

NEW JERSEY
District Ethics Committee Manual
2012

2019 Abridged Edition

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NEW JERSEY
DISTRICT ETHICS COMMITTEE
MANUAL
2012



2019 abridged edition

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DISTRICT ETHICS COMMITTEE MANUAL

For Use Only By
Committee Appointed
By the
Supreme Court of New Jersey

Prepared by

OFFICE OF ATTORNEY ETHICS



SUPREME COURT OF NEW JERSEY

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PREFACE

The New Jersey Supreme Court has repeatedly held that it is "settled principle that the primary reason for discipline is not to punish the attorney; rather it is 'to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general.'" In re Gallo, 117 N.J. 365, 373-74 (1989) (quoting In re Wilson, 81 N.J. 451, 456 (1979)), quoted with approval in In re Greenberg, 155 N.J. 138, 161 (1998).

Chapter 1 Overview

Section 1 Overview

The New Jersey attorney disciplinary structure is a modern three-tiered system which provides for the fair and reasonable resolution of grievances made against members of the Bar. The three levels of the disciplinary system are:

- Regional District Ethics Committees and the Statewide Office of Attorney Ethics
- Statewide Disciplinary Review Board
- Supreme Court of New Jersey

Staffed jointly by volunteers who donate considerable amounts of their time to the investigation, prosecution and hearing of ethics matters, and full-time staff from the Supreme Court's Office of Attorney Ethics (OAE), the system has attempted to keep pace with an increasing bar population. According to the records of the Lawyers' Fund for Client Protection, the lawyer population of New Jersey has grown significantly:

| | |
|---------------|--------|
| December 1979 | 20,535 |
| December 1989 | 41,165 |
| December 1999 | 70,264 |
| December 2009 | 85,690 |
| December 2016 | 98,039 |

FIRST TIER

The most basic tier in the disciplinary system consists of 18 regional district ethics committees ("Ethics Committees") made up of volunteer attorneys and lay persons appointed by the Supreme Court. Ethics Committees receive and take initial action upon grievances alleging unethical conduct on the part of New Jersey lawyers whose offices are located in their district (referred to as respondents). The OAE also receives and takes initial action on grievances alleging the most serious unethical conduct.

When an Ethics Committee receives a grievance alleging lawyer unethical conduct, the matter is screened by the Ethics Committee secretary and, if appropriate, docketed and assigned to an attorney investigator for such investigation as may be necessary to determine the validity of the allegations. A written report of investigation is then submitted to the Chair of the Ethics Committee (or the Director, OAE, where the OAE investigates grievances) for a determination as to whether there is a reasonable prospect of finding unethical conduct by clear and convincing evidence. If such evidence does not exist, the matter is dismissed. In such event, the investigative stage of the matter is at an end. If it is determined that "minor unethical conduct" has occurred, the matter may be diverted to a non-disciplinary resolution if the lawyer agrees to comply with specified conditions. Otherwise, if the lawyer does not qualify for or does not agree to diversion, a complaint may be filed. If the alleged unethical conduct is not minor and it is concluded that there is a reasonable prospect of proving the unethical

conduct by clear and convincing evidence, the respondent may either agree to discipline by consent or the Ethics Committee (or the OAE) may file a complaint. The complaint is served on the respondent, who is then required to file a verified answer within 21 days of service. This step begins what is known as the hearing stage.

Formal matters where unethical conduct is charged are tried before a hearing panel consisting of three members, composed of two lawyers and one public member. Where a case is complex or unduly time consuming, a retired judge or former ethics chair, vice chair or secretary may be engaged to sit as a special ethics master. Attorneys are required to file a verified answer to a formal complaint. If this is not done, no hearing is held and the default is certified to the Disciplinary Review Board for the imposition of sanction. After the hearing is concluded, the panel (or master) deliberates and takes one of the following actions:

- dismisses the complaint, or
- determines that the lawyer has been guilty of unethical conduct and recommends an admonition, reprimand, censure, term suspension, indefinite suspension or disbarment.

Prior to October 2005, all matters in the investigative stage were considered private and confidential, and everyone - including the grievant - was prohibited from disclosing the filing of a grievance, unless and until a formal complaint was filed and served. However, on October 19, 2005, the Supreme Court of New Jersey filed its opinion in *R.M. v. Supreme Court of New Jersey, et al.*, 185 N.J. 208 (2005), in which it held that a **grievant** has a First Amendment Right to "speak" publicly about his or her grievance, regardless of whether it has reached the formal complaint stage. The Court specifically noted, however, that this right did not extend to ethics officials. Thus, under *R. 1:20-9(b)*, while grievants may make public statements regarding the disciplinary process, the filing and content of a grievance, and the result, if any, of a grievance, from the perspective of DEC members and all attorney disciplinary employees, all matters in the investigation stage are to remain private and confidential. This is discussed further in Sections 22, 38, 40 and 92. Ethics officials are required to comply with the confidentiality provisions of *R. 1:20-9* and may neither speak about the case/investigation nor release any documents made or gathered during the course of the investigation, until and unless a formal complaint is filed and served.

SECOND TIER

In the event that a docketed grievance has been dismissed by an Ethics Committee at the investigative or hearing stage, the grievant has the right to appeal to the statewide Disciplinary Review Board (Board). Like the District Ethics Committees, the Board is composed of both lawyers and public members. The Board may affirm the action of the Ethics Committee or the OAE or remand the matter for further proceedings. When a hearing panel or master finds unethical conduct has occurred, the report and recommendation are forwarded to and considered by the Board. If the Board determines that an admonition constitutes adequate discipline, it issues an appropriate letter

admonition. Where other public discipline (reprimand, censure, suspension or disbarment) is recommended, oral argument is routinely scheduled before the Board. The respondent may appear in person and may be represented by counsel. A representative of the Ethics Committee or the OAE also appears at oral argument before the Board. If the Board determines that admonition, reprimand, censure, suspension or disbarment is appropriate, its written decision is filed with the Supreme Court.

THIRD TIER

The Supreme Court represents the third and final disciplinary tier. Except in disbarment matters where there is an automatic right of review by the Supreme Court, the Board's disciplinary decision is final 30 days after it is filed, unless the Court determines to review the matter. Either the respondent or the OAE may request discretionary review in any case other than disbarment.

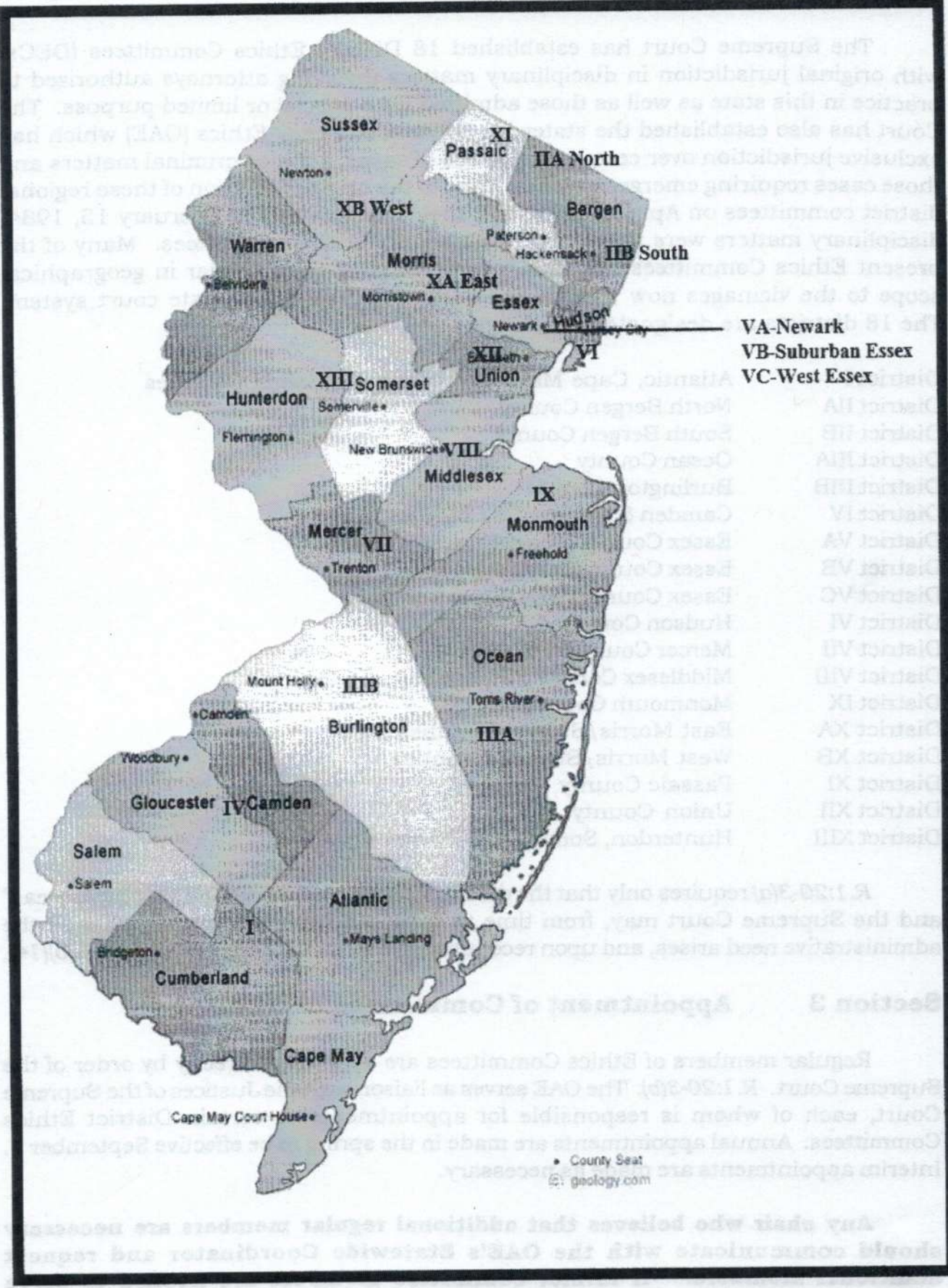
The OAE represents the public interest at all oral arguments before the Court. If, upon conclusion of the argument, the Court determines to impose discipline, either by way of admonition, reprimand, censure, suspension, or disbarment, a written opinion or an order is filed by the Court. This decision or order is published in a bound volume of Supreme Court opinions entitled *New Jersey Reports*. Following the filing and service of a complaint, all hearings before the Ethics Committees and all oral arguments before the Board and the Supreme Court are public. Deliberations of these bodies are private and confidential.

THE OFFICE OF ATTORNEY ETHICS

In October, 1983, the Supreme Court of New Jersey established the OAE in order to manage all Ethics Committees throughout the state. In addition to broad administrative and managerial powers, the OAE also has jurisdiction to investigate and prosecute serious, complex and emergent ethics matters. It exclusively handles all cases where a lawyer is a defendant in any criminal proceeding. Additionally, the OAE takes any emergent action that may be necessary to protect the public by applying to the Supreme Court, or to the Board, for interim temporary suspensions. This may occur, for example, where a lawyer is initially convicted of a serious criminal violation, where there is substantial proof that clients' trust money has been stolen, or where a lawyer abandons the practice of law.

The OAE also provides statewide management of all District Fee Arbitration Committees, which hear client disputes over lawyers' bills for services. The OAE administers the Supreme Court's Random Audit Compliance Program, which conducts compliance audits of trust and business accounts to see that mandatory record keeping practices are followed by all private law firms. That program is the largest in the nation, currently employing four full-time auditors. Additionally, the OAE manages the Trust Overdraft Notification Program. That program provides for bank reporting and the active review of overdrafts of attorney trust accounts due to insufficient funds.

