Section 41.8 Future Use of Agreement in Lieu of Discipline

If accepted by the Director, the Agreement by its terms is "valid and a copy admissible, but only in this and any subsequent disciplinary proceeding as evidence of the respondent's unethical conduct." Thus, if a respondent agrees to diversion and then fails to successfully complete it, the agreement, which contains written admissions of unethical conduct, is admissible in prosecuting a complaint based on the original charge.

Likewise, where the diversion is successfully completed but the respondent is involved in subsequent unethical conduct, a copy of the prior agreement is admissible, for example, to prove knowledge or a pattern of unethical conduct or with respect to the issue of sanction, since the prior diversion, by its terms, constitutes minor unethical conduct.

Section 42 Discipline by Consent

Section 42.1 Generally

Discipline by consent (other than disbarment) is governed by *R.1:20-10(b)* and is **a procedure to expedite the imposition of discipline in certain limited cases.** It requires a thorough investigation of the facts on the part of the investigator and a realistic assessment by the investigator, presenter and the respondent of the extent and nature of the sanction that will likely be imposed if the matter is contested at a hearing and decided by the Disciplinary Review Board. If both the investigator (or presenter) and respondent agree, and if that agreement is approved by the Board, the case is resolved in an expedited manner at a reduced cost to the parties.

Section 42.2 Standards

Discipline by Consent is **not plea bargaining.** Rather, it is an assessment by the investigator or presenter that if a hearing were held the stipulated facts are those that the presenter could reasonably expect to prove by clear and convincing evidence. If a complaint has been filed, the stipulated facts must include all of the allegations in the complaint. If the respondent agrees to these material facts and if the parties can further agree on a recommended sanction or range of sanctions, they may submit a Stipulation of Discipline by Consent (**Figure 28**) together with respondent's Affidavit of Consent (**Figure 29**) to the Board with a Notice of Motion (**Figure 30**). **The chair must approve** these documents. The above documents are sent to the OAE liaison attorney for review and transmission to the DRB. (The OAE must always be notified of the motion.) A copy of the transmittal letter to the liaison should be sent to the Statewide Coordinator. **In order to avoid rejection by the Board, discipline by consent ordinarily should be used only in cases where there is clear legal precedent for the level of discipline to be imposed.** The documents mentioned above should, however, provide for the agreed upon discipline "or such lesser discipline as the Board may deem warranted." If accepted by the Board, trial of the matter is waived and the sanction is immediately imposed by the

Court, except in those rare cases where the Court rejects the discipline by consent. If rejected by the Board, the matter is returned to the Ethics Committee for processing in the normal course and no stipulations are admissible in evidence. *R.1:20-10 (b)(3).*

Section 42.3 Timeliness

Discipline by Consent is available at any time during the investigation of a case. It is also available at any time prior to "60 days after the time prescribed for the filing of any answer to a complaint." *R.1:20-10(b)(1).* This "cut off date" is firm in order to avoid eve-of-hearing proposals after the presenter, respondent and/or adjudicator have invested substantial time and effort. After the "cut-off-date," the respondent has only two choices: 1) to admit the allegations as charged, leaving discipline to the discretion of the trier of fact, or 2) to go to hearing. Thus, the "cut-off date" is mandatory and **may not be extended** by any party or by the adjudicator.

Section 42.4 Procedure

Investigation

Discipline by Consent is appropriate only where the investigation demonstrates and the attorney agrees that unethical conduct has occurred. **If no unethical conduct occurred, the only appropriate action is to recommend dismissal.** The investigation must be concluded in the normal course — six months for standard cases and nine months for complex cases. Both the respondent and grievant must be contacted in the normal manner. Discipline by consent **does not extend the time deadlines** for resolution of the case by the Ethics Committee.

Stipulation and Affidavit

The Stipulation of Discipline by Consent in the approved form (**Figure 28**) is to be prepared by the investigator, and must attach an Affidavit of Consent. **Figure 29**. It must include a detailed statement of the unethical conduct committed, any aggravating or mitigating circumstances, a recommended sanction or range of sanctions coupled with an analysis of any relevant legal precedent to support the sanction or range of sanctions recommended. The Stipulation must attach both the Affidavit of Consent and any exhibits necessary to substantiate the facts that are admitted as constituting unethical conduct. The Affidavit must be properly executed by the respondent. The investigative report should **not** accompany a motion for discipline by consent nor should it be incorporated by reference, or otherwise, into the record.

