approaching a probable cause determination to file specifications of charges. It appeared that in a few instances, years after the fact, respondents learned that complaints had been filed against them and had been dismissed without notification that a matter had ever been pending.

Current Rule 18 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings provides that "... the complainant shall be notified, by the prosecuting counsel, in writing, within a reasonable time, of the disposition of a matter." However, the Consultation Team was advised by interviewees and observed in its review of files that while complainants ultimately were advised of the disposition of their complaint, sometimes requests about the status of proceedings went unanswered. The same was true regarding some requests by respondents about the status of their cases.

The Professional Regulation Committee recommends, in the interest of fairness and to enhance the efficiency of investigations, that respondents be provided with more timely notice of complaints, except under extenuating circumstances such as pending litigation or criminal investigation, where there is a risk that a disciplinary or other law enforcement investigation could be jeopardized. In addition to enhancing fairness and increasing the efficiency with which complaints are processed, timely notice to lawyers that they are the subject of a complaint allows them to timely and properly fulfill any reporting obligations to professional liability insurers and others (e.g., bar admissions authorities or on applications for judicial appointment).

The Committee suggests, consistent with national practice, that the Court amend the proposed Rules to provide that upon receipt of a complaint and determination that an investigation is appropriate, Regulation Counsel should provide the respondent with a copy of the complaint and request a response within fourteen days. Reasonable and limited extensions of time should be permitted. The Court may wish to consider adding language to the proposed Rules limiting the number of requests for extensions of time to respond to a complaint that a respondent may seek. Generally, unless there is a reason not to do so, such as pending litigation between the complainant and respondent, the complainant should receive a copy of the respondent's response and be provided an opportunity to reply within fourteen days. If necessary, as part of the conducting of a

¹⁷² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 & cmt. These time standards are based upon the recommendations of the National Organization of Bar Counsel.

full and complete investigation, Regulation Counsel should ask the respondent to promptly provide any additional response to the complainant's reply.

The Consultation Team heard from some interviewees about inconsistencies in the levels to which complainants and respondents were kept apprised of the status of matters during investigations and formal proceedings. A few interviewees commented that they were unable to obtain information about the status of their complaint for long periods of time. Both the respondent and complainant should be apprised of the status of proceedings and should receive regular updates as their matters progress through the disciplinary system.¹⁷³

¹⁷³ ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(B)(6).

Recommendation 14: Disciplinary Proceedings in Guam Should Be Public After The Filing and Service of Formal Charges

Commentary

Rule 2 of the Bar of Guam Ethics Committee Rules of Procedure sets forth the requirements for confidentiality of lawyer disciplinary proceedings. All disciplinary proceedings are confidential until the Ethics Committee has filed its proposed disciplinary order with the Supreme Court of Guam or has issued a public reprimand. That would change under proposed Rule 16, which provides that disciplinary proceedings become public ninety days after the filing and service of formal charges. Disability proceedings will be confidential, except that any order placing a lawyer on disability inactive status will be public. The Professional Regulation Committee urges the Court to adopt proposed Rule 16, which includes a provision permitting protective orders.

It is not uncommon for complainants to provide to the disciplinary agency records and other documents that contain personal, sensitive or otherwise private information. Such materials often include tax returns, bank records, health records and records relating to loans and other financial transactions. Complainants may not be sophisticated enough to understand the ramifications of providing such materials or they do so thinking that they will be held in confidence by the system. Respondents, too, may provide such documents as part of a response to a complaint. For example, they may provide copies of checks and other bank records that may contain not only account information, but also the names of other clients, the identity of endorsees, and other personal information. In numerous circumstances, such as when there is a dispute as to whether funds provided to a lawyer are a fee or monies to be held by the lawyer on behalf of a client, it is not uncommon for a disciplinary agency to request the lawyer's tax returns.

That the Court's Subcommittee has included a provision in proposed Rule 16 allowing for protective orders is laudable. It allows the Court to demonstrate that the discipline system is transparent and accountable to the public, but cognizant of legitimate privacy and other liability-related concerns. For example, as the Court is aware, identity theft is a continuing and growing problem. Properly drawn protective orders is a better approach to balance the public interest against potential harm that may result from the release of specific information after a finding of probable cause and the filing of formal charges.

With one or two exceptions, all lawyers interviewed by the Consultation Team expressed strong opposition to proposed Rule 16. They primarily cited to potential harm to lawyers' reputations due to what they perceived as risks of frivolous complaints coupled with the small size of the Guam bar and population. While their arguments in favor of retaining the status quo were thoughtful, they were, in the Professional Regulation Committee's experience, consistent with concerns raised in jurisdictions of all sizes where courts eventually made changes akin to those set forth in proposed Rule 16 (and Rule 16 of the ABA Model Rules for Lawyer Disciplinary Enforcement). Lawyers in the few remaining jurisdictions where disciplinary proceedings are confidential until the Court issues an order imposing public discipline continue to voice those concerns about the dangers of lawyers being subject to a public airing of frivolous or unfounded allegations, and cite to factors they believe are unique to their jurisdiction, including the size of their lawyer population and the prevalence of small towns where there may only be a few

practitioners. The Professional Regulation Committee is sensitive to these concerns, but does not believe they merit retaining the status quo. The experience of jurisdictions of all sizes has proven those fears have not translated into reality.

The McKay Commission heard these complaints prior to the adoption of its Report in 1992, by the ABA House of Delegates. Recommendation Seven of that Report, which urges that disciplinary proceedings be made public upon the filing and service of formal charges, notes that the evidence contradicts those who fear unjust damage to lawyers' reputations.¹⁷⁴ The experience of those jurisdictions that have more open disciplinary systems demonstrates that lawyers are adequately protected and that public protection requires eliminating secrecy in the process. *See, e.g., Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 326 S.E. 2d 705 (W.Va. 1984).