Chapter 2 Composition of Committee



Section 2 Establishment

The Supreme Court has established 18 District Ethics Committees (DECs) with original jurisdiction in disciplinary matters involving attorneys authorized to practice in this state as well as those admitted for a special or limited purpose. The Court has also established the statewide Office of Attorney Ethics (OAE) which has exclusive jurisdiction over certain categories of cases, such as criminal matters and those cases requiring emergent action. Prior to the original creation of these regional district committees on April 1, 1978, and their modification on February 15, 1984, disciplinary matters were processed by 21 county ethics committees. Many of the present Ethics Committees (**see Geographic Layout**) are similar in geographical scope to the vicinages now used in the administration of the state court system. The 18 districts are designated as follows:

| | |
|---------------|---|
| District I | Atlantic, Cape May, Cumberland & Salem Counties |
| District IIA | North Bergen County |
| District IIB | South Bergen County |
| District IIIA | Ocean County |
| District IIIB | Burlington County |
| District IV | Camden & Gloucester Counties |
| District VA | Essex County (Newark) |
| District VB | Essex County (Suburban Essex) |
| District VC | Essex County (West Essex) |
| District VI | Hudson County |
| District VII | Mercer County |
| District VIII | Middlesex County |
| District IX | Monmouth County |
| District XA | East Morris/Sussex Counties |
| District XB | West Morris/Sussex Counties |
| District XI | Passaic County |
| District XII | Union County |
| District XIII | Hunterdon, Somerset & Warren Counties |

R. 1:20-3(a) requires only that the districts consist of "defined geographical areas" and the Supreme Court may, from time to time, alter disciplinary districts as the administrative need arises, and upon recommendation by the Director. *R. 1:20-2(b)(14)*.

Section 3 Appointment of Committees

Regular members of Ethics Committees are appointed directly by order of the Supreme Court. *R. 1:20-3(b)*. The OAE serves as liaison with the Justices of the Supreme Court, each of whom is responsible for appointments to certain District Ethics Committees. Annual appointments are made in the spring to be effective September 1. Interim appointments are made as necessary.

Any chair who believes that additional regular members are necessary should communicate with the OAE's Statewide Coordinator and request additional members. If former committee members are needed to serve

temporarily as volunteers, committees should likewise contact the Statewide Coordinator.

Section 4 Size and Composition

District Ethics Committees are established by the Court in a size that is sufficient to handle the annual caseload for that district. No Ethics Committee, however, may be composed of fewer than eight members, at least four of whom are attorneys and two of whom are non-lawyers, usually referred to as public members. *R.1:20-3(a)*

Section 5 Eligibility: Office, Residence, Political Activity

The only qualification prescribed by the rules for attorney members is that they either reside or work within the county in which the district they serve is located. *R.1:20-3(a)*. Likewise, public members are also eligible for appointment if they either "reside or work in the district or county in which the district is located." *R.1:20-3(a)*. If the public member has more than one residence, the member is eligible to serve based upon either location.

It is the Supreme Court's policy that any member or potential member of an Ethics Committee may hold an elective or appointive municipal public office, but county or higher level public office is a bar to DEC membership.

So long as a member qualifies under *R.1:20-3(a)* for appointment at the time of appointment, subsequent relocation of an office or residence will not disqualify the member from continuing to serve on the Ethics Committee.

The secretary or chair of the Ethics Committee will notify the OAE's Statewide Coordinator in the event that any member becomes unable to carry out the required duties for medical or other reasons.

Section 6 Terms of Office; Continuation Beyond Full Term

Members are appointed for a single four year term. Original appointments commence September 1 of each year. A rotation system is employed in the appointment of members so that generally the terms of one-fourth of all the members of each Ethics Committee expire annually. *R.1:20-3(b)*. This procedure preserves continuity while inviting fresh ideas. Once a member has served a full term, however, the member is not thereafter eligible for immediate reappointment to the Ethics Committee. *R.1:20-3(b)*. The member is, however, eligible to be considered for appointment to one of the 17 District Fee Arbitration Committees.

Despite the fact that an individual's term has expired, any member who is serving in connection with an investigation that is pending at that time may continue to serve in such a matter until its conclusion. *R.1:20-3(b)*. Thus, while investigations can usually be conveniently terminated and reassigned from an outgoing to a new member,

complex investigations and those that have been assigned for more than sixty days when the member's term expires should be completed by the former member promptly after the expiration of the member's term. A former member must always continue to serve on a hearing panel where testimony has begun, until its conclusion and the filing of a report, unless the member has been relieved by the Supreme Court. *R.1:20-6(a)(4)(D)*. The hearing panel chair should give priority to the scheduling of such holdover matters so that the retiring member's term is not extended unnecessarily.

In September of each year the new Ethics Committee chair should review with the vice chair and secretary the status of matters in which retiring members are involved. So that there are no misunderstandings, the chair should discuss the case with the retiring member and then confirm those discussions and agreements in writing. Any problems should be discussed with the OAE Statewide Coordinator for resolution.

Section 7 Removal of Members

The chair is responsible for the overall performance of the Ethics Committee. The chair should pay particular attention to and assist newly appointed members during the first three to four months of their terms. Even though all Ethics Committee members are volunteers, members must complete their work in a timely fashion.

Where problems develop, the chair should make reasonable but specific efforts to have the member complete the work, including setting specific **written deadlines**. Where a member demonstrates an inability or unwillingness to work in a timely fashion, the member must resign or be removed.

The chair may either secure a letter of resignation from the member directly or request the OAE Director to do so through the OAE Statewide Coordinator. In the latter case the chair should call or write to the Coordinator and should provide a brief synopsis of the facts, including copies of any letters written to the member. The Coordinator will consult with the Director. The Coordinator will then make contact (either by phone, preferably, or else in writing) with the member and will secure an explanation and offer the member **one opportunity** to agree to complete all outstanding work within a short time frame (usually two weeks). If the member agrees and completes the assignments, the member will be continued on the Ethics Committee. If the member again becomes delinquent in the future, no second chance will be afforded. Where the member is either unwilling or unable to agree with the Statewide Coordinator to complete the work, or where the member agrees but does not meet the deadline, the Statewide Coordinator will advise the member immediately in writing that he or she has been removed. A replacement will be selected and appointed immediately to fill the vacancy.

The Supreme Court has determined as a matter of policy that, where the chair and OAE Director agree on removal, the Director has the authority to remove the member. The Court will not become involved in the process. Where the chair and the Director disagree, either may present the facts to the Chief Justice in letter form and the Chief Justice will make the final decision.

Section 8 Commercial/Political Use of Membership; Expert Testimony By Members

The Supreme Court desires that Ethics Committee members not use the fact of current membership in a commercial manner. Thus, for example, no mention of the fact that one is currently an Ethics Committee member should be made in an advertisement activity. To do so may be perceived as adding the imprimatur of the Supreme Court to work performed outside the Ethics Committee and is, therefore, not permitted. However, it is proper for a member to list on a resume or biography the fact of current or prior membership on an Ethics Committee. The Supreme Court's policy is also that a current member of an Ethics Committee may testify as an expert in a legal malpractice or other matter, but in doing so should make no reference to any Ethics Committee role. To do so would inevitably add the Court's imprimatur, through Ethics Committee membership, to the advantage of a litigant. Secretaries of District Ethics Committees shall not testify as expert witnesses. Further limitations on Committee members are discussed in Sections 30 and 31.

Section 9 Volunteers - Associates and Partners

Section 9.1 Volunteers - New or Prior Members

In accordance with *R.1:20-2(b)(18)*, the Director may approve the selection of attorney volunteers to supplement members of Ethics Committees. New volunteers and former Ethics Committee members may act as investigators and presenters. Additionally, *R.1:20-2(b)(17)* provides that attorneys and public members who have previously served on Ethics Committees may be selected by the Director to serve on hearing panels to adjudicate complaints.

In order to secure the appointment of volunteers, the chair or vice chair, after consultation with the secretary, simply submits a written list of the names of potential volunteers to the Statewide Coordinator, indicating former service on the ethics committee or that the volunteer is a newly appointed attorney who has attended orientation but whose term has not yet begun. After reviewing the attorney's ethical records, the Coordinator will then notify the officers of the names that have been approved.

Section 9.2 Use of Associates and Partner of Committee Members

The limited use of associates and partners of Ethics Committee members is appropriate and consistent with the limited use of volunteers, a procedure sanctioned by the Supreme Court. So long as the regular member retains overall responsibility in the direction and analysis of the investigation or presentation of a matter, the use of a firm member may prove to be extremely helpful in the timely resolution of an ethics investigation or hearing. Firm members may be helpful in the drafting of a proposed statement of facts, as well as proposed ethical conclusion for investigative reports. Obviously, approval of the wording of the final investigative report must remain with

the Ethics Committee member. Similarly, in emergencies, the use of firm members to present a matter at the formal hearing stage may be appropriate. Generally, however, presentation of an ethics matter should be made by a regular member experienced in the ethics process.

The rule of investigative confidentiality in ethics matters (R.1:20-9) should be stressed to the firm member. Likewise, that firm member should be made to understand that no adverse inference is to be drawn simply as a result of the filing of any grievance against an attorney. (See Section 31 for restrictions on the representation of respondents by Ethics Committee members or their law firms).

Section 10 OAE Statewide Coordinator and Assistant Statewide Coordinator

The OAE employs a full-time assistant ethics counsel who is designated as Statewide Ethics Coordinator and a full-time deputy ethics counsel who is designated as Assistant Statewide Coordinator. The primary function of the Coordinator and Assistant Coordinator is to manage and assist Ethics Committees to ensure compliance with the goals adopted by the Supreme Court. The Coordinator and Assistant Coordinator handle the appointment and removal of members, as well as any procedural legal advice requested by Ethics Committee officers and members. The Coordinator and Assistant Coordinator will maintain a direct liaison with all Ethics Committees and will routinely attend at least one meeting of each Ethics Committee during the year. All questions and problems should be directed to the Statewide Coordinator or Assistant Statewide Coordinator.

To further assist Ethics Committees, the OAE also has designated another deputy ethics counsel as liaison with each Ethics Committee throughout the state. These attorneys are available as additional resources to officers and members of Ethics Committees to consult on legal or procedural issues that may arise from time to time. They have extensive private practice/litigation experience - some in both criminal and civil law areas. The liaison counsels' names and districts are listed at the front of this manual.

Chapter 3 Committee Organization

Section 11 Committee Meetings

The Ethics Committee exists as an entity, and yet not a single action is taken by majority vote of its membership. Rather, individual investigating members make recommendations to the chair, who alone determines whether a matter is dismissed, submitted to the Director for diversion or a complaint is filed. *R.1:20-3(h)* and *(i)(1)* and *R.1:20-4(a)*. Likewise, it is the hearing panel that makes the final decision at the conclusion of formal hearings whether the case should be dismissed or should be sent to the Board for public discipline. *R.1:20-6(c)(2)(E)*. Nevertheless, the Ethics Committee meets together regularly throughout the year and the discussion, experience and input of its members assist in the resolution of many matters.

Section 12 Organizational Meeting

Section 12.1 Generally

The Ethics Committee organizational meeting is held in September of each year following the commencement of all appointments effective September 1. This meeting sets the tone for the Ethics Committee's work under the new chair, vice chair and the secretary. The first meeting also allows new and existing attorney and public members to get to know each other and learn how they will work together. The primary purposes of the organizational meeting are to (1) organize the Ethics Committee by familiarizing members with the new officers and (2) orient new and existing members as to specifically what is required of them and to familiarize them with the time goals adopted for the system.

Section 12.2 Specialization List of Members

At the organizational meeting of the Ethics Committee the chair should see to it that a list of areas of practice in which members specialize is prepared for use in assigning investigators and hearing panel members. A copy of the list should be distributed to each member of the Ethics Committee who should feel free to consult with a committee colleague on any ethics matter within that colleague's area of expertise.

Section 12.3 Appointing Designated Public Member

The secretary must annually appoint the Ethics Committee's designated public member(s). *R.1:20-3(e)(4)*. The designated public member will work closely with the secretary to see to it that all cases that do not set forth facts that, if proved, would constitute an ethics violation are declined expeditiously without being docketed. (See Section 19.3 for explanation of the designated public member's functions.)

Section 12.4 Establishing Hearing Panels

Likewise, the chair and vice chair must annually determine the composition of hearing panels for use in the assignment of formal matters. *R.1:20-6(a)(1)*. Hearing panels for unethical conduct matters will consist of **only** three members (two attorneys and one public member); alternate attorney and public members may be appointed but will sit only in the event of the absence of one of the attorneys or of the public member appointed to the panel. *R. 1:20-6(a)(2)(A)*. Considerations in designating panel members are discussed in more detail in Section 62.

Section 13 Regular Meetings

Although the Ethics Committees are encouraged to meet "monthly" [*R. 1:20-3(c)*], it is sufficient that they meet regularly (once every month to two months) depending on workload and productivity. It is imperative that the Ethics Committee's work continue between meetings with the chair reviewing and deciding the disposition of investigative reports and the vice chair overseeing the conduct of all hearings.