Transmittal to Chair

The Stipulation and Affidavit, together with all supporting documents, must be forwarded to the chair for approval. *R.1:20-10(b)(1).* If the chair does not approve,

the matter is returned to the investigator or presenter for further action. If the chair approves, he or she must so indicate by signing the stipulation and returning it to the investigator or presenter.

Transmittal to DRB and OAE

The approved stipulation and attachments, together with a Motion for Discipline by Consent (**Figure 30**) are filed with the Board. The OAE recommends that the entire package, including an original and three copies for the Board and one copy for the OAE of the Notice of Motion, Stipulation of Discipline by Consent, Affidavit of Consent and the transmittal letter to the Board, be sent to the OAE liaison for review and transmission to the Board. A copy of the transmittal letter to the OAE liaison should be sent to the Statewide Coordinator. A sample transmittal letter to the Board is shown as **Figure 31**. On receipt the OAE will place the matter in the DRB stage pending action by the Board.

Confidentiality

When a motion for discipline by consent is submitted in either the investigative stage or the hearing stage, the contents of the motion remains confidential until the motion is approved by the Board. *R. 1:20-9(a).*

Action by the Board

The record is submitted to the Board. *R.1:20-10(b)(3).* It is considered by the Board as a consent matter. *R.1:20-15(g).* If the motion is granted, the Board submits the record to the Clerk of the Supreme Court for entry of an order of discipline. If the motion is denied, the disciplinary proceeding is returned to the district to "resume as if no motion had been made" and "no admissions made therein shall be admitted into evidence." *R.1:20-10(b)(3).*

Section 42.5 Disciplinary Stipulations

Occasionally, respondents admit unethical conduct but diversion and discipline by consent are precluded by the nature of the conduct, the respondent's prior history, the lack of precedent regarding discipline or the time restrictions of *R. 1:20-10(b).* Disciplinary stipulations must specify that the respondent agrees that certain Rules of Professional Conduct were violated. A disciplinary stipulation of facts binds the respondent and the investigator or presenter as to those factual admissions. Although the quantum of discipline can be recommended (either jointly or separately), the ultimate decision will be made by the Disciplinary Review Board and will be binding, subject to Supreme Court review. See **Figure 56**.

If the matter is in the investigation stage, the investigator should prepare a full report and a disciplinary stipulation reflecting the finding in the report. When these have been approved by the chair, the disciplinary stipulation, together with any

supporting documents, are transmitted by the committee secretary to the OAE liaison attorney who reviews them and sends them on to the Disciplinary Review Board for implementation of discipline.

When a matter is in the hearing stage, a respondent may file an answer admitting the allegations. "A hearing shall be held only if the pleadings raise genuine disputes of material fact, if the respondent's answer requests an opportunity to be heard in mitigation, or if the presenter requests to be heard in aggravation." *R. 1:20-6(c)(1).* If mitigation and aggravation are not contested and respondent does not ask for a hearing, the pleadings and any supporting documents should be sent to the OAE liaison for filing directly with the Disciplinary Review Board. If requested by either the presenter or respondent, a hearing may be held as to mitigation or aggravation only.

If the respondent admits the unethical conduct after an answer contesting the allegations has been filed, the presenter may prepare a written disciplinary stipulation mirroring the allegations in the complaint. When a disciplinary stipulation is to be placed on the record at a hearing, it is important that respondent stipulate to the allegations in the complaint and not be permitted to qualify them. If the respondent cannot or will not stipulate to the allegations, a hearing must be held.

Section 43 Investigative Determination by Chair

The chair should review the investigative report and recommendation within three business days following receipt. If the chair concludes that the matter should be closed for an absence of provable unethical conduct, the chair should direct the secretary to dismiss the matter and to advise the grievant, the respondent and the OAE. **Each of these parties must be furnished by the secretary with a copy of the written, dated, investigative report**. *R.1:20-3(h).* The original investigative report should be sent by the secretary to the OAE. To comply with the Court's directive in *R.M. v. Supreme Court of New Jersey, et al.* and with the requirements of *R. 1:20-9*, each page of the **grievant's copy** of the investigative report, as well as all attachments thereto, must be marked "confidential." The notification letter to the parties must be in the form shown in **Figure 25**. That letter will remind the parties that the investigative report and attachments may **not** be released to anyone outside of the disciplinary system. The grievant and the OAE each have standing to appeal the dismissal of a matter. *R.1:20-15(e)(1).* The form for appeal that has been approved by the Board is shown in **Figure 32**.