In 1989, the Illinois Supreme Court's Blue-Ribbon Committee to Study the Functions and Operation of the Attorney Registration and Disciplinary Commission issued a report recommending that the Court amend Supreme Court Rule 766 to provide that disciplinary proceedings in the state become public after the filing and service of formal charges. Over the objections of the organized bar, which cited reputational harm to charged lawyers, including those publicly vindicated from wrongdoing, the Court adopted this change. The fears of the bar were not realized.

The Supreme Court of New Jersey, in 1994, amended its rules of lawyer disciplinary procedure to make disciplinary matters public at the formal complaint stage. In doing so, the Court adopted the recommendation of the 1993 Report of the New Jersey Ethics Commission. In a July 14, 1994 Report describing its actions to open the system, the Court stated that the values served by doing so far outweighed the risk that an ethical lawyer, unfairly accused, might suffer from damaging publicity. New Jersey lawyers vehemently opposed this change. A May 2002 article in the New Jersey Law Journal memorializing Raymond R. Trombadore, chair of the McKay Commission, noted that those fears did not materialize.

In May 1994, the President-Elect of the New Hampshire State Bar Association wrote an article for the New Hampshire State Bar News decrying the secrecy of lawyer disciplinary proceedings and urging that the New Hampshire Supreme Court open lawyer disciplinary proceedings to the public at an earlier stage. A copy of that article is attached to this Report as Appendix A. Later that year, the New Hampshire Supreme Court Professional Conduct Committee recommended making lawyer disciplinary proceedings in the state open to the public after the probable cause determination. The State Bar President at the time, who had written the earlier article, supported that proposed change in October 1994. A copy of that article is attached as Appendix B. Effective March 1996, amendments to New Hampshire Supreme Court Rule 37 required that the public be provided access to disciplinary information at the time Notices of Charges were issued. *See, e.g., Petition of Brooks*, 678 A. 2d 140 (N.H. 1996). This Rule applied to complaints received by the disciplinary system on or after March 7, 1996. In January 2000, the Supreme Court of New Hampshire opened the system further by amending Part 17 of Supreme Court Rule 37 to provide that with respect to complaints filed on or after April 1, 2000, non-docketed grievances would be available for public inspection for a period of two years. Docketed matters that are dismissed after

¹⁷⁴ MCKAY REPORT, *supra* note 2, at 33.

investigation become public upon the date of dismissal. The Professional Regulation Committee is not recommending that the Supreme Court of Guam expand public availability of records in the same manner as New Hampshire.

Until 2006, Section 25 of Rule 9 of the Tennessee Supreme Court Rules stated that lawyer disciplinary proceedings in Tennessee were confidential until and unless a recommendation for the imposition of public discipline was filed with the Court. In 2003, the Professional Regulation Committee conducted a consultation of the Tennessee lawyer disciplinary process at the Court's request. In addition, the Court directed a study of the system by the Tennessee Board of Professional Responsibility Advisory Committee. After both entities submitted their reports and recommendations, and following solicitation and consideration of public comment as occurred in Guam, in April 2006, the Tennessee Supreme Court amended Rule 9 in several ways, including amendments to Section 25 of Rule 9 to provide that disciplinary proceedings would become public upon:

(a) a recommendation for the imposition of public discipline, without the initiation of a formal disciplinary proceeding pursuant to Section 8.2, is filed with the Supreme Court by the Board; or (b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2; or (c) the respondent-attorney requests that the matter be public; or (d) the investigation is predicated upon conviction of the respondent-attorney for a crime.¹⁷⁵

The Court later amended its confidentiality rule in 2013 (now Section 32.2 of Rule 9) to clarify which records would be open for public inspection absent issuance of a protective order.¹⁷⁶

Commentary to Rule 16 of the ABA Model Rules for Lawyer Disciplinary Enforcement states:

Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to protect the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct has been exonerated after a hearing behind closed doors is suspect. The same disposition will command respect if the public has had access to the evidence.

Lawyers are rightly concerned about their reputations. However, the Court must be concerned about public protection and its reputation in regulating the profession in the public interest. The public expects that judicial proceedings will be public and that it and the media will be free to attend and comment upon them. While it is likely that neither the public nor the media will be interested in attending most disciplinary hearings, the public and the media believe that they should

¹⁷⁵ *In Re: Amendment to Rule 9, Rules of the Tennessee Supreme Court* (Apr. 25, 2006), available at https://www.tncourts.gov/sites/default/files/rule_9_33_10aord.pdf.

¹⁷⁶ *In Re: The Adoption of Amended Tennessee Supreme Court Rule 9* (Aug. 30, 2013), available at https://www.tncourts.gov/sites/default/files/supreme_court_order_amending_supreme_court_rule_9_with_apendix_-_8-30-2013.pdf.

be able to do so. As noted in the McKay Report, “[S]ecret records and secret proceedings create public suspicion regardless of how fair the system actually is.”¹⁷⁷

Should the Court ultimately decide to adopt proposed Rule 16 as recommended in this Report, it would bring disciplinary practice in Guam in line with the more than 40 other jurisdictions where disciplinary proceedings become public at this stage or earlier.¹⁷⁸ That includes jurisdictions with small lawyer populations and a more rural demographic, albeit not as small as Guam.

Of particular importance, the Guam Rules for Judicial Disciplinary Enforcement provide that after the filing and service of formal charges against a judge, the proceedings are public, unless they are incapacity proceedings.¹⁷⁹ That formal judicial disciplinary proceedings in Guam are public undercuts, in the Professional Regulation Committee’s view, the argument that the size of the Guam bar merits continued confidentiality until the imposition of a public sanction. While not a public official like a judge, a lawyer, “as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice... The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”¹⁸⁰

It is also notable that proposed Rule 16 provides lawyers in Guam with a protection that judges do not have in this context. Proposed Rule 16 provides for a ninety-day period before formal charges become public after they are filed and served. The Professional Regulation Committee recommends eliminating that ninety-day period, consistent with the Model Rules for Lawyer Disciplinary Enforcement and national practice.

By keeping matters prior to the filing and service of a formal charge confidential, including the investigation, the Court would protect the respondent from any publicity regarding unfounded accusations. Further, providing the Regulation Counsel with the additional technology resources and an investigator will, as recommended above, enhance confidence of the bar and the public that allegations of misconduct will be thoroughly investigated and scrutinized, and that a case will not proceed if the allegations are frivolous.