Regular meetings should include a summary review of all outstanding ethics matters with an eye towards concluding cases within the established time frames. It is imperative that the chair and vice chair communicate **by phone** with any non-attending members to see if there are any problems with the matters assigned. Routine investigative reports recommending dismissal need not be agenda items. Rather, meetings should be held to utilize the talents of both attorney and public members to review and analyze difficult legal and factual situations. The meeting need generally address in depth only the "problem" cases that offer difficult questions of proof and procedure, or that exceed disposition times adopted by the Supreme Court in *R. 1:20-8*.

Section 14 Officers

Rule 1:20-3(c) provides for the appointment of three officers to each Ethics Committee: chair, vice chair and secretary.

Section 15 Chair

Each year the Supreme Court designates an attorney member of each Ethics Committee to serve at its pleasure as chair. *R.1:20-3(c)*. The chair is the chief executive officer of the Ethics Committee with the consequent ultimate responsibility for all policy decisions and caseload flow.

Court rules set forth specific functions to be performed by the chair, among them:

- Establishment of committee's regular meeting schedule.
R.1:20-3(c).

- Consultation with Director, OAE, on selection of committee secretary. *R.1:20-3(c)*.
- Establishment of procedures for secretary's routine assignment of investigators. *R.1:20-3(g)(1)*.
- Review and determination of the disposition of all reports of investigation by directing dismissal, *R.1:20-3(h)*, administrative dismissal with the concurrence of the Director, *R.1:20-3(h)*, by requesting the Director to implement diversion in unethical conduct cases, *R.1:20-3(i)(2)(B)*, by directing the filing of a formal complaint for discipline, *R.1:20-3(i)(3)(B)*, or incapacity, *R.1:20-3(j)*, or by authorizing the filing of a motion for discipline by consent, *R.1:20-3(i)(3)(B)*.
- Designation of a public member to review initial grievances with the Ethics Committee's secretary before they may be declined. *R.1:20-3(e)(4)*.
- Assignment of presenters. *R.1:20-4(g)(1)*.
- Assignment of members of hearing panels and single member adjudicators. *R.1:20-6(a)(1) and (d)(3)*. This is usually done in consultation with the vice chair and/or secretary.
- Consultation with Statewide Coordinator on continuing satisfactory performance of all Ethics Committee members by way of monthly reports and other contacts.
- Supervising the work of investigators with regard to meeting the Supreme Court's guidelines for timeliness.

Some of these administrative and designation functions will be delegated to the Ethics Committee secretary or vice chair by pre-arrangement so that procedures are routinized and expedited.

Moreover, one of the chair's main duties is to oversee and control the movement of the caseload in the district to insure conformance with time goals set out in *R.1:20-8*, including:

Investigations: Standard cases - six months; complex cases - nine months.

Hearings and Submission of Reports: Standard and complex cases - six months after the time for filing answer.

The chair and secretary should coordinate the follow-up of matters with specific investigating members and the vice chair should follow up with all hearing panel members to be sure that cases are proceeding in accordance with the adopted time standards. Where unusual problems develop or where members are unable or unwilling to meet their obligations, the Statewide Coordinator should be consulted. (See Section 7 on Removal of Members.) The chair must review the caseload at least monthly.

Near the expiration of the chair's term (between August 1-31) the chair, vice chair and secretary should review the cases of all members whose terms are expiring

so that explicit arrangements are made (1) to reassign all investigations pending less than 60 days (2) to have members complete by a certain date all investigations pending over 60 days (3) to have members complete all hearings and any assigned hearing reports where testimony has already begun and (4) to assign a new member to sit on any hearing panel where the outgoing member has not yet commenced hearings.

Section 16 Vice Chair

Like the chair, the vice chair is appointed annually by order of the Supreme Court. Some of the functions of the vice chair are framed in more general terms than those of the chair:

Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice chair shall perform the duties of the chair. *R.1:20-3(c)*

However, the vice chair's overriding responsibility is to administer all formal hearings conducted by the Ethics Committee. *R.1:20-3(c)*. The vice chair has specific responsibility to review and keep track of the hearing panel docket.

Specifically, the vice chair should make sure, once a complaint is served and the respondent has filed an answer, that:

The answer is verified and otherwise conforms to the requirements of *R.1:20-4(e)*.

- A hearing panel is promptly appointed.
- All hearings are concluded as expeditiously as possible.
- The hearing report is filed with the secretary (together with the exhibits and any necessary transcripts) within the prescribed time.

The vice chair should take such action as appropriate to see that the system's goals are achieved and should report monthly all progress, and any problems, to the chair. The vice chair is required to report monthly to the Statewide Coordinator on all cases in the hearing stage.

The vice chair also has responsibility to obtain the names and addresses of suitable attorney and public member candidates who may be appointed to the Ethics Committee for next term. The Statewide Coordinator provides the vice chair with forms and an analysis of the committee's membership needs.

Section 17 Secretary

The secretary is appointed annually by the Director after consultation with the Ethics Committee chair. The secretary continues to serve at the pleasure of the Director

[R. 1:20-3(c)] and acts as the chief administrative officer of the Ethics Committee. In order for an Ethics Committee to function effectively, it is imperative that the secretary and the OAE have a close working relationship.

The secretary is not a member of the Ethics Committee and, therefore, cannot substitute for any Ethics Committee member. However, the secretary must be a member of the bar and must also maintain an office in the district served or in the county within which the district is located. R. 1:20-3(c). In the event that the secretary for any reason moves out of the district or is otherwise unable to serve, the Statewide Coordinator should be notified so that a successor may be promptly appointed.

Section 18 Principal Office

The secretary's office serves as the principal office for the Ethics Committee. R. 1:20-3(d). This office is the place at which all grievances are initially received and to which all correspondence should be initially referred. The public portions of Ethics Committee files are available for inspection at the secretary's office. See Section 22.2.

Section 19 Case Screening

Section 19.1 Docketing Standards for District Ethics Committee Secretaries

The initial decision to docket a case is made by the secretary of the committee. If the secretary determines to decline to docket the matter because the alleged conduct, if proven, would not be unethical, the file must also be reviewed by a public member of the committee so designated by the secretary. That person is referred to as the "designated public member...." R. 1:20-3(e)(4).

Assuming that the grievance should not be declined for the reasons set forth in Section 19.2, there are three preliminary questions to be asked in reviewing a grievance and making a decision whether to docket the matter (1) whether the attorney is subject to the jurisdiction of the Supreme Court (2) whether the grievance alleges "facts;" (3) whether the facts, "if true, would constitute unethical conduct as defined by the Rules of Professional Conduct, case law or other authority, or incapacity." R. 1:20-3(e)(1).

First, the matter should be declined if the individual charged is not a New Jersey attorney or otherwise subject to the jurisdiction of the Supreme Court of New Jersey. Second, the grievance must set forth "facts" that would support probable cause to believe that unethical conduct has occurred. Thus, a grievance alleging simply a "conspiracy to corrupt justice," without specific facts to support those bare allegations would be insufficient to warrant docketing. Ethics investigations are not pursued based solely on hearsay, innuendo and other wholly unsupported allegations. Anyone who reads the Rules of Professional Conduct can state a cause of action for violation. The grievant must, however, have either personal knowledge of the facts or enough information to articulate sufficient "facts" to support the allegation. Third, the facts

alleged, if proven, must constitute unethical conduct or incapacity. If all three of these questions are answered affirmatively, then the matter should be docketed.

Secretaries are not permitted to conduct extended investigations before determining whether or not to docket a case. *R. 1:20-3(e)*. Indeed, grievances should be reviewed and a decision made within 45 days after receipt. In a number of instances the secretary will be able to make a decision whether to docket based on the materials provided by the grievant. In other cases, the secretary may, in order to determine the nature and facts of the matter set forth in the grievance, solicit comments from the respondent or third party and may consider such information before making a decision to docket the case. When such information is secured, however, a copy of that information must be provided to the grievant before the docketing decision is made. In that case, the grievant must be advised in writing that he or she has ten days to make any response to the materials before a docketing decision is made. This process is necessary in fairness to grievants, especially in light of the fact that there is no right of appeal from a declination in which the designated public member concurs. It also is necessary in order to detect those few, but real, cases where respondents make up and submit documents in response to an ethics inquiry.

Occasionally, grievants attempt to file multiple grievances against five, ten or more attorneys at the same time. No more than three to four such cases should ever be accepted for docketing at the same time. The grievant should be advised to choose three or four attorneys and the system will process them first. After those have been dealt with, then the grievant is free to file against the next group. Experience has shown that such reasonable limitations are necessary. Large numbers of related grievances become unwieldy to investigate at the same time, with the result that the quality of investigations suffers and unnecessary delay almost invariably occurs. Rarely, a grievance may be declined as cumulative. *R. 1:20-3(h)*. This basis for declining a grievance is determined only by the Director.

Section 19.2 Mandatory Declination

There are circumstances where the Supreme Court has determined that the secretary alone may reject a grievance. There are five such instances:

- **Lack of Jurisdiction.** If the person complained of is “not subject to the jurisdiction of the Supreme Court of New Jersey . . . the matter shall be declined and referred to the appropriate entity in any jurisdiction in which the attorney is admitted.” *R.1:20-3(e)(2)(A)*.
- **Advertising or Related Communications.** If the grievance relates to advertising or “other related communications within the jurisdiction of the Committee on Attorney Advertising [R.1:19A-2(a)] . . . the matter shall be sent to that committee unless the matter has been referred by the Advertising

Committee in accordance with R.1:19A-4(e) or (h).” *R.1:20-3(e)(2)(B)*. The address for the Advertising Committee is:

Secretary, Committee on Attorney Advertising
Administrative Office of the Courts
P.O. Box 037
Trenton, New Jersey 08625

- **Grievances Against Disciplinary or Fee Arbitration Agency Members.** If the grievance concerns disciplinary or fee arbitration agency members “arising out of their processing of an ethics grievance or fee arbitration request,” it shall be declined, as such grievances “shall be filed with and considered exclusively by the Board in connection with any appeal or other authorized review of a matter in the normal course under *R.1:20-15(e)*.” *R.1:20-3(e)(2)(C)* and *R.1:20-7(j)(1)*.
- **Fee Disputes.** Grievances that the secretary determines involve “aspects of a substantial fee dispute and a charge of unethical conduct” shall be declined and the grievant shall be referred to the appropriate Fee Committee “unless so directed by the Director or unless the matter is referred by the Fee Committee in accordance with *R.1:20A-4*.” *R.1:20-3(e)(2)(D)*.
- **Civil/Criminal Litigation.** Where there is related civil or criminal litigation, grievances arising therefrom shall be declined unless “in the opinion of the chair or Director, Office of Attorney Ethics, the facts alleged clearly demonstrate provable ethical violations or if the facts alleged present a substantial threat of imminent harm to the public.” *R.1:20-3(e)(2)(C)* and *R.1:20-3(f)*. However, the OAE may docket, investigate and prosecute a matter where “an attorney is a defendant in any criminal proceeding.”

Where the secretary declines to docket a grievance, the rules provide that the secretary “furnish a concise written statement to the grievant of the reasons therefor and shall enclose a copy of the court rule or written guideline for declination approved by the Supreme Court.” *R.1:20-3(e)(5)*. Mandatory declination form letters are shown as **Figures 1 through 6**. A photocopy of the relevant court rule or guideline must be enclosed with each letter. The secretary may seek further guidance from the Statewide Coordinator.

There is no appeal from a mandatory declination decision by the secretary of an Ethics Committee. *R.1:20-3(e)(6)*.

Section 19.3 Designated Public Member

All cases other than those requiring mandatory declination **must be reviewed** by the secretary to determine whether the facts alleged, if true, would constitute unethical conduct. *R.1:20-3(e)(3)*. If so, the case should be docketed and assigned for investigation. If, however, the secretary determines that the grievance contains no facts, or the grievance otherwise does not meet the above standard, the secretary must have the matter reviewed by a designated public member. If the public member agrees with the secretary, "the matter shall be declined." In that event, the form letter shown in **Figure 7** must be sent together with a photocopy of *R.1:20-3(e)(3)*. If the public member concludes that there may be unethical conduct, "the matter shall be docketed and assigned for investigation." *R.1:20-3(e)(3)*. The secretary and designated public member will develop a close working relationship. Cases requiring the public member's review can be transmitted by mail or these matters can be reviewed at the conclusion of the Ethics Committee's monthly meeting or otherwise. Any questions can be discussed by phone as well as in person. However, declination can occur only with the concurrence of both the secretary and public member. Once declined, there is no appeal from that decision. *R.1:20-3(e)(6)*. Although it is not required by rule, it is helpful to have the declination letter signed by the public member as well as the secretary.