If the chair concludes that further investigation is necessary or that the respondent's mental or physical capacity to practice law is impaired, the chair should direct the matter to proceed accordingly or refer it to the Director.

If the chair concludes that the facts show that unethical conduct has occurred, the chair may either request that the Director approve diversion [*R.1:20-3(i)(2)(B)*], or the chair may approve a motion to the Board to impose discipline by consent [*R.1.20-10(b)(1)*], or the chair may direct that a complaint be filed and a hearing held [*R.1:20-3(i)(3)*]. In the latter case the chair will forward to the secretary the investigator's

complaint, which will be served on the respondent. Upon receipt of copies of the investigative report, complaint and service letter, the OAE will place the matter in the hearing stage.

If the chair requests that the Director approve diversion (see Section 41), the documents listed in Section 41.5 must be transmitted to the Director.

Section 44 Misappropriation of Trust Funds

While ethics grievances run the gamut from conflicts to criminal conduct, from misrepresentation to failing to represent clients zealously, a number of recurring grievances persist. In order to investigate grievances effectively, it is important that all investigators become sensitive to certain types of conduct that will be encountered.

On December 19, 1979, Chief Justice Robert N. Wilentz wrote the Supreme Court's unanimous opinion *In the Matter of Wendell R. Wilson,* 81 *N.J.* 451 (1979), where an attorney was disbarred for the knowing misappropriation of trust funds. The first paragraph of this opinion underlines the critical importance that the Court attaches to the handling of misappropriation cases:

> In this case, respondent knowingly used his client's money as if it were his own. We hold that disbarment is the only appropriate discipline. We also use this occasion to state that, generally, all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable. *Id.*

The Court also set forth a clear definition of the term "misappropriation" as:

> . . . any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom. *Id.* at 455 n.1.

In *In re Noonan,* 102 *N.J.* 157 (1986), the Court stated that "knowing" misappropriation requires no intent to defraud or to permanently deprive the client of funds. The Court explained:

> The misappropriation that will trigger automatic disbarment under *In re Wilson* . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. . . . [I]t is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. *Id.* at 160.

Since *Wilson,* a long list of normally mitigating factors have been eliminated as irrelevant in cases of knowing misappropriation. In *Wilson* the Court determined that the following mitigating factors were irrelevant: restitution, youth and

inexperience, age or prior outstanding career, current compliance with proper record keeping requirements. During 1986 this list of irrelevant mitigating factors was expanded by case law to include the following additional items:

- *In re Noonan*, 102 *N.J.* 157 (1986), (use of the money for a good or bad purpose, use of the money for the benefit of the lawyer or others, intention to return the money, good character and fitness, absence of dishonesty, venality or immorality).

- *In re Fleischer,* 102 *N.J.* 440 (1986): (poor accounting practice, no client suffered a loss, prior unblemished disciplinary record, unlikelihood of future subsequent misappropriations).

- *In re Lennan,* 102 *N.J.* 518 (1986): (severe financial pressures, client's subsequent ratification of knowing misappropriation, candor and cooperation with disciplinary authorities).

In *Lennan* the Court met squarely one respondent's argument that the only reason he used client's funds was extreme financial pressure. Quoting its original language in *Wilson* seven years earlier, the Court stated:

> An attorney beset by financial problems, may steal to save his family, his children, his wife or his home. After the fact, he may conduct so exemplary a life as to prove beyond doubt that he is as well equipped to serve the public as any judge sitting in any court. To disbar despite the circumstances that lead to the misappropriation, and despite the possibility that such reformation may occur is so terribly harsh as to require the most compelling reasons to justify it. As far as we are concerned, the only reason that disbarment might be necessary is that any other result risks something even more important, the continued confidence of the public in the integrity of the Bar and the judiciary. (Citation omitted.) 102. *N.J.* at 524.

Perhaps the most difficult of all mitigating factors deals with the effect of recognized medical disabilities. In companion decisions in 1986 the Supreme Court virtually struck alcoholism and voluntary drug addiction from the list of factors that could ever mitigate disbarment in cases of misappropriation. It held that in order to be entitled to consideration for a sanction less than disbarment a respondent would be required to prove, under the M'Naghten test of insanity,

> . . . that a disease of the mind rendered him unable to tell right from wrong or to understand the nature and quality of his acts. *In re Romano,* 104 *N.J.* 306, 311 (1986). Accord *In re Hein,* 104 *N.J.* 297, 303 (1986).