The Professional Regulation Committee also commends the Court’s Subcommittee for including paragraph (j) of proposed Rule 16. Paragraph (j) makes clear that the strictures of proposed Rule 16 apply to disciplinary system officials and employees, not to complainants. Currently, complainants are asked to respect system confidentiality “as an important component of the attorney discipline system.”¹⁸¹

Restrictions on complainants’ in other jurisdiction (sometimes referred to as “gag rules”) have been found to be unconstitutional infringements on First Amendment rights.

¹⁷⁷ MCKAY REPORT, *supra* note 2, at 38.

¹⁷⁸ Attached to this Report as Appendix C is a chart setting forth the stage at which disciplinary matters become public in each U.S. jurisdiction.

¹⁷⁹ Guam Rules for Judicial Disciplinary Enforcement R. 11(A)(2).

¹⁸⁰ MODEL RULES OF PROF’L CONDUCT, Preamble, Para. [1] & [12] (2019).

¹⁸¹ *Supra* note 50.

For example, in *Doe v. Supreme Court of Florida*, the United States District Court for the Southern District held that Florida Bar Rule 3-7.1, which prohibited complainants/participants in the disciplinary process from disclosing information regarding disciplinary proceedings, violated First Amendment free speech protections.¹⁸² At the time, Rule 3-7.1 prohibited disclosure by complainants of all matters relating to disciplinary proceedings, including records of investigations, files and reports.¹⁸³ The plaintiff in that case was a complainant who had filed a grievance against a lawyer that resulted in the imposition of a private reprimand.¹⁸⁴ The plaintiff wished to speak and publish articles about his complaint and the sanction issued, but feared the issuance of a contempt citation.

In striking down the Florida Rule's prohibitions as improper time, place and manner restrictions on free speech, the District Court found that the Rule improperly prohibited complainants from speaking or writing about the nature of a pending or past disciplinary matter.¹⁸⁵ The Professional Regulation Committee notes that the *Doe* court condemned as overbroad the Florida Rule's prohibition on the disclosure by complainants of allegations of misconduct found to be meritorious and worthy of a private sanction.¹⁸⁶ The District Court in *Doe* also rejected all of the Florida Bar's justifications for upholding the "gag" rule.¹⁸⁷

Citing to the Florida case of *Doe*, the New Hampshire Supreme Court and Supreme Court of Tennessee respectively discussed and rejected various justifications by a disciplinary agency for maintaining a "gag" rule, including claims about the need to protect lawyers' reputations.¹⁸⁸ The *Brooks* case is particularly interesting in that the Supreme Court of New Hampshire decided to consider the challenge to its Rule requiring confidentiality in the disciplinary process even though that Rule had been amended and the question had become moot. Given the significant constitutional question raised by the former Rule, the Court undertook a review of its older Rule. The New Hampshire Supreme Court held that its prior Rule failed to pass First Amendment scrutiny.¹⁸⁹ In addition to being held unconstitutional, imposing such restrictions on complainants can foster resentment and contempt for the disciplinary process, not the confidence and respect it deserves.

In *In re Warner*, the Louisiana Supreme Court held that the "confidentiality requirement imposed upon participants in attorney disciplinary proceedings" under Louisiana's disciplinary procedural rules violated the First Amendment of the United States Constitution.¹⁹⁰ The Louisiana Court noted that in addition to the disciplinary system's volunteers and staff, the term "participant"

¹⁸² *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990).

¹⁸³ *Id.* at 983.

¹⁸⁴ *Id.* at 982.

¹⁸⁵ *Id.* at 985.

¹⁸⁶ *Id.* at 987-88.

¹⁸⁷ *Id.* at 985-88.

¹⁸⁸ See *Petition of Brooks*, 678 A.2d 140 (N.H. 1996) & *Doe v. Doe*, 127 S.W.3d 727 (Tenn. 2004).

¹⁸⁹ *Brooks*, 678 A.2d at 146.

¹⁹⁰ *In re Warner*, 21 So. 3d 218, 262 (La. 2009) (Court also defined participant as "simply one who 'takes part' in the disciplinary proceeding").

includes complainants, witnesses, respondents, and any lawyers retained by them.¹⁹¹ Noting that other courts similarly found such restrictions unconstitutional, the Court in *Warner* determined its disciplinary procedural rule implicitly threatened sanctions against all participants.¹⁹²

¹⁹¹ *Id.* at 233.

¹⁹² *Id.* at 232.

Recommendation 15: The Court Should Add a Terminology Section to the Proposed Rules

The Professional Regulation Committee recommends that the Court add a Terminology Section to any version of the proposed Rules that it adopts. Including a Terminology Section will provide necessary clarity for Guam lawyers and assist in making sure that the Rules are interpreted and understood as intended.

The Consultation Team observed several instances where the current Supreme Court of Guam Rules for the Discipline of Attorneys and Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings used different terms to describe various individuals, sanctions, and processes in the system. The Team also observed places where terminology in one set of Rules did not match that used in the other. The Team understands that, in part, the use of multiple terms to refer to participants, sanctions or procedures is the result of these Rules having not been amended for some time. For example, the Supreme Court of Guam Rules for the Discipline of Attorneys and the Bar of Guam Ethics Committee Rules refer alternatively to “hearing counsel” as well as to “prosecuting counsel.”¹⁹³ It was not immediately clear to the Team that these were intended to refer to the same individual, who is the lawyer known as the “Ethics Prosecutor.”

In addition, the terms “reprimand” and “admonition” appear to be used interchangeably in Rule 19 of the Bar of Guam Ethics Committee Rules. There is no mention of admonitions in Rule 12 of the Supreme Court of Guam Rules for the Discipline of Attorneys. That Rule describes the types of discipline that can be imposed on a lawyer. The Supreme Court of Guam Rules for the Discipline of Attorneys designates “public or private reprimand” as a type of discipline. Later in that same Supreme Court Rule where the publication of discipline is discussed, there is reference to “censure” as well as to a “warning letter,” which is not considered discipline.¹⁹⁴ In national practice, “reprimands,” “censures,” and “admonitions” are different.