Section 19.4 Assignment For Investigation

If on review of the grievance the secretary is satisfied that there are "facts alleged which, if true, would constitute unethical conduct as defined by the Rules of Professional Conduct, case law or other authority," the matter must be docketed, acknowledged and assigned for investigation. *R.1:20-3(e)(1)*.

Acknowledgment to the grievant and assignment of the matter to the investigator should be accomplished by a single letter. That letter should provide the grievant with the name and address of the Ethics Committee investigator assigned and should advise the grievant that all future communications should be made directly with the investigator. Likewise, the letter to the grievant should uniformly enclose the pamphlet entitled "Information About Grievance Procedures and Discipline of Lawyers" (**Figure 8**), if that pamphlet has not previously been provided. This pamphlet explains what the grievant should, and should not, expect from the ethics system, including the Court's recent revision of the confidentiality rule as it relates to a **GRIEVANT'S** First Amendment Right to speak about his or her grievance.

Section 20 Docketing Grievances

Docketing grievances involves three steps: (1) preparing a docket card, (2) opening a file and (3) listing the matter on the Ethics Committee's docket sheet.

In order to assist the Ethics Committees and the OAE in maintaining a current record of the status of all ethics cases, carbonized four-part docket cards have been developed for use by the secretary. **Figure 9** shows the "Respondent Card," which is

so designated because the box in which the respondent's last name appears has been shaded. Three additional cards are provided, one with the docket number shaded, another with the grievant's last name shaded and the last card again with the respondent's last name shaded.

When these cards are completed, the second, third and fourth cards should be removed by the secretary and retained for the Ethics Committee's records. The first card should be attached to the Attorney Grievance Form (or grievance letter) and forwarded to the OAE; no cover letter is necessary.

There are eleven major areas on the docket card that require attention.

Section 20.1 Docket Numbers

A docket number must be assigned to **each attorney respondent** complained against. The docket number is assigned as follows: the Roman numeral assigned as the designation for the particular district; the four digits of the calendar year in which the file is opened and, starting with number "1" on January 1 of each, the sequential number of the case, followed by the letter "E," which designates a matter being processed by the Ethics Committee, as distinguished from a district fee arbitration committee. Thus, the first ethics case to be opened in 2012 by the Ethics Committee for the counties of Atlantic, Cape May, Cumberland and Salem would be designated as follows:

I-2012-0001E

This number should be typed in the docket card space entitled "Docket Number."

Section 20.2 Respondent's Name

A separate docket number must be assigned for each attorney complained of. Thus, if a grievance is received against two attorneys, two separate sets of docket cards are completed. In the area designated "Respondent's Name," the secretary should insert the name of the respondent complained against followed by the words "*et al.*" Additionally, in the block denominated "Description of Action," the docket number assigned to the related case should also be shown. For example, "See IIA-12-0002E." It is important to remember that ordinarily ethics grievances are not entertained against a business entity or law firm and that the committee's OAE liaison or the Statewide Coordinator should be consulted before docketing against a firm. Generally only the names of individual attorneys within the firm (whether a corporation, partnership or other association) may be accepted as respondents. A grievance letter that does not so specify the individual attorneys to be charged should be acknowledged, but the grievant should be advised that he or she must name the specific persons about whose conduct the grievance is being made.

Section 20.3 Grievant's Name

Regardless of the number of grievants, **only one person should be listed** in the box designated "Grievant Name." Thus, grievances filed by corporations and other entities should be considered and listed in the name of the officer or person filing that grievance and not in the name of the entity on whose behalf the grievance is written. Usually, this will be the first person who signs the grievance letter. (The only entities that are permissible are the Ethics Committee or the OAE when they appear as the grievant). If there is more than one grievant, the Secretary should simply put the words "*et al*" after the grievant's last name. In other words, it is not necessary to make up four separate sets of docket cards simply because four grievants sign one grievance letter against a respondent. Rather, the designation "*et al*" is sufficient.

Occasionally matters will be referred to Ethics Committees by judges. In such cases it is the policy of the Supreme Court that **judges are not to be listed as grievants**. Rather, the matter is to be docketed in the name of the Ethics Committee and processed just like any other matter. However, **the judge is to be notified of the result of such referral**. There is no imprimatur attached to such a referral simply because of the fact that it is filed by a judge. Referrals by Superior Court judges and presiding Municipal Court judges are ordinarily sent by the secretary to the Statewide Coordinator who transfers them to another county for screening and possible docketing and investigation. **Figures 10, 11**. Referrals by Appellate Division and Tax Court judges are usually handled in the district where the respondent's office is located. As to the considerations involved in requesting a judge to testify, see Section 70.

Section 20.4 Date Docketed

In the space entitled "Date Docketed," the secretary should place the date on which the docket number is actually assigned.

Section 20.5 Date of Grievance

In the space entitled "Date of Grievance," the secretary should insert the date of the grievance letter or the date the grievance form was signed.

Section 20.6 County of Practice

The name of the county where the respondent maintains an office for the practice of law should be inserted in the space provided. In single county districts, this will usually mean inserting the county in which the district is located, unless the matter has been transferred from another Ethics Committee. In multi-county Ethics Committees, like District XIII (Hunterdon, Somerset and Warren Counties), each docket card will reflect the particular county within that district in which the respondent maintains a law office. For cases that have been transferred from another Ethics Committee, the county (outside of the particular district) in which the respondent has a law office is the county that will be listed on the docket card.

Section 20.7 Classification Codes

Each grievance must be reviewed and a classification code assigned by the secretary. There are two classification codes: "S" (standard) and "C" (complex). While not immutable, **the initial assignment of a classification code** is extremely important because it **will determine the time goal** to which the Ethics Committee will be held in investigating and prosecuting the case. The following time goals have been adopted by the Supreme Court in Rule 1:20-8:

INVESTIGATIONS

- Standard Cases — six months
- Complex Cases — nine months

HEARINGS

- Standard and complex matters — six month after time for filing answer

Consequently, it is important that the classification code assignment be as informed a decision as possible.

Complex cases are defined by the degree of difficulty and amount of work involved. A complex case is one that requires unusual skill, time or labor-intensive investigation due to the nature of the problem(s) presented. Examples of cases that will meet this definition:

- Financial cases involving intensive auditing or investigative resources.
- Serial offenders involved with multiple grievances mandating intensive investigative resources.
- Cases requiring the allocation of significant resources.
- Cases involving significant medical or psychiatric issues.

The Director has the right to review and make a final determination as to which cases are complex, after consulting with the chair of an Ethics committee. The Director delegates this authority to the Statewide Coordinator with respect to District Ethics Committee cases.

Standard cases are defined by exclusion as those that are not complex. The overwhelming majority of all cases will be standard and, therefore, presumptively all newly docketed cases should be classified as standard unless they clearly meet the criteria for complex designation.

Section 20.8 Source of Grievance Codes

For statistical purposes each grievance must be coded according to the person or entity responsible for causing the grievance to be filed. The table shown in **Figure 12** is used exclusively to assign the source code. Only if no other code applies should the "Other" code be used.

Section 20.9 Alleged Violation Codes

All grievances must be categorized according to the **most serious** ethical violation alleged. If the secretary is unable to determine what the violation is from what is stated in the grievance, the grievance should be returned to the grievant for further explanation. **A grievance that cannot be understood should never be docketed.** The OAE has categorized all violations into 71 codes which are set forth in **Figure 13**.

Based upon historical analysis of grievances filed, the most frequently used violation codes are:

- 06 Business Relations with Clients, *RPC 1.8(a)*
- 07 Communication Lacking with Client, *RPC 1.4*
- 10 Conflict of Interest, *RPC 1.7-1.12*
- 21 Deceit, *RPC 8.4(b)*
- 25 Disciplinary Case-Non-Cooperation DEC, *RPC 8.1(b)*
- 34 File/Document Failure to Release, *RPC 1.16(d)*
- 44 Misrepresentation, *RPC 8.4(c)*
- 45-49 Money, *RPC 1.15*
- 50 Neglect/Competence/Diligence, *RPC 1.1-1.3*
- 52 Notarization/Certification, *RPC 8.4(c)*
- 64 Withdrawing/Terminating Representation, *RPC 1.16*

Section 20.10 Alleged Case Type Codes

The final code assigned relates to the type of case (or area of practice) being handled by the lawyer when the alleged violation occurred. The OAE has developed an exclusive list of case types shown in **Figure 14**.

The case types "Other Litigation" and "Other Non-Litigation" should be used **only** if no other case type code is appropriate.

Section 20.11 Investigator Assigned

The name of the investigator to whom the case is originally assigned, as well as the date on which that assignment is made is to be inserted in the appropriate area in the middle of the docket card.

The secretary and chair should, by pre-arrangement, create a rotating system for assignments. In making assignments from the list the following guidelines are relevant:

- **Specialization of Members:** Insofar as practical, all assignments should be made so as to maximize the skill, talents and expertise of members.
- **Single Member Assignments of Multiple Ethics Grievances Against the Same Attorneys:** All grievances against the same respondent should, where practical, be assigned to a single investigator. Where too many cases are generated by a single respondent, additional investigators should be assigned but must be required to communicate with the original investigator to insure coordination and cooperation.
- **Assignment of Single Ethics Grievance Against Multiple Attorneys to Same Committee Member:** Although a single grievance against multiple attorneys must be given separate docket numbers, all grievances should be assigned to a single investigator.

Other than as above stated, it is not necessary for the secretary to complete any information in the boxes entitled "Status of Action - Ethics," or in the middle box denominated "Date" to the right thereof. For the Ethics Committee's own convenience, however, the secretary may wish to have the assigned clerical staff complete this information on the Ethics Committee's copies of the docket cards at the time that the case is closed so that an accurate, local, historical record of the disposition of a particular matter may be maintained. Additional supplies of the carbonized docket cards can be obtained from the OAE's Statewide Coordinator as needed.

The OAE computerizes all information that the Ethics Committee secretary provides on the docket cards. Much of that information will appear on the OAE's monthly computerized printouts which are sent to the Ethics Committee's officers on a monthly basis. **Secretaries should review these printouts carefully to assure that the information recorded by the OAE agrees with their information and should contact the Statewide Coordinator in the event of discrepancies.**

Section 21 Docket Control

To insure proper control, docket numbers are assigned chronologically by year beginning on January 1st of each year. Every Ethics Committee must maintain its own manual or computerized docketing system. Maximum control and information can be maintained by utilizing three docket sheets: Open Docket, Closed Docket and Hearing Panel Docket.

Section 21.1 Open Docket Sheet

When a case is first docketed it is also listed on the Open Docket Sheet (**Figure 15**) and given the next chronological docket number. All cases are maintained on the Open Docket until they are disposed of. Approximately 70% to 75% of all cases on average will be disposed of by dismissal and 25% to 30% will require diversion or a hearing. A case should not be shown as disposed of, but should remain open, until it has been finally concluded, either through successful diversion, dismissal or until the formal hearing has been concluded and a final disposition made.

Section 21.2 Closed Docket Sheet

In order to be able to tell the extent and nature of the Ethics Committee's concluded work in a given period a Closed Docket Sheet (**Figure 16**) is also maintained. Here all cases disposed of from the open docket sheet, as well as from the hearing panel docket, should be logged in chronologically by the date of disposition. By so doing the secretary can tell for any month how many cases have been concluded and the disposition of each. A case is disposed of when the letter of dismissal actually goes out, when diversion has been successfully completed, or when a hearing panel report is actually sent to the OAE liaison counsel for filing with the Disciplinary Review Board. Cases will be closed out on the OAE's master list only when all necessary closing papers have been received.

The secretary should keep files for one year after dismissal, completion of diversion or final action by the Disciplinary Review Board or Supreme Court. Thereafter, files may be disposed of by shredding or in a similar manner. Investigators should follow the same guideline.

Section 21.3 Hearing Panel Docket Sheet

The Hearing Panel Docket Sheet (**Figure 17**) is required to track concisely the progress of all cases that have been determined by the chair of the Ethics Committee, after review of the investigator's report, to require a hearing. The case should be entered initially on the Hearing Panel Docket when the complaint is filed and served. Then, at each significant step in the proceeding, appropriate information can be recorded to track the progress of these matters. When the case has been concluded, the secretary should list the disposition on the Hearing Panel Docket and on the Closed Docket Sheet.