¹⁹³ See, e.g., Bar of Guam Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 4, 12 & 16.

¹⁹⁴ Sup. Ct. of Guam Rules for the Discipline of Attorneys R. 12(d).

Recommendation 16: Complainants Should Receive Detailed Dismissal Letters, and the Court Should Adopt a Complainant Appeal Rule

Commentary

The purpose of the lawyer disciplinary process is to protect the public and to ensure that the profession is accountable for misconduct committed by its members, as well as for the actions taken by those charged with disciplinary enforcement (e.g., those performing the Regulation Counsel function as well as the volunteers in the system charged with making decisions). It is important that the disciplinary agency not only be optimally accessible and transparent, and that complainants and respondents be kept apprised of the status and disposition of each matter, but that complainants be provided with a limited ability to appeal dismissal decisions.¹⁹⁵

Under Rule 18 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings, complainants are to be notified within a reasonable time of the disposition of their complaints. Currently, there is no procedure that would allow complainants to appeal the dismissal of their complaint, and the proposed Rules also do not provide for a complainant appeal process. The Consultation Team observed that such dispositions letters, most frequently letters informing complainants of the dismissal of their complaints, are basically form letters. They do not explain in detail why a matter was dismissed.

The Professional Regulation Committee recommends that this practice change, and that Regulation Counsel provide complainants with a more detailed explanation of the basis for a dismissal. Notice to complainants that a matter has been dismissed should include a concise statement of the facts resulting from the investigation and the reasons the matter has been dismissed.¹⁹⁶ In the Professional Regulation Committee's experience, a well-crafted letter that explains the reasons for the dismissal results in fewer contacts by complainants expressing dissatisfaction with the process, and helps decrease skepticism about the agency through this form of transparency.

Detailed dismissal letters to complainants also, in the Professional Regulation Committee's experience, reduce requests to Regulation Counsel for reconsideration of those decisions, and decrease complainant appeals of such dismissals in jurisdictions where that is permitted. Over half of U.S. jurisdictions have rules that permit complainants to appeal the dismissal of their grievance. In a number of jurisdictions where such rules do not exist, the practice is to allow complaints to request reconsideration of dismissals.

The Professional Regulation Committee recommends that the Court add to the proposed Rules a limited appeals process for complainants, and that notice of this right to a limited appeal be provided in the dismissal letter.¹⁹⁷ The Professional Regulation Committee is recommending a process that is less extensive than that in Rule 31 of the ABA Model Rules for Lawyer Disciplinary Enforcement. That Rule provides for a three-tiered complainant appeals process. The Model Rules have long provided for this three-level process because it is important that complainants feel

¹⁹⁵ *Id.* See also ABA Model Rules for Lawyer Disciplinary Enforcement R. 31.

¹⁹⁶ *Supra* note 173.

¹⁹⁷ *Id.*

that their complaints have been heard, and at the time that the Model Rule was adopted, most jurisdictions had no complainant appeal process at all.¹⁹⁸ Further study by the Committee has shown that while the majority of jurisdictions permit limited complainant appeals, nationally only a few jurisdictions (e.g., Louisiana, Michigan, and Iowa) permit a three-level appeal process. Further, the more limited complainant appeals processes have proven fair and effective. The Professional Regulation Committee is considering whether to propose an amendment to the Model Rules to further tailor complainant appeals while ensuring system accountability and public protection.

The Committee suggests that, under the proposed Rules, a complainant who is not satisfied with Regulation Counsel's dismissal at the screening level may, within thirty days of the notice of dismissal, appeal that decision to the Chair of the Investigative Committee. The Investigative Committee Chair can approve the dismissal or direct further investigation. Their decision should be final, and the standard of review should be whether the Regulation Counsel abused his/her discretion in dismissing the complaint at the screening level. Similarly, a one-time complainant appeal to the Chair of the Hearing Panel from the Investigative Committee's decision to not pursue a matter would be appropriate, with the same standard of review.

The Professional Regulation Committee understands that the Court and the Guam Bar Association may be concerned that instituting this limited complainant appeal will result in significant added work. However, in the Committee's experience, when lawyers performing the Regulation Counsel function take time to consistently and fully, but concisely, explain the reasons for dismissals at the screening and post-investigation stage, complainant appeals are limited. And, errors in judgment do happen on occasion.¹⁹⁹ A limited complainant appeal provides a necessary check and balance in the system.²⁰⁰

¹⁹⁸ ABA Model Rules for Lawyer Disciplinary Enforcement R. 31.

¹⁹⁹ ABA Model Rules for Lawyer Disciplinary Enforcement R. 31 Cmt.

²⁰⁰ *Id.*

Recommendation 17: The Court Should Amend The Proposed Rules to Require Prehearing Conferences

Commentary

Based on national practice and the Professional Regulation experience, regular prehearing conferences are an important caseload management tool at the formal charges stage of proceedings. The current Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings recognize this and provide that the Chair of the Adjudication Committee may, if deemed necessary, schedule a prehearing conference to narrow issues and facilitate stipulations.²⁰¹ The proposed Rules similarly provide that prehearing conferences may be held at the discretion of the Hearing Panel or at the request of party.²⁰² The Consultation Team learned that because there have not been many formal proceedings in Guam, and that a majority of them are resolved by settlement, that prehearing conferences have not been regularly held.

While there is no way to predict the number of formal proceedings in any given year, and which of those may proceed to a contested hearing or be resolved by negotiated disposition, the Professional Regulation Committee recommends that the Court amend the proposed Rules to provide for at least one mandatory prehearing conference to be held soon after the expiration of the time in which a respondent's answer to formal charges must be filed.²⁰³ By then, contested issues in the case should be framed. Subsequent prehearing should occur as needed.

So that the initial prehearing conference has maximum effectiveness, the adjudicator of formal charges and the parties should address the following:

- a. a deadline for the respondent to file an answer if not yet filed;
- b. simplification of issues;
- c. appropriate elimination of charges and defenses;
- d. amendments to pleadings;
- e. identifying where the parties can stipulate to facts and the admissibility of evidence;
- f. pre-trial rulings on the admissibility of evidence;
- g. identification and limitation of occurrence, character, and expert witnesses, including explanations of the subject matter of their proposed testimony;
- h. limitations on discovery, including the setting of deadlines and limitations on the number and length of depositions;
- i. the consideration of hearing dates and its estimated length;
- j. deadlines for the exchange of exhibits between the parties and submission of exhibits to the adjudicator;
- k. anticipated evidentiary and legal issues to be raised at trial; and
- l. any other matters that will aid in the prompt disposition of a case.

²⁰¹ Guam Bar Ethics Comm. Rules of Procedure for Disciplinary Proceedings R. 25(b).

²⁰² Proposed Guam Rules for Lawyer Disciplinary Enforcement & Disability Proceedings R. 18(e).

²⁰³ While the Model Rules for Lawyer Disciplinary Enforcement, like the proposed Rules, provide for discretionary prehearing conferences or that they be held at the request of a party, the Professional Regulation Committee is a change to provide for one mandatory pre-hearing conference based on changes in national practice since adoption of the Model Rules and increases in the complexity of many disciplinary matters.

Subsequent to each prehearing conference, the Hearing Panel member who held the prehearing conference should enter an order setting forth all action taken that also recites any agreements between the parties. These pre-trial orders should be enforceable. Prehearing conferences should be held in person unless not practicable. Otherwise, they can be held telephonically. The Professional Regulation Committee also suggests that consideration be given to recording prehearing conferences by some means if that is not already done.

Recommendation 18: The Court Should Determine Whether the Statute of Limitations Conflicts With Record Retention Rules, Thereby Impacting the Ability of Lawyers to Defend Themselves

Currently, Rule 7 of the Bar of Guam Ethics Committee Rules of Procedure for Disciplinary Proceedings states that the Ethics Committee cannot consider a complaint against a lawyer unless it is “filed with or initiated by the Committee within six years from the time the complainant knew or should have known the facts upon which the complaint was filed. The Committee may make exceptions to this rule based upon violations of the fiduciary relationship between attorney and client which are concealed from the client for substantial periods of time.” The proposed Rules provide that a “complaint against a lawyer shall be filed within six years of the time that the complainant discovers or reasonably should have discovered the misconduct. There shall be no statute of limitations for misconduct alleging fraud, conversion, or conviction of a serious crime, or for an offense the discovery of which has been prevented by concealment on the part of the lawyer.”

The ABA Model Rules for Lawyer Disciplinary Enforcement recommend that there be no statute of limitations in disciplinary proceedings.²⁰⁴ The purpose of lawyer discipline is to protect the public from those who are no longer deserving of the privilege to practice law. The conduct of a lawyer, no matter when it occurs, is always relevant to the question of fitness to practice law.²⁰⁵ The passage of time between when the misconduct occurred and the filing of a complaint may be relevant to the appropriate level of sanction to be imposed in a matter that proceeds for formal charges, but such delay in filing a complaint should not be determinative of whether the disciplinary agency should be able to investigate.²⁰⁶ Eliminating the statute of limitations would not prevent the triers of fact or the Court from applying the doctrine of laches if the delay resulted in unfair prejudice to the respondent’s ability to procure witnesses and evidence. The Professional Regulation Committee understands that the doctrine of laches may be used in Guam.

That the statute of limitations in the proposed Rules allows disciplinary proceedings for certain types of egregious misconduct is better than a rule of total preclusion. The Committee suggests in addition to the circumstances set forth in the proposed Rule to which the six-year statute of limitations does not apply, that the Court consider adding matters where the complainant was under the age of majority at the time of the misconduct or otherwise unable to file a complaint due to mental or physical incapacity, where the respondent is engaged in a continuing course of misconduct, or previously undisclosed misconduct. Eliminating these types of misconduct from the reach of the statute of limitations ensures optimal public protection.

Rule 6 of the current Supreme Court of Guam Rules for the Discipline of Attorneys requires lawyers to maintain for five years records regarding the handling, maintenance and disposition of client and third-party funds and property. In addition, lawyers must retain up-to-date books and records demonstrating their compliance with Rule 1.15 of the Guam Rules of Professional Conduct. Rule 1.15 of the Guam Rules of Professional Conduct provide that lawyers are required to maintain records of funds and property belonging to clients and third persons for a period of

²⁰⁴ ABA Model Rules for Lawyer Disciplinary Enforcement R. 32 Cmt.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

five years after the termination of the representation. While the proposed Rules eliminate from coverage of the statute of limitations conversion and fraud, there may be other complaints about a lawyer's conduct for which these documents and records will be relevant. The Court may wish to consider whether to extend the time for which Guam lawyers are required to retain records under Professional Conduct Rule 1.15 in the context of how that five-year time period may impact a lawyer's ability to defend himself or herself in the context of the six-year statute of limitations and beyond.

VIII. DIVERSION

Recommendation 19: The Court Should Adopt A Diversion Rule and the Bar Association of Guam Should Develop Programs to Support Referrals

Commentary

An effective lawyer disciplinary system is comprised of several components in addition to the investigatory/prosecutorial functions, including programs offering law practice management assistance and lawyer assistance programs (see Recommendation Six).²⁰⁷ Other elements can include programs such as ethics and trust accounting school. In Guam, there currently exists no formal mechanism for diverting matters involving lesser misconduct to programs like these. Interviewees, when asked whether the Court should adopt an alternatives-to-discipline rule and the Guam Bar Association should implement programming to which lawyers could be referred, were unanimous in their endorsement of these ideas. They recognized that such programs benefit both lawyers and clients, result in a better use of disciplinary system resources, and provide an opportunity for the Bar to provide enhanced member services. Given the success of alternatives-to-discipline programs nationwide, the Professional Regulation Committee urges the Court to enact rules and procedures to create such a mechanism in Guam.