Section 22 Public Records

Effective July 14, 1994, the Supreme Court determined that all matters then pending in which a complaint had been **filed and served**, and all such cases in which complaints are subsequently filed and served, shall be public. See Section 22.2 for exception. All district proceedings prior thereto remain confidential unless public discipline has been imposed. *R.1:20-9(a)*. This has not been changed by the Court's

opinion in *R.M. v. Supreme Court of New Jersey, et al.*, which only recognized a **grievant's** First Amendment Right to speak about his or her grievance. Members of the disciplinary system must continue to maintain confidentiality throughout the investigative process, in accordance with R. 1:20-9.

Section 22.1 Public Complaint Lists

The OAE prepares monthly Statewide Public Complaint Lists for use by the press and public showing all cases statewide in which public complaints exist. District secretaries can access this list on the OAE website under "Public Charges" at www.judiciary.state.nj.us/oea/index.htm. This listing shows all pending cases in the complaint by district. In order for the Office of Attorney Ethics to maintain an accurate statewide list of cases, it is essential that, in all complaint matters, the secretaries provide their OAE liaison counsel with a copy of:

1. Complaint
2. Service Letter
3. Formal Answer

The secretary should send to the Statewide Coordinator copies of all cover letters (without enclosures of reports, complaints or answers) and a copy of:

4. Letter assigning hearing panel
5. All scheduling and rescheduling letters

Section 22.2 Content of Public Files

Ethics Committee secretaries must maintain a public file for all matters in the district in which a complaint is filed and served. **The public file must be available to the public and the press to review on reasonable request.** Under R. 1:20-9(c), the public file consists of all documents and records **filed subsequent to a complaint**, including:

1. Complaint
2. Service Letter
3. Formal Answer
4. Letter Assigning Hearing Panel or Special Master
5. All Scheduling Letters
6. Any Briefs filed
7. Hearing Panel or Special Master Report

The following documents filed after the filing of a complaint are not public:

1. Those subject to a protective order
2. Those submitted in support of a motion for discipline by consent which has not yet been granted.
3. Those submitted in connection with a confidential pre-hearing conference.

Secretaries should maintain the public files separately from the investigative case files. This will facilitate public access and availability. It will also insure the integrity of investigative materials so that no confidential material is inadvertently made public.

Section 22.3 Reproduction and Inspection of Public Files

In accordance with *R. 1:20-9(c)* and Administrative Directive #15-05 (Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records - Staff Guidelines, secretaries must be in a position to provide copies of public records to those who request them. **Figure 18** sets forth the reproduction policy for the attorney disciplinary system. Photocopy costs for state public records are set by Administrative Directive #15-05. **Figure 19** is a form for use by the member of the public who wishes to have a portion of a public disciplinary file reproduced. Costs for photocopies should be made payable to the ethics committee secretary and retained by him or her. No further accounting is necessary. It is recommended that the secretary photocopy **Figures 18 and 19** as a two-sided document so that the public has available both the policy on costs and the form on which to make reproduction requests. Effective September 1, 2004, secretaries may arrange to have voluminous documents reproduced by a commercial photocopy service at the prepaid expense of the person requesting them. *R. 1:20-9(c)(1)*.

Section 23 Computerized Reports by OAE

The OAE has computerized all current ethics records. To maintain these records in a current posture, it is necessary for the secretary to promptly forward to the OAE (1) docket cards and new grievances filed, (2) all original investigative reports, (3) copies of all dismissal letters, (4) copies of all complaints and service letters, (5) answers, (6) letters assigning hearing panels, (7) all scheduling letters and (8) copies of all hearing panel reports. Original hearing panel reports and the entire record in the matter (including transcripts and briefs) are sent to liaison counsel for filing with the Disciplinary Review Board.

On or before the fifth day of each month the OAE prepares, reconciles and distributes to each chair, vice chair and secretary two computerized printouts as follows:

To the chair and secretary a chronological listing of active pending district investigations **by docket number** showing:

- Docket Number
- Respondent's Name
- County
- Grievant's Name
- Most Recent Investigator Assigned
- Date Assigned
- Standard (S) or Complex (C) designation
- Aging Information

To the vice chair and secretary, a listing of all active pending hearings, organized as to whether they are pending answer, hearing or panel report. Secretaries also receive a printout of all untriable cases.

It is essential that these reports be reviewed by the secretary monthly and that any changes or corrections be returned by fax or mail to the OAE Statewide Coordinator by the end of the third week of the month they are received. Any changes will be reflected on the OAE's report for the following month.

Section 24 Agenda

The Secretary is responsible for preparation of the agenda prior to the regular meeting of the Ethics Committee.

Section 25 Attendance Sheets

Attendance sheets (**Figure 20**) should be maintained by the secretary and should reflect the attendance record of each member at the regular Ethics Committee meetings.

Section 26 Emoluments

Ethics secretaries are paid an emolument in an amount established by the Supreme Court from time to time. Such a stipend is not in payment for services rendered but, rather, to offset out-of-pocket costs that are paid by the secretary, including Ethics Committee letterhead and envelopes, postage, photocopies, telephone and the like. Emoluments are paid quarterly, at the end of the quarter, to all secretaries except for Essex and Bergen. Because these two counties have each hired full-time clerical assistance for their Ethics Committees, they are paid quarterly at the beginning of each quarter. The manner and method of payment is set forth in Section 85 entitled "Supplies and Reimbursement for Secretaries."

In addition to emoluments, the OAE supplies the following items to all secretaries:

- Attorney Grievance Forms (**Figure 21**)
- Ethics Information Pamphlets (**Figure 8**)
- One ICLE volume containing all advisory opinions, including periodic supplements for use by the secretary
- District Ethics Committee Manual for each Ethics Committee member
- A manual containing professional responsibility rules in a convenient format for each member
- Current edition of *New Jersey Attorney Ethics* by Kevin H. Michels for each committee officer and each newly appointed attorney member

Chapter 4 Jurisdictional and Related Issues

Section 27 Original Jurisdiction; Limitation of Actions; Standing

In fulfilling its constitutional obligation to regulate members of the bar, the Supreme Court has vested original disciplinary jurisdiction to hear and determine grievances alleging unethical conduct in 17 district ethics committees and in the OAE. *R.1:20-2(a), (b)* and *1:20-3(a)*.

Each Ethics Committee has jurisdiction over admitted attorneys who maintain an office within that particular district. *R.1:20-3(a)* and *(e)(1)*. Moreover, our rules provide that:

(E)very attorney . . . authorized to practice law in the state of New Jersey, including those specifically authorized for a limited purpose, or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3.

R.1:20-1(a). Thus, attorneys admitted *pro hac vice* are subject to the disciplinary jurisdiction of this state. *In re Bailey*, 57 N.J. 451 (1971) and *In re Rubin* 144 N.J. 161 (1996). Because such attorneys do not maintain offices in this state, the Director will initially assign such matters to an Ethics Committee for processing. *R.1:20-2(b)(6)*. Also included within the meaning of those “specifically authorized for a limited purpose, or in connection with a particular proceeding” are those law students and out-of-state attorneys who are authorized to practice under *R.1:21-3*. *In re Shomari Lateef a/k/a George Harris*, 81 N.J. 623 (1979) (temporary suspension) and unreported (1981 – final discipline). Effective September 1, 2004, the Supreme Court amended *R.1:20-1(b)* to include within its jurisdiction “those holding a limited license as in-house counsel under *R.1:27-2*, those registered as multijurisdictional practitioners under *RPC 5.5(b)*, and those certified as Foreign Legal Consultants under *R.1:21-9 . . .*” The Office of Attorney Ethics has exclusive jurisdiction over investigation and prosecution of cases involving multijurisdictional practitioners and in-house counsel. *R.1:20-2(b)(1)(F)*.

There are “no time limitations with respect to the initiation of any disciplinary . . . matter.” *R.1:20-7(c)*. Nor are there any requirements of standing for grievants to meet. See also Section 19.1.

Section 28 Prisoner Grievances

Despite the general rule that ethics grievances are heard in the district where the attorney has an office for the practice of law, when either the grievant or, on occasion, the attorney is a prisoner, the policy of the Supreme Court is to conduct ethics investigations and hearings in the correctional facility where the party is incarcerated. To do otherwise, especially where hearings are concerned, would (a) require the Ethics Committee to secure a court order in each instance to release the prisoner for an interview or hearing, (b) result in considerable expense in providing transportation and armed guards for the prisoner to and from an interview or hearing,

(c) cause unnecessary security problems at the interview or hearing for Ethics Committee members, the attorney and, possibly the general public and (d) run the risk of encouraging frivolous ethics grievances by prisoners who simply desire "a day out."

Consequently, secretaries in districts that house correctional facilities will screen all ethics grievances involving prisoners residing in those institutions. As noted in Section 19 on "Case Screening," ethics grievances by defendants in criminal matters should not be entertained while direct remedies remain available. Only after these remedies have been exhausted should such grievances be accepted, absent a patent ethical violation.

The following is a list of state correctional facilities:

District I (Atlantic, Cumberland, Cape May & Salem)

Southern State Correctional Facility
P.O. Box 150
Delmont 08314
(856) 785-1300

Bayside State Prison
P.O. Box F-1
Leesburg 08327
(856) 785-0040

Federal Correctional Institution
P.O. Box 280
Fairton 08320
(856) 453-1177

South Woods State Prison
215 S. Burlington Road
Bridgeton 08302
(856) 459-7000

District III (Burlington)

Mid-State Correctional Facility
P.O. Box 866
Wrightstown 08562
(609) 723-4221

Albert C. Wagner Correctional Facility
P.O. Box 500
Bordentown 08505
(609) 298-0500

Section 38 Prisoner Grievances

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District VA (Essex – Newark)

Northern State Prison
168 Frontage Road
P.O. Box 2300
Newark 07114-2300
(973) 465-0068

District VII (Mercer)

New Jersey State Prison
3rd & Federal Streets
P.O. Box 861
Trenton 08611-0861
(609) 292-9700

Garden State Youth
Correctional Facility
P.O. Box 11401
Yardville 08620
(609) 298-6300

District VIII (Middlesex)

East Jersey State Prison
Woodbridge Avenue, Lock Bag R
Rahway 07065
(732) 499-5010

Adult Diagnostic &
Treatment Center
P.O. Box 190
Avenel 07001
(732) 574-2250

New Jersey Training School
P.O. Box 500
Jamesburg 08831
(732) 521-0030

District XIII (Hunterdon, Somerset & Warren)

Edna Mahan Correctional Facility for Women
P.O. Box 4004
Clinton 08809-4004
(908) 735-7111

Mountainview Youth Correctional
Facility
P.O. Box 994
Annandale 08801
(908) 638-6191

In order to schedule a hearing at a correctional facility, arrangements should be made at least **two weeks in advance** through the office of the superintendent. Note that *R. 1:20-6(c)(2)(A)* requires **25** days notice of hearings generally. The presenter and respondent must provide the hearing panel chair with a list of witnesses in advance. The hearing panel chair must then provide the superintendent with a complete list of all persons, including court reporters and Ethics Committee members, who will appear at the prison for the scheduled hearing. **For security reasons it is usually not possible to add or change that list of visitors on the day of the hearing.**

Section 29 Grievances Against Judges

While Ethics Committees have jurisdiction over all individuals who are admitted to practice in this state, the Court has established a separate body to consider grievances regarding the conduct of judges. This body is known as the Advisory Committee on Judicial Conduct (*R.2:15-1 et seq.*). All complaints with respect to judicial conduct, whether municipal or upper court, should be referred to:

Secretary
Advisory Committee on Judicial Conduct
Administrative Office of the Courts
P.O. Box 037
Trenton, New Jersey 08625

Ethics Committees, however, do have jurisdiction and should entertain grievances against attorneys who also happen to be municipal court judges for grievances arising out of their practice of law. They should not, of course, consider grievances alleging judicial unethical conduct. Where multiple-respondent grievances are received alleging unethical conduct on the part of attorneys, as well as judges, unless the judge's conduct is more than peripheral or incidental, the Ethics Committee should process the allegations against the attorneys and simultaneously refer the grievant to the Advisory Committee on Judicial Conduct. If, however, the judge's conduct is a significant factor in the grievance, then no action should be taken by the Ethics Committee except to refer the entire matter to the Advisory Committee on Judicial Conduct for its action.