Nationwide, a majority of complaints made against lawyers allege instances of lesser misconduct. The consultation team did not receive information indicating that Guam is an exception in this regard. While technically violations of the rules of professional conduct, single instances of minor neglect or minor incompetence rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These complaints are almost always dismissed by the disciplinary agency. While these matters should be removed from the disciplinary system, they should not be simply dismissed. Such grievances should be handled administratively via referral to bar associations programs such as law practice management assistance.

Participation in the program should not be used as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanctions would be less than disbarment, suspension or probation.²⁰⁸ The existence of one or more aggravating factors does not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The existence of prior disciplinary offenses should not necessarily make a lawyer ineligible for referral to the alternatives to discipline program. Consideration should be given to whether the lawyer's prior offenses are of the same or similar nature, whether the lawyer has been placed in the alternatives to discipline program for similar conduct and whether it is reasonably foreseeable

²⁰⁷ ABA Model Rules for Lawyer Disciplinary Enforcement R. 1(A).

²⁰⁸ ABA Model Rules for Lawyer Disciplinary Enforcement R. 11(G).

that the lawyer's participation in the program will be successful. Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

The Court should consider adopting a Rule with the following components:

- 1) In matters involving lesser misconduct, prior to the filing of formal charges, Regulation Counsel may refer the lawyer to the Alternatives-to-Discipline Program. Lesser misconduct is conduct that does not warrant a sanction restricting the lawyer's license to practice law. Acts involving the misappropriation of funds, conduct causing, or likely to cause, substantial prejudice to clients or others, criminal conduct and conduct involving dishonesty, fraud, deceit or misrepresentation are not minor misconduct;
- 2) The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record;
- 3) Regulation Counsel should consider the following factors in deciding whether to refer a lawyer to the program:
 - (1) whether the presumptive sanction for the alleged misconduct is likely to be no more severe than reprimand or censure;
 - (2) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;
 - (3) whether aggravating and mitigating factors exist; and
 - (4) whether diversion has already been tried;
- 4) Regulation Counsel and the respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by both parties, should set forth with specificity the terms and conditions of the plan and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to disciplinary counsel. A practice and/or recovery monitor should be identified where necessary, and the monitor's duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures may be made to Regulation Counsel. The contract should include a specific acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original charge(s) filed. The contract should be amendable upon agreement of the lawyer and Regulation Counsel. The agreement should also provide that the respondent pay all costs incurred in connection with the contract;
- 5) The lawyer should have the right not to participate in the program. If he or she does not agree to diversion, the matter should proceed as if no referral had been made. While a respondent should suffer no adverse consequences for refusing to participate, that refusal is a factor that may be considered in determining whether to recommend the filing of formal charges. Regulation Counsel may recommend formal charges even if the original grievance alleged lesser misconduct, or may recommend dismissal;

- 6) After an agreement is reached, the disciplinary complaint should be dismissed pending successful completion of the terms of the contract. The Guam Bar Association should provide verification of successful completion of the program if that is where the lawyer has been referred to complete the contract. Otherwise, the assigned practice or recovery monitor should provide that information to Regulation Counsel;
- 7) The contract should be terminated automatically upon successful completion of its terms. This constitutes a bar to further disciplinary proceedings based upon the same allegations; and
- 8) A material breach of the contract terminates the lawyer's participation in the program and disciplinary proceedings may be resumed or reinstated.

Typically, alternatives-to-discipline programs include law practice management, lawyer assistance programs, and trust accounting modules. Currently, the Guam Bar Association does not have any of these. As discussed above, support for creation of a Lawyer Assistance Program was overwhelming, and Recommendation Six discusses the development and implementation of such a program.

The Consultation Team discussed with interviewees the benefits of the Bar instituting a law practice management program.²⁰⁹ Over twenty state bar associations offer programs to help lawyers improve law practice management skills.²¹⁰ Expanding the availability of a law practice management program so that it is available generally and not just to lawyers referred from the disciplinary agency would allow the Guam Bar Association to further demonstrate its value to its members, particularly to young lawyers, many of who are entering solo practice and need the resources offered by this program to help them succeed and avoid disciplinary complaints.

The Court, Regulation Counsel, and the Bar each have distinct and important roles to play in successfully implementing this proposed initiative. The Bar's active role in this process is vital to the success of the diversion process and will enhance the public's perception of the profession and the disciplinary system. The Professional Regulation Committee recommends that the proposed new Commission, Regulation Counsel, and the Guam Bar Association establish a committee to study the development and implementation a law practice management program. Information available to the Professional Regulation Committee indicates that the Bar can adequately resource such a program with volunteers and minimal funds from its assets, especially with the Court funding additional disciplinary expenses via the new registration fee.

²⁰⁹ The Professional Regulation Committee can provide additional resources to the Guam Bar Association regarding law practice management programs at other state bar associations, in addition to contacts with law practice management advisors who may be able to assist in the development and implementation of such programs. The ABA Law Practice Division offers resources on its website including: *Planning Guide to Start a Bar-Sponsored Practice Management Assistance Program*, <http://www.americanbar.org/content/dam/aba/administrative/barservices/archive/library/4479.authcheckdam.pdf> (last visited Apr. 30, 2019).

²¹⁰ See https://www.americanbar.org/groups/bar_services/publications/bar_leader/2006_07/3106/lpm/.

IX. SANCTIONS

Recommendation 20: The Court Should Adopt the ABA Standards for Imposing Lawyer Sanctions.

Commentary

The *ABA Standards for Imposing Lawyer Sanctions* (Sanctions Standards) provide a framework for ensuring consistency in the recommendation and imposition of lawyer disciplinary sanctions. That framework requires consideration of the rule violated, the lawyer's mental state, the extent of the injury, and aggravating and mitigating circumstances. The Sanctions Standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. They attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time.

The Supreme Court of Guam has not adopted the ABA Standards for Imposing Lawyer Sanctions, and the current rules of the Guam Bar Association and the Court do not require the current Ethics Committee and Adjudicative Committee to use them as guidance. Rule 10(c) of the proposed Rules provide that certain factors set forth in the Sanctions Standards be considered after a finding of misconduct. The inclusion of this provision in the proposed Rules is a positive addition. However, the Professional Regulation Committee recommends that in order to enhance the consistency with all sanctions imposed and recommended to the Court, that the Court issue an order adopting the Sanctions Standards in toto, and require their use in the adjudication of matters and citation reports and recommendations to the Court and in any post-trial submissions by the parties, in addition to other authority. The Annotated *ABA Standards for Imposing Lawyer Sanctions* can further assist Regulation Counsel and system volunteers in enhancing the consistency with which they recommend sanctions.²¹¹

²¹¹ See ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2019). This book is available for purchase at the ABA Web Store at: <https://www.americanbar.org/products/>.

Recommendation 21: The Court Should Adopt a Separate Rule for the Imposition, Monitoring and Revocation of Probation

Commentary

Both the current and proposed Rules provide for probation as a form of discipline. Under the current Rules for the Discipline of Attorneys, the Court may impose probation as a sanction, in its discretion, as a sanction itself or in combination with other forms of discipline.²¹² Proposed Rule 10(a)(3), consistent with Rule 10(a)(3) of the ABA Model Rules for Lawyer Disciplinary Enforcement, provides that the Court may impose probation for a period not to exceed two years. The Model Rules provide that probation may be imposed also by the Disciplinary Board or Regulation Counsel if the respondent consents to its imposition. But if the Board or Regulation Counsel recommend probation and the respondent does not consent, formal charges may be initiated. The proposed Rules do not include this provision regarding consensual probation, but it does appear that under proposed Rule 21, discipline on consent could include an agreement for the imposition of probation, akin to the Model Rules.

The proposed Rule states that probation may be extended if the Investigative Committee recommends doing so for up to another two years. Pursuant to national practice, it is most often Regulation Counsel who recommends the extension of probation because that office is responsible for monitoring probation. Proposed Rule 10(a)(3) states that the Court may terminate probation upon the filing of an affidavit by the disciplined lawyer and probation monitor attesting to completion of the probationary conditions and that probation is no longer necessary.

The Professional Regulation Committee commends the Court and its Subcommittee for continuing to include probation as a form of sanction. It is laudable that both the Court and its Subcommittee recognize that placing a lawyer on probation protects the public and acts to prevent future misconduct by addressing the problem(s) that led to the filing of disciplinary charges. Probation allows a lawyer who can still perform legal services to do so while being properly treated and monitored in the interest of the public. As noted in the proposed Rules, and the Model Rules, probation is only an appropriate sanction where there is little likelihood that the lawyer will harm the public during the period of treatment and rehabilitation.

There are no provisions in the proposed Rules setting forth specific requirements for the imposition, monitoring or revocation of probation. The Professional Regulation Committee suggests that it would be helpful for the Court to, in addition to proposed Rule 10(a)(3), draft and adopt a complementary procedural rule that does so. Adopting a separate, more detailed procedural rule relating to probation would best achieve the Court's and the bar's goals of successful rehabilitation of lawyers and the protection of the public.

This additional procedural rule should provide necessary guidance to the disciplinary agency and lawyers with respect to the types of cases for which probation is appropriate. It should set forth in general terms the requirements for imposition of probation. These include whether:

²¹² Sup. Ct. of Guam Rules for the Discipline of Attorneys, R. 12(b).

- 1) the lawyer can perform legal services without causing the courts or legal profession to fall into disrepute;
- 2) the lawyer is unlikely to harm the public during the period of rehabilitation;
- 3) necessary conditions of probation can be formulated and adequately supervised;
- 4) the respondent has a temporary or minor disability that does not require transfer to inactive status; and
- 5) the respondent has not committed misconduct warranting disbarment.

The rule should provide that the order placing a respondent on probation must state unambiguously each specific condition of probation. Placing the conditions of probation in the Court's order lets the respondent know exactly what is expected and what will constitute a lack of compliance that could lead to a revocation of probation and the imposition of suspension. The conditions should consider the nature and circumstances of the misconduct and the history, character and condition of the respondent. Specific conditions may include:

- 1) supervision of client trust accounts as the Court may direct;
- 2) limitations on practice;
- 3) psychological counseling and treatment;
- 4) abstinence from drugs or alcohol;
- 5) random substance testing;
- 6) restitution;
- 7) successful completion of the Multistate Professional Responsibility Examination;
- 8) successful completion of a course of study;
- 9) regular, periodic reports to the Office of the Counsel for Discipline; and
- 10) the payment of disciplinary costs associated with the imposition and enforcement of the probation.

The terms of probation should specify periodic review of the order of probation and provide a means to supervise the progress of the probationer. There also is no specific procedure currently in place for screening and selecting probation monitors. There are no guidelines or rules in place for the disciplinary agency to work with the probation monitor selected for a respondent to ensure that the terms of probation are met. The Rules do not provide reporting requirements for monitors.

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. Consistent with national practice, the Professional Regulation Committee recommends that this new rule provide for the continued administration of probation under the control of the office Regulation Counsel and for the selection and appointment of appropriate monitors. The newly created lawyers' assistance program can assist with identifying proper monitors. The Committee believes that promulgating a policy for the screening and selection of a regular roster of qualified probation monitors by the office of Regulation Counsel will better serve the system, the public and respondents.

The Regulation Counsel should work with the Guam Bar Association and the new lawyers' assistance program to develop criteria for screening and selecting probation monitors. The Regulation Counsel, with input from these individuals, should develop qualifications for probation monitors; an overview of their duties; policies and procedures for appointing monitors; a method for supervising the monitors; policies and procedures regarding monitor reports to Regulation

Counsel; and policies and procedures for the removal of monitors by that individual when necessary. The monitor's only role should be to supervise the monitored lawyer in accordance with the terms of the probation and to report compliance or noncompliance with the Court's order to Regulation Counsel. The monitor is not a counselor or sponsor for the probationer. Any separate probation rule adopted by the Court should provide that the probationer must be required to sign a release authorizing the monitor to provide information to the office of Regulation Counsel.