Since March 15, 1988, the Supreme Court has determined that the OAE should exclusively investigate and prosecute all grievances against upper court judges that relate to their conduct as attorneys prior to their appointment to the bench. To avoid the obvious difficulties in having practicing Ethics Committee attorneys adjudicate such cases, the Court has determined that the prosecution of such grievances, when necessary, shall be taken before special ethics masters. Hearing reports should then proceed through the normal review process by the Disciplinary Review Board.

Section 30 Conflicts, Transfer and Disqualification

All grievances should be initially screened by the secretary for conflicts of interest due to the service of members of the Ethics Committee or their law firm associates and partners. The Director has determined that, for purposes of ethics proceedings, conflicts of interest are of two types:

- (a) Direct Conflicts – requiring transfer of the matter to another Ethics Committee, and
- (b) Indirect Conflicts – requiring only disqualification of an individual Ethics Committee member from participation in a particular matter.

When a grievance arising out of the practice of law is filed against a **present**

member of an Ethics Committee or a volunteer currently assisting the committee, or against the secretary of an Ethics Committee, or against his or her partner or associate, a direct conflict exists and the matter will be transferred to another Ethics Committee for processing. Of course, if the grievance alleges unethical conduct in the processing of an ethics grievance, it will be declined under *R. 1:20-3(e)(2)(C)* and *R. 1:20-7(j)(1)* by the secretary. **Figure 3.**

If a complaint is issued after the investigation of a grievance against a committee member or active volunteer, the Statewide Coordinator will advise the chair and secretary of the committee that no additional cases should be assigned to that person until the complaint is resolved.

All other conflicts, including those where a present member of an Ethics Committee or his or her partner or associate has been involved in the underlying matter giving rise to the grievance, are indirect conflicts and are remedied by the disqualification of the affected member.

All questions relating to conflicts of interest by members, transfer of matters, or other questions of a jurisdictional nature may be referred to the Statewide Coordinator for review and appropriate advice.

Inasmuch as a member of an Ethics Committee exercises a quasi-judicial role, the member should also be disqualified upon the same grounds and conditions applicable to judges. In accordance with *R. 1:12-1 et seq.*, a member should, therefore, not sit in any matter when:

- the member is by blood or marriage the second cousin of, or is more closely related to the grievant or the respondent;
- the member is by blood or marriage the second cousin of, or is more closely related to any attorney in the action. Such proscription shall extend to the partners, employers, employees, or office associates of any such attorney;
- the grievance arises out of a matter in which the law office of a member has been involved;
- there is any other reason which might preclude a fair and unbiased investigation, hearing or judgment, or might reasonably lead the parties to believe so.

The vice chair of the committee should make the determination of whether or not a hearing panelist should be disqualified from a hearing. All other disqualification issues arising with respect to a committee should be decided by the committee chair.

Section 31 Representation of Ethics Respondents or Grievants by Committee Members or Their Law Firms

It is the Supreme Court's policy that an Ethics Committee member may not, during the member's term, appear before any other committee in the judicial or attorney disciplinary system or before the Supreme Court as counsel for respondent. Nor may a member appear as grievant's attorney. Thus, a member may not represent a client before an Ethics Committee in any district in the state, represent a respondent in connection with any OAE investigation, or appear before a District Fee Arbitration Committee, Committee on Attorney Advertising, Advisory Committee on Judicial Conduct, Advisory Committee on Professional Ethics or the Disciplinary Review Board. [Memorandum of Stephen W. Townsend dated March 9, 1990]. This policy, however, is personal to the member and does not apply to partners and associates of the member. Of course, if the partner or associate appears before a committee on which the member serves, the member must be disqualified and shielded from any discussion of the matters.

Section 32 Advisory Opinions; Ethics Research Assistance Service

Ethics Committees have authority to hear and decide actual cases and controversies involving allegations of unethical conduct. They have no jurisdiction, however, to rule upon hypothetical or other non-fact questions or to give advice.

Rather, all requests for advisory opinions as to the propriety of conduct of a member of the legal profession under the Rules of Professional Conduct and other Rules of Court governing the practice of attorneys are to be determined by the Supreme Court's Advisory Committee on Professional Ethics (ACPE) appointed pursuant to *R. 1:19-1 et seq.* Published opinions of the ACPE are "binding upon the Ethics Committees in their disposition of all matters." *R. 1:19-6.* Inquiries regarding advertising, letterheads, solicitation and similar issues specified in *R. 1:19A-2(a)* are determined by the Supreme Court's Committee on Attorney Advertising. Therefore, all such advisory requests should be forwarded to either:

Secretary
Advisory Committee on Professional Ethics
Administrative Office of the Courts
P.O. Box 037
Trenton, New Jersey 08625

or

Secretary
Committee on Attorney Advertising
Administrative Office of the Courts
P.O. Box 037
Trenton, New Jersey 08625

Ethics Committees also lack jurisdiction to consider grievances involving questions of attorney advertising. *R.1:20-3(e)(2)(B)*. All such inquiries should be referred by the ethics secretary to the Secretary of the Committee on Attorney Advertising. *R.1:19A-1 et seq.* As discussed further in Section 68, where the Committee on Attorney Advertising files a complaint it may refer the case for trial and factual report to an Ethics Committee.

Members of the bar also have access to an Ethics Telephone Research Service. *R.1:19-9*. This pay telephone (**1-900-526-5600**) hotline service offers non-binding research assistance. It is operated by an attorney who is staff to the Advisory Committee on Professional Ethics. However, unlike the Advisory Committee on Professional Ethics, opinions secured through the research service are only for the assistance of the bar. The lawyer must come to his or her own conclusion as to the ethical propriety of the conduct. Information received, as well as the fact that an inquiry was made, is inadmissible in any legal or disciplinary proceeding. *R.1:19-9(d)*. Moreover, all records kept by the research service are confidential and immune from subpoena. *R.1:19-9(e)*.

Section 33 Related Civil or Criminal Litigation

While the Ethics Committee may be entitled to take jurisdiction and determine a matter, there may yet be circumstances that militate against such action. Our court rules specifically provide that Ethics Committees have discretion to decline consideration of a matter if the allegations are "substantially similar to the material allegations of pending civil or criminal litigation." *R.1:20-3(f)* provides that, unless there are provable ethical violations or the facts present substantial threat of imminent harm to the public, such cases should not be docketed until the conclusion of litigation. When such pending litigation is discovered or commences during the investigation, the investigator should write a letter to the chair, with a copy to the secretary, describing the litigation. In most cases the matter will be administratively dismissed without prejudice and the grievant will be informed that the grievance may be re-filed after the litigation is concluded. Note that **once a formal ethics complaint has been filed, the ethics matter shall not be dismissed** or held in abeyance without the OAE's Director's approval.

Section 34 Withdrawal of Grievance

Not infrequently, grievants who have received satisfaction from the respondent subsequent to the filing of a grievance may desire to withdraw the grievance prior to final determination. *R.1:20-7(d)* specifically provides that: "Neither unwillingness nor neglect by the grievant to sign a grievance or prosecute a charge, nor settlement or compromise between the grievant and the respondent or restitution by the respondent, shall, in itself, justify abatement of the processing of the grievance." Thus, the Ethics Committee may not allow a grievant to withdraw a grievance unless and until it has first made an independent determination of the relative merits of the matter. It is this determination as to the merits of the case, rather than the desire of the grievant standing alone, that should form the basis for any investigative report recommending

a particular disposition. Where the grievant is or becomes unavailable, the Ethics Committee should proceed if a provable case can still be made out. Quite frequently, for example, a client will complain about delay in the handling of trust funds by an attorney. On the surface this problem may simply appear to be one of neglect and once the client receives the funds that are due, the client often loses interest in pursuing the original ethics grievance. The true problem, however, may run considerably deeper than appears at first glance. A client who has been defrauded or whose funds have been misappropriated by an attorney demonstrates a similar lack of fervor in pursuing an ethics grievance once the client has been made whole. To uncover the whole problem it is necessary to investigate the matter. To perfunctorily allow a grievance to be withdrawn when it may in fact involve misuse of trust funds may be to allow other unsuspecting clients to fall prey to the attorney's demonstrated unethical propensities. Such an action would of course be irresponsible and not in the best interests of the public or the profession.

A grievant's refusal to cooperate with the Ethics Committee, to furnish documentation, or to appear at any ethics hearing, should one be scheduled, is not determinative of the merits of the grievance. Such action on the part of any grievant may simply reinforce a skeptical attitude as to the reasons for withdrawal of the grievance. Under the provisions of *R. 1:20-7(i)*, the Ethics Committee has full investigatory and adjudicatory subpoena power. All subpoenas issued by the Ethics Committee and properly served may be enforced by the Superior Court in the manner provided by *R. 1:9-6*. The Ethics Committee should not hesitate to subpoena any grievant or other relevant witness during the investigation or the hearing of the matter. The recalcitrant grievant (or witness) should certainly be advised of the consequences of any refusal to honor a subpoena. However, the Ethics Committee should communicate with the OAE prior to instituting enforcement proceedings in order that such further efforts as practicable may be made to secure the grievant's compliance and cooperation without the necessity for formal enforcement proceedings. When necessary, in serious cases, however, formal enforcement proceedings should be instituted when the testimony of the witness or other party is necessary to the full and accurate adjudication of the matter. *In re Katz*, 90 N.J. 272, 281 n.3 (1982). In the past, successful enforcement proceedings have been brought in significant cases. See **Figure 42** for *Subpoena Duces Tecum* with confidentiality language.

Section 35 Dual Grievances – Ethics and Fee

Arbitration of fee disputes is handled by the Supreme Court's 17 District Fee Arbitration Committees appointed pursuant to *R. 1:20A-1*. Nevertheless, grievances are often received that sound both in ethics and fee. In matters where a grievance involves both a **substantial** fee dispute and a charge of unethical conduct, the grievant should be advised that he or she **must first proceed with the fee dispute** before the appropriate District Fee Arbitration Committee. *R. 1:20-3(e)(2)(D)* (amended effective September 1, 2004 to include the word "substantial"). The client cannot waive any fee dispute once the secretary has determined that the fee dispute is substantial. [See Section 19.2 and **Figure 4**, Declination Letter (Fee Disputes)]. If during the course of the fee dispute, the Fee Committee becomes aware of evidence of unethical conduct, it

has a duty to then refer that matter back to the appropriate Ethics Committee at the conclusion of the arbitration proceeding. *R. 1:20A-4*. Additionally, a grievant may still believe that an ethics grievance exists after conclusion of the fee hearing and so may independently file with the Ethics Committee after the conclusion of the fee dispute.

Section 36 *Pro Bono* Assignments – Ethics Members

In accordance with *Madden v. Delran*, 126 N.J. 591 (1992), the Supreme Court has authorized exemptions from *pro bono* assignments. (Memorandum of Chief Justice, February 16, 1993). Those exemptions include all members of District Ethics and Fee Arbitration Committees appointed by the Supreme Court. The exemption is claimed with the annual attorney registration and billing on the Annual Pro Bono Counsel Assignment Questionnaire or, during the year, by writing to the Assignment Judge.

Chapter 5 Investigating Ethics Grievances

Section 37 Generally

There are several stages in processing docketed ethics grievances:

Stage I-Investigation

Stage II-Hearing

Figure 22 contains two time lines that reflect the allotted time for the tasks to be performed during the investigative stage and the hearing stage.

The vast majority of grievances (70% to 75%) are disposed of during the investigative stage. When such cases are properly processed, they should be resolved by an Ethics Committee within six months (183 days) for minor unethical conduct and standard matters, and nine months (274 days) for complex matters. Note that the time runs from docketing until the OAE receives a copy of the investigative report (and complaint or agreement in lieu of discipline if indicated) and notification to the grievant of the disposition. When a complaint is filed, the case enters the hearing stage. Under our rules, a period of six months plus 21 days for the respondent to answer (204 days) is allowed for completion of the hearing. *R. 1:20-8*.

The secretary and the chair are the most visible members of the Ethics Committee and most often will receive initial communications from potential grievants. Thus, a large portion of the work that these officers necessarily perform involves public relations, a subject about which all members of the profession must be concerned. Many prospective grievants do not have a bona fide grievance. Often they are litigants who are dissatisfied with the outcome of a case. These persons, as is true of all inquirers, deserve to be treated politely and with consideration. It is entirely proper, however, to be frank and advise such individuals that, although they may have other remedies available, their grievance does not state a claim of unethical conduct. If the grievant insists that unethical conduct has been committed, however, the secretary must forward the grievance to the designated public member for review (Section 19.3), unless it comes within the guidelines for mandatory declination (Section 19.2). If the grievance is in fact baseless, a second opinion from the Ethics Committee's designated public member will confirm the secretary's conclusion. Other grievances that state a possible cause of action should be assigned to regular Ethics Committee members for investigation. The majority of ethics grievances can be expeditiously concluded by a concise written report which will serve as proof that the grievance has received due consideration and fair treatment. More importantly, following the above procedure will demonstrate to the particular grievant that the Ethics Committee has listened to his or her complaint.

The OAE has promulgated an Attorney Ethics Grievance Form for use by grievants. **Figure 21.** Occasionally, instead of an Attorney Ethics Grievance Form or a handwritten letter, a complaint in traditional legal style will be prepared by the grievant's attorney and filed with the Ethics Committee as a grievance. Often such grievances will meet all the requirements for a "complaint" under *R. 1:20-4(b)*. Such technical differences

are irrelevant; all grievances are treated the same. Only the chair, after investigation, can authorize the filing of a complaint.

After docketing the grievance, the secretary must then acknowledge its receipt and assign the matter for investigation. This can usually be accomplished by a single letter directed to the grievant with a copy to the investigator. That letter should provide the grievant with the name and address of the investigator as well as advice that all future communications should be made directly to the investigator. Likewise, the letter to the grievant should enclose the pamphlet entitled "Information About Grievance Procedures and Discipline of Lawyers." **Figure 8.** This pamphlet explains what the grievant should, and should not, expect from the ethics system, including the Court's recent revision of the confidentiality rule as it relates to a **GRIEVANT'S** First Amendment Right to speak about his or her grievance.

Once the grievance has been acknowledged and docketed, the secretary prepares the ethics docket cards and forwards the top card to the OAE together with a copy of the grievance. The matter is then ready for investigation.

Section 38 Assignment And Investigative Procedures

Investigation of an ethics matter serves as the foundation for all further proceedings. During investigation, (the time goal for which is six months for minor and standard unethical conduct and nine months for complex unethical conduct), the assigned member must gather and review the evidence necessary to evaluate the grievant's allegations, arrive at a recommendation and prepare an investigation report and any accompanying documents and submit them to the chair in time for review and possible revision (see Section 40).

The chair of the Ethics Committee is responsible for assigning an attorney member to investigate each grievance. All investigators must be attorneys, or the staff of the OAE designated by the Director. *R.1:20-3(g)(1)*. As a practical matter, the chair generally delegates this responsibility to the secretary to assign matters according to a plan which efficiently spreads the workload and utilizes the expertise of the attorney members. An investigator should be assigned within three business days from the secretary's docketing of a grievance. The same investigator should generally handle all grievances against the same attorney unless there are more than four pending simultaneously. In that case the chair should direct the investigators to communicate with each other in order to detect any patterns (e.g. a pattern of neglect) that may emerge. Likewise, a single ethics grievance against multiple attorneys should be assigned to the same investigator, but no more than four should be docketed at one time (see Section 19).

If the secretary is unavailable, the chair is responsible for finding a replacement in consultation with the Statewide Coordinator or Director. For obvious reasons of confidentiality, the partners or associates of the secretary may not substitute for that individual during temporary absences.

Experience has demonstrated that roughly 70% to 75% of all ethics grievances are ultimately determined not to involve provable unethical conduct. The remaining 25% to 30% of grievances will either be diverted (Section 41), result in a complaint (Section 48) or result in discipline by consent (Section 42).

The investigator's specific charge is to make the inquiries reasonably necessary to determine both the facts and the law surrounding the grievance and to report them, together with an appropriate recommendation and draft of the accompanying agreement in lieu of discipline or complaint, where applicable, to the chair. *R. 1:20-3(h)*. In order to insure that this is done within the prescribed timetable, shown in **Figure 22**, the investigator should follow these steps:

- Examine the materials immediately upon receipt to determine if there is any conflict of interest in handling the matter (see Section 30 entitled Conflicts: Transfer and Disqualification") and, if so, return the materials forthwith to the secretary for reassignment.
- Forward a copy of the Attorney Grievance Form or Grievance letter to the respondent immediately upon receipt of the assignment and solicit the attorney's factual response within ten days. *R. 1:20-3(g)(2)and(3)*. **Figure 23**.
- Communicate with the grievant, by telephone, in writing or in person, to insure that the grievance, and all evidence, has been fully aired, and afford the grievant the opportunity to respond in writing within 14 days. *R. 1:20-3(g)(5)*.
- When the attorney responds, send a copy to the grievant and request any additional comment within ten days. **NOTE:** To comply with the Supreme Court's directive that ethics officials maintain the confidentiality of the investigative process and of all documents gathered during that process, all copies of the respondent's reply to the grievance; witness statements; or any other document sent to the grievant during the course of the investigation, must be clearly marked "Confidential."
- When the grievant replies, send a copy to the attorney and request final comment within ten days.
- Contact and interview any other necessary witnesses.
- Prepare the investigative report and any accompanying complaint or agreement in lieu of discipline. **NOTE:** To comply with the Supreme Court's directive that ethics officials maintain the confidentiality of the investigative process and of all documents gathered and reviewed during that process,

every page of the **grievant's copy** of the investigative report, Agreement in Lieu of Discipline as well as all attachments thereto, must be clearly marked "Confidential."

In most instances the above process will furnish the necessary information to determine whether there is sufficient credible evidence to support a charge of unethical conduct by clear and convincing evidence, thus warranting a complaint.

In the event that, during the investigation but before filing of any complaint, the investigator learns of pending related litigation not disclosed prior to docketing, which in accordance with *R. 1:20-3(e)(2)(c)*, should result in declination of the grievance, the investigator should state the facts in a letter to the chair, requesting that the matter be administratively dismissed. If, after review, the chair concurs, the secretary shall so inform the grievant in writing by adapting the letter shown in **Figure 5**. A copy of the investigator's letter and the secretary's letter shall be sent to the Statewide Coordinator.

During the investigation of an ethics grievance, every respondent has an absolute affirmative obligation to "cooperate" and "reply in writing" within ten days of receipt of a request for information. The rules provide that, where an attorney is unable to provide the requested information within that time, he or she must so state in writing and give a date certain when it will be provided. *R. 1:20-3(g)(3)*. Respondents must also "produce the original of any client or other relevant law office file for inspection and review, if requested." *R. 1:20-3(g)(3)*. Most attorneys will cooperate. However, **if the attorney does not cooperate, the investigator must still make a timely report**. In this case the investigator may accept the grievance (after completion of other investigative steps) as establishing the facts alleged and, if those facts warrant, recommend a complaint. Once a complaint is issued, respondent must file an answer. *R. 1:20-4(e)*. Failure to answer a complaint is a violation of *R. 1:20-4(e)* and *R.P.C. 8.1(b)*. It also constitutes an admission of the facts *R. 1:20-4(f)(1)*, and may eliminate the need for any hearing. *R. 1:20-6(c)(1)*. (See Section 61). The Ethics Committee may, however, amend its complaint to allege an additional count for violation of *RPC 8.1(b)*. This is the most productive way to handle a respondent's failure to answer and enables the Ethics Committee to continue processing the case.

As noted earlier, although a grievant may "speak" publicly about the fact that he/she has filed a grievance and the result thereof, even after *R.M.*, ethics officials must continue to maintain the confidentiality of the investigative process, and of any records or documents made or gathered during that process in accordance with *R. 1:20-9*. Ethics officials do not violate confidentiality by discussing the case with witnesses. However, every effort should be made to stress the confidential nature of the investigation with any witnesses.

Section 39 Resources Available

The following basic documentary resources are available in the conduct of ethics investigations:

- Rules of Professional Conduct: included in a separate Appendix to this Manual entitled Discipline and Fee Arbitration Rules and Rules of Professional Conduct. They can also be found at the conclusion of Part 1 of the Rules Governing the Courts of the State of New Jersey (both West and Gann editions). Because the Supreme Court amended the RPC's effective January 1, 2004, investigators should note the **date of the unethical conduct** to determine which version of the RPC's applies. DR's can be accessed at www.gannlaw.com/Ethics/APPENDIX

- *Annotated Rules of Professional Conduct*: in the pocket part supplement to Volume 1 of *New Jersey Practice Series*.

- *Opinions of the Supreme Court's Advisory Committee of Professional Ethics* are available in an on line searchable database at Rutgers Camden Law Library at <http://lawlibrary.rutgers.edu/ethics/search.html>. These opinions are also published in the NEW JERSEY LAW JOURNAL and NEW JERSEY LAWYER. The Institute for Continuing Legal Education produces an indexed compilation of these opinions with annual supplements. The secretary of every Ethics Committee is provided with one such volume which is transferred to his or her successor.

- Select Disciplinary Review Board opinions and corresponding Supreme Court orders (Rutgers Law Library site)

- *Rules Governing the New Jersey Disciplinary System*

- *New Jersey Digest*

There may be occasional need for expert or other professional services such as accountants, interpreters, court reporters, physicians, etc. Because the cost of such services is paid by the disciplinary system, **authorization must be secured from the OAE prior to making any commitments for these services**. The failure to do so may result in personal liability by the contracting member. Moreover, the investigating member should feel free to contact the OAE liaison or Statewide Coordinator at any time to seek assistance in the processing of a case. For example, the OAE may authorize handwriting analysis and other forensic evidence. The OAE may also approve examination by a physician for either physical or mental disability.

Most investigations are accomplished with the voluntary cooperation of the grievant, the respondent and all necessary witnesses. Occasionally, however, it may be necessary or proper to secure the statement of a witness or the production of documentary evidence by means of compulsory process. The Ethics Committee has available to it plenary, investigatory subpoena power under *R.1:20-7(i)*. In addition, the Ethics Committee always has the right through *subpoena duces tecum* to require the respondent to produce all trust and business account books and records required

to be maintained by every attorney under our record keeping rule. *R.1:21-6(c)*. The procedure for invoking this power is the same as that which applies at the hearing stage and is discussed at length in Section 59 entitled "Subpoenas."

Section 40 The Investigative Report

Each investigating member is required to issue a written report to the committee chair. The report should be in the following format:

- A concise **Procedural History** including a review of all pertinent dates relating to the assignment, as well as to all correspondence and inquiries made.
- A concise **Statement of Facts** relating to the issues raised by the grievance, including a summary of the facts alleged by each party, those facts which are disputed and those which are undisputed, and those which are supported by documentation or objective corroborating witnesses. Refer specifically to all relevant documentation and include copies as exhibits.
- The report should contain an **Analysis** of the facts with a specific description of each ethical issue raised, and with specific reference to the relevant Rules of Professional Conduct. Conduct must be analyzed in terms of the Rules of Professional Conduct.
- Next, the report must contain a **Conclusion**. Essentially, there are five conclusions that an investigator can make:

(1) no unethical conduct has occurred and the matter should be dismissed;

(2) minor unethical conduct has occurred and the matter should be diverted by the Director under *R.1:20-3(i)(2)(A) and (B)* (See Section 41);

(3) unethical conduct has occurred which the respondent admits and discipline by consent [*R.1:20-10(b)*] should be imposed (See Section 42);

(4) unethical conduct has occurred and a complaint [*R.1:20-4(a)*] should be filed (See Section 48);

(5) incapacity or disability proceedings should be undertaken by the Director under *R.1:20-3(j) and R.1:20-12* (See Section 100).

- Finally, the investigator must **sign** and **date** the report.

An example of a good, concise investigative report is shown in **Figure 24**. In reaching a conclusion, the investigator should consider whether the evidence is such that there is a “reasonable prospect of finding unethical conduct by clear and convincing evidence.” The same standard is to be applied by the Ethics Committee chair in determining whether a complaint should be filed. This standard is clearly stated in both *R. 1:20-3(i)(1)* and *R. 1:20-4(a)*.

Thus, on two levels, there must be some evaluation of the reasonableness of proving unethical conduct by the requisite clear and convincing evidence standard. While it is unlikely, at least in theory, that a one-on-one dispute between an attorney and a grievant will routinely meet that standard, the ultimate decision is a judgment call by the chair based on the investigator’s assessment of credibility and other circumstantial evidence.

Whenever an investigative report recommends that a complaint be filed, the investigator should prepare and attach the proposed complaint (see Section 48) and submit both documents to the chair. Likewise, where diversion or discipline by consent is recommended, a proposed agreement in lieu of discipline or motion for discipline by consent should be attached (see Sections 41 and 42).