Adequate and regular training of probation monitors is vital to the successful use of probation. Regulation Counsel should work with the lawyers' assistance program, the Guam Bar Association, and other appropriate professionals to develop the training program. Other jurisdictions that have training programs for probation monitors in place should be consulted. All probation monitors should be required to attend training at least bi-annually.

Probation monitors should be required to immediately report to Regulation Counsel any instances of noncompliance. The new rule relating to probation should provide that upon receipt of such a report, Regulation Counsel may, if appropriate, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation, and requesting an order to show cause why probation should not be revoked and any stay of suspension vacated. The Professional Regulation Committee does not believe that Regulation Counsel should have to obtain the approval of the Investigative Committee to do so. The Court should provide the probationer with a short time period, fourteen to twenty-one days, in which to respond to the order to show cause. After consideration of the lawyer's response to the order to show cause, the Court may take whatever action it deems appropriate, including revocation of the probation and the imposition of the stayed suspension or modification of the terms of the probation. This summary proceeding will save time and resources and promptly remove the risk to the public and the profession that a lawyer who is not complying with the terms of probation poses.

Additionally, the Professional Regulation Committee commends the Court's Subcommittee for including monitors in proposed Rule 12 that provides for immunity. Monitors should be specifically identified and covered by immunity for carrying out their official duties.

Recommendation 22: Proposed Rule 11 Should Be Revised to Ensure Consistency With Proposed Rule 10

Commentary

Proposed Rule 11(c) seems to contemplate that a private admonition may be imposed without the respondent's consent if the Investigative Committee determines that is appropriate, the Rule 4(e)(1) member approves, the respondent is notified of such decision and within fourteen days does not demand that the matter be resolved through formal charges. The failure to make such demand within fourteen days would constitute consent and result in the issuance of the private admonition. This proposed provision of Rule 11 conflicts with proposed Rule 10, which sets forth the types of permissible sanctions. Rule 10(a)(5) sets forth the requirements for the issuance of a private admonition by the Investigative Committee or Hearing Panel *with* the consent of the respondent. Proposed Rule 10 does not provide for admonitions where the respondent does not consent. As a result, the Professional Regulation Committee recommends that the Court revise proposed Rule 11(c) to be consistent with proposed Rule 10, which would also eliminate the role of the Rule 4(e)(1) member.

Recommendation 23: The Investigative Committee Should Not Be Involved in Discipline on Consent

Commentary

Rule 21 of the Proposed Rules addresses discipline on consent. The Consultation Team was advised that in most cases, matters involving specifications of charges are resolved consensually. The proposed Rule applies to matters in which formal charges have been filed against a lawyer. At this stage of the process, the Investigative Committee's work has been completed. As a result, and because Regulation Counsel must have the prosecutorial discretion to determine when consensual discipline is appropriate, the Professional Regulation Committee recommends that the Court eliminate from proposed Rule 21 the requirement that Regulation Counsel receive the Investigative Committee's approval to settle a matter. Concomitant amendments should be made to any other related proposed Rules. This additional layer of process is not necessary given the need for the Hearing Panel to review and approve any disposition pursuant to this proposed Rule, and the ultimate requirement that the Court make the final determination to approve or reject such settlements.

The Professional Regulation Committee recommends that the Court consider requiring that a request for discipline on consent be filed in the form of a joint petition by Regulation Counsel and the Respondent. While this process differs from that in the Model Rules for Lawyer Disciplinary Enforcement, requiring the Regulation Counsel and respondent to submit a joint pleading should help ensure that the Hearing Panel and Court get sufficient information with which to make their decisions.

The Consultation Team heard from interviewees and observed in files that stipulated dispositions lack sufficient information, including citation to relevant authority in support of the recommended settlement. Requests for discipline on consent must contain sufficiently detailed information to allow the Hearing Panel and Court and to make a prompt and educated decision on the matter. This includes citation to the ABA Standards for Imposing Lawyer Sanctions and to relevant authority from Guam. If there is no relevant authority in terms of cases in Guam, the petition may cite to precedent from other jurisdictions, as is consistent with national practice.

Recommendation 24: The Court Should Consider Eliminating Fines as a Form of Discipline

Commentary

The current and proposed Rules provide that the Court may impose a fine as a form of lawyer discipline. As noted in Standard 1.1 of the ABA Standards for Imposing Lawyer Sanctions, “the purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.” Lawyer discipline is intended to be remedial in nature, and not a form of punishment. This is one reason that courts have held that the double jeopardy clause does not apply in lawyer disciplinary cases.²¹³

Monetary fines are considered to be a form of punishment²¹⁴, and therefore are inconsistent with the purposes of lawyer discipline. For this reason, and consistent with national practice, the Professional Regulation Committee suggests that Court consider eliminating fines as a form of lawyer discipline. The Court has already incorporated into the proposed Rules a provision allowing it to assess the cost of proceedings against a respondent who has been disciplined.

²¹³ See *e.g.*, *In re Caranchini*, 160 F.3d 420 (8th Cir. 1998).

²¹⁴ See, *e.g.*, *In re Brown*, 906 P.2d 1184 (Cal. 1995) (noting that lawyer disciplinary sanctions do not take the form of criminal sanctions, such as fines, and is not punishment for purposes of a double jeopardy analysis).

X. CONCLUSION

The Standing Committee on Professional Regulation hopes that the recommendations contained in this Report will assist the Guam Supreme Court in its work to review its lawyer disciplinary procedural rules and to enhance system accountability, effectiveness, and efficiency. The members of the Committee and the Consultation Team thank the Court for the opportunity to provide these consultation services. The Committee and Team are grateful to the leaders of the Guam Bar Association and the current Ethics Prosecutor for their hospitality, and for ensuring that the Consultation Team had access to all the information it needed to perform its study. As part of the discipline system consultation program, the Committee is available to provide further assistance to the Court and to the Bar if so requested.