It is important that the investigator prepare an adequate and well documented report of investigation. When a grievant appeals the dismissal of a particular matter, the investigative report will be relied on in proceedings before the Disciplinary Review Board to determine whether the Ethics Committee’s decision should be sustained. The report should be a complete document unto itself. It should have annexed as exhibits, the initial grievance, respondent’s response and grievant’s reply, copies of all relevant pleadings, letters, bank records, checks, and other documents to substantiate the investigator’s recommendation. If the report leaves open significant factual questions or fails to analyze pertinent allegations of ethical violations, the Board may have no alternative but to remand the matter back to the Ethics Committee (and probably to the same investigating member), for further investigation.

Despite this caveat, investigative reports need not be unduly lengthy. An informative investigative report can, and often should, be accomplished in three to four typewritten pages. Naturally, the complexity of the matter is the final determinant of the appropriate length of an investigative report.

On completion, after review by the chair, the original and three copies of the investigative report should be promptly forwarded to the secretary. When the report recommends dismissal, the secretary must promptly forward the original of the report to the OAE, and provide a copy to the respondent and the grievant together with the usual dismissal letter. **Figure 25**. Each page of the grievant’s copy, as well as all attachments thereto, must be marked “Confidential.”

Section 41 Diversion

Section 41.1 Generally

Diversion is a non-disciplinary alternative for the treatment of “minor unethical conduct” that would otherwise be processed by filing a complaint. **Diversion is available only during the investigative stage** of a matter for qualified attorneys who have committed “minor unethical conduct.” Diversion can be imposed only with the consent of the respondent attorney by entering into an “Agreement in Lieu of Discipline” (**Figure 26**) in which the respondent admits unethical conduct and agrees to meet certain conditions within a specified period of time (usually six months or less). Diversionary conditions are designed, where possible, to remedy the causes of unethical conduct and, where appropriate, to afford the grievant some tangible satisfaction. The Agreement must be recommended by the investigator, approved by the chair of an Ethics Committee and imposed after review and approval by the Director, Office of Attorney Ethics. A respondent has no right to diversion and no right to appeal from a refusal to offer of diversion. The grievant has no right to appeal an offer of diversion, but must be notified of the offer of diversion, be provided a copy of the Agreement in Lieu of Discipline and be given the opportunity to comment to the investigator and to the Director, OAE before diversion is granted. See *R. 1:20-3(i)(2)(B)(i)* and **Figure 27**. This “ten day letter” may be signed by either the chair or the secretary.

Section 41.2 Minor Unethical conduct

Diversion is available only in cases that meet the definition of minor unethical conduct. *Rule 1:20-3(i)(2)(A)* defines minor unethical conduct in part as “unethical conduct which, if proved, would not warrant a sanction greater than a public admonition.”

Admonition Cases

Where an admonition would likely be the sanction imposed, the case may qualify as “minor unethical conduct.” Admonition is the least serious disciplinary sanction. Prior to the Supreme Court’s Administrative Determination of July 14, 1994, the equivalent of this sanction was a private reprimand. Following are some examples that may constitute minor unethical conduct:

| Case Type | Violation |
|---|--------------------------|
| Bona Fide Office | RPC 5.5(a) & R.1:21-1(a) |
| Gross Neglect (Single Act) | RPC 1.1(a) |
| Lack of Diligence | RPC 1.3 |
| Lack of Communication | RPC 1.4(a) |
| Failure to Explain Fee in Writing | RPC 1.5(b)(c) or (d) |
| Simple Conflict of Interest (e.g. Buyer-Seller of Real Estate, Driver-Passenger in negligence case) | RPC 1.7 and 1.9 |
| Improperly Withdrawing from Representation (including failure to turn over client files) | RPC 1.16(d) |
| Failure to Maintain Proper Trust and Business Account Records (minor unethical conduct) | RPC 1.15(d) & R.1:21-6 |
| Commingling Legal Fees and Trust Funds | RPC 1.15 |
| Improper Notarization of a Document | RPC 8.4(c) |
| Ineligible Practicing Law (very limited period) | RPC 5.5(a) |

This list is not exhaustive. Moreover, each case must be judged on its own merits, since some unethical conduct may constitute multiple violations of the Rules of Professional Conduct and each case may have aggravating or mitigating factors that affect the sanction. District committee investigators should feel free to communicate with their district committee officers, as well as with their OAE liaison attorney or with the Statewide Coordinator to discuss a particular case.

Disqualifying Circumstances

A case that otherwise would qualify as “minor unethical conduct” **shall not qualify** if any of the following considerations, stated in *R. 1:20-3 (i)(2)(A)*, apply:

(i) The conduct involves **knowing** misappropriation of funds. This disqualifier does not include negligent misappropriation.

(ii) The unethical conduct “resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made.” One of the primary purposes of diversion is, where appropriate, to provide the injured party with reasonable and direct restitution. In these cases, unless the respondent makes or agrees to make restitution of direct expenses, diversion is inappropriate. There may be some cases, however, where the prejudice is great and there is no monetary restitution that can be made.

(iii) The “respondent has been disciplined in the previous five years.”

(iv) The unethical conduct involves “dishonesty, fraud or deceit.” Such serious unethical conduct is inappropriate for diversion. Misrepresentation to the client or others may be included in this category, depending on the specific facts.

(v) The unethical conduct “constitutes a crime as defined by the New Jersey Code of Criminal Justice.” Such serious unethical conduct is inappropriate for diversion.

Where the investigator is contemplating diversion, he or she should communicate with the Statewide Coordinator or OAE liaison to check the respondent’s ethical history in order to review for disqualifier “iii” above.

Section 41.3 Time Goals

Minor unethical conduct cases must be investigated and concluded within six months from the date a written grievance is docketed. The case must either be dismissed, diverted, or a complaint filed within that period. *R. 1:20-8(a)*. When diversion is considered by the investigator, a number of steps must be taken (see

Section 41.5). Because these steps are time consuming, the investigator should make a decision as to whether the unethical conduct is minor and diversion seems appropriate **within three to four months after assignment.**

Section 41.4 Diversionary Conditions

Diversion serves two primary purposes: to correct or remedy the causes of the minor unethical conduct and thus avoid the recurrence of unethical conduct by the respondent and to provide the grievant or injured party with quick, reasonable and, where possible, tangible satisfaction. With this in mind, the rules provide that the diversionary agreement “may contain an agreement to meet, within a specified period, stated conditions addressed, to the extent practicable, to the remediation of the cause of the unethical conduct.” *R.1:20-3(i)(2)(B)(iii)*. Moreover, failure to make restitution may be a “disqualifying circumstance.” Consequently, where substantial monetary prejudice is likely or has resulted, restitution will be a required condition for diversion. In fact, it is likely that restitution will be one of the most frequently stated conditions.

The types of conditions are unlimited. They may include, for example one or more of the following:

- Written apology
- Restitution or refund
- Completion of legal work
- Establishment of an office system (e.g. docketing or conflict-checking system)
- Psychological Counseling
- Medical Treatment/Evaluation (including substance abuse)
- Continuing Legal Education (ICLE)
- Continuing Legal Education (NJSBA sponsored)
- Trust Account Audit by Private Accountant
- Employment of Bookkeeper
- Monitoring by Seasoned Attorney

Conditions will be fashioned by the investigator and included in the Agreement in Lieu of Discipline. **Figure 26. NOTE:** Because the terms of the Agreement in Lieu of Discipline remain confidential, even after *R.M. v. Supreme Court of New Jersey, et al.*, every page of the **grievant’s copy** of the Agreement in Lieu of Discipline, as well as all attachments thereto, must be marked “confidential.”

A word about a special condition is in order. Soon after the Supreme Court provided for diversion, the **New Jersey State Bar Association** developed the **Diversionary Continuing Legal Education Program**. It is an ICLE Seminar offered on a statewide basis, designed to address the ethical issues raised in the most common cases of minor unethical conduct. Attendance at this seminar is a condition of most Agreements in Lieu of Discipline. The *pro forma* language for this condition is shown in **Figure 26**. The OAE notifies respondents of the time and place of the next diversionary

seminar. The State Bar contacts respondents about costs and reports to the OAE on attendance.

The diversionary program is separate from the usual Institute for Continuing Legal Education Seminars offered monthly to all attorneys. These seminars are always available and may be appropriate conditions for a diversion.

All agreements must include a reporting requirement whereby the attorney agrees to file specific report(s) with the Office of Attorney Ethics on a specified time schedule demonstrating progress toward and completion of the condition(s) imposed. The OAE's Diversion Coordinator will monitor completion of the condition(s), which generally should not exceed six months duration. *R. 1:20-3(i)(2)(B)(iii)*. Until the respondent fulfills the condition(s), the matter remains in the Diversion stage. Upon successful completion, the case is closed without discipline. If the attorney fails substantially to meet the obligations, the case is reopened and returned to the Investigation Stage. The Ethics Committee is directed to file and prosecute a complaint under an expedited procedure.

Section 41.5 Procedures for Implementing Diversion

Investigation

Diversion is appropriate only where the investigation demonstrates and the respondent attorney agrees that minor unethical conduct has occurred. **If no unethical conduct occurred, the only appropriate disposition is dismissal.**

Agreement in Lieu of Discipline

If it appears that diversion is appropriate, the investigator should take the following steps:

- The investigator should check with the Statewide Coordinator to see if the respondent is eligible for diversion or precluded from diversion because of prior ethics history. At that time, the investigator will be asked to **fax** a copy of his/her draft investigative report and proposed diversionary conditions to the Statewide Coordinator for further approvals (e.g. whether the nature of the unethical conduct (in context) is appropriate for diversion; the suitability of the proposed conditions and proposed timeframe for completion, etc.).
- After the Statewide Coordinator has reviewed the draft investigative report and has approved the matter for the offer of diversion (and assuming the DEC Chair also has approved that proposed disposition), the investigator should broach the subject with the respondent or his/her counsel to see if respondent is willing to make the necessary admissions and satisfy appropriate conditions. The respondent should be advised that diversion is dependent on final approval by the DEC Chair and the OAE Director (or his/her designee) after review of any comments received from the grievant.

If the respondent does not agree with diversion, the standard investigative report recommending a Complaint, together with a draft of the Complaint, should be promptly forwarded to the DEC Chair for review.

- The final investigative report (with exhibits) recommending diversion and the Agreement in Lieu of Discipline (**Figure 26**) should be submitted to the Chair for review and formal approval or revision, if necessary. If approved by the Chair, he/she should sign the Agreement in Lieu of Discipline.

- The approved Agreement should be sent to respondent or his/her counsel with a **short time (one week to ten days)** for his/her signature and return.

- The investigative report (with exhibits) and fully executed Agreement (signed by the investigator, Chair and respondent and his/her counsel, if any) should be forwarded to the DEC Secretary.

- The Secretary should send a copy of each to the grievant with the "ten day letter" (**Figure 27**). Each page of the **grievant's copy** of the Agreement in Lieu of Discipline and the investigative report, as well as attachments to both of these documents, **must be marked "confidential"**. The "ten day letter" will remind the grievant that the contents of the Agreement in Lieu of Discipline remain confidential. The respondent should be copied on this letter (**See Figure 27**).

The Secretary sends the investigative report, the original fully executed Agreement in Lieu of Discipline, and a copy of the "ten day letter" to the OAE Diversion Coordinator for approval by the Director or his/her designee.

Section 41.6 Action by Office of Attorney Ethics

On receipt of a properly completed Agreement in Lieu of Discipline and supporting documentation, the Director will review the matter together with the disciplinary record of the respondent and will notify the chair, secretary, investigator, respondent and grievant of the action taken. If the diversion is declined, the Director will so indicate and return the agreement to the chair with directions to file a complaint.

If the diversion is accepted, the Director will divert the matter, notify the parties, and place the case in the Diversion stage. The OAE Diversion Coordinator will monitor the matter until conclusion. On successful completion, the case will be dismissed. If the diversion is not completed, the Director will notify the Ethics Committee of the failure and direct it to file a complaint.

Section 41.7 Frequency of Diversion

There is no absolute limitation on the number of times that diversion may be offered to any one attorney so long as the offense otherwise qualifies as "minor unethical conduct." It will be rare, however, that more than one diversion will be approved for the same attorney. If an attorney consistently violates the Rules of Professional Conduct, important goals of diversion (increasing ethical awareness and avoiding repeated unethical conduct) have not been achieved.