The Court, in *Hein,* went on to explain its rationale in the following language:

> We have no doubt that the alcoholism contributed to the loss of critical control of judgment, but cannot conclude that the evidence warrants a departure from the principle that we set forth in *In re Wilson.*
>
> To some extent a similar effect on perception, cognition and character may be caused by financial reverses, especially when that results in extreme hardship to respondent's family. It is not unusual in these cases to find such hardship, at least as perceived by most respondents. Yet we disbar invariably. It is difficult to rationalize a lesser discipline where alcohol is the cause — especially in view of the related factors of financial reverses, failure in the profession, family hardship, and ultimately misappropriation.
>
> We recognize, as respondent argues, that alcoholism is indeed not a defect in character. The public policy of the state of New Jersey recognizes alcoholism as a disease and an alcoholic as a sick person. See, *e.g., N.J.S.A. 26:2B-7* (alcoholics "should be afforded a continuum of treatment" rather than subjected to criminal prosecution). The course that we have pursued in disciplinary matters is premised on the proposition that in our discipline of attorneys our goal is not punishment but protection of the public. (Citations omitted). *Id.* at 302.

Since *Hein* and *Romano*, the Court has been faced with a number of cases where attorneys attempted to mitigate cases of knowing misappropriation with claims of alcoholism, drug addiction or compulsive gambling, all to no avail. See, e.g., *In re Devlin,* 109 *N.J.* 135 (1988) (alcohol); *In re Goldberg,* 109 *N.J.* 163 (1998) (gambling); *In re Lobbe,* 110 *N.J.* 59 (1998) (gambling); *In re Nitti,* 110, *N.J.* 321 (1988) (gambling) *In re Steinhoff,* 114 *N.J.* 268 (1989) (cocaine).

Financial improprieties by attorneys are a significant, recurring problem throughout the nation. Often, cases involving misappropriation of trust funds by attorneys are slow to surface. Once the defalcator has diverted funds for the first time, however, subsequent abuses may suddenly snowball. It is thus of paramount importance that misappropriations and other financial improprieties be detected as early as possible so that prompt action can be taken to stop further violations. The investigating member is one who will most often see initial indications of trust fund abuse. **Whenever the investigator (or any member of the committee) obtains information that he or she reasonably believes may indicate misappropriation of trust funds by an attorney, the Statewide Coordinator, OAE, should be notified immediately by telephone.** This call should then be followed the same day by a confirmatory letter enclosing any existing documentation. An indication of misappropriation is certainly

present, for example, where an attorney's trust account check has been dishonored for insufficient funds, notwithstanding the fact that it may have subsequently been honored by the bank and regardless of the fact that the amount may be small. Possible misappropriation is also indicated where an attorney refuses to make timely disbursement of trust funds (*e.g.*, buyer's attorney withholds amount to pay off seller's mortgage and then fails to remit same for three or four months; also, where funds are deposited with an attorney, either for investment purposes or as a litigation or other settlement, and the attorney fails or refuses to turn over the funds promptly when due). Likewise, issuance of trust account checks to pay an attorney's personal or business obligations (rent or mortgage payments, automobile expenses, law book subscriptions, photocopy expenses, etc.) indicates a clear abuse. In this regard it should be remembered that the purpose of immediately notifying the OAE is for the protection of the public. Early warning signals may forestall catastrophic consequences and to this end time is of the essence.

Allegations of misappropriation of trust funds will be given absolute priority. A review will be undertaken immediately to determine what further and emergent steps, including contact with the attorney, arrangements for immediate audit, production of bank records, etc., should be undertaken. If it appears that there is *prima facie* evidence of misappropriation of trust funds, the OAE will file an emergent petition for temporary suspension directly with the Court, pursuant to *R.1:20-11(a).* In the event that an attorney is temporarily suspended from the practice of law, it may be necessary to request the local bar association to secure the appointment of an attorney-trustee (see Section 104) under *R.1:20-19* to deal with the immediate problems caused by the defalcating attorney (*e.g.* inventory and storage of open files, handling of client telephone inquiries, and other pending matters). Every effort, of course will be made to keep this involvement to a minimum.

Section 45 Contempt and Trial Unethical Conduct

There has been an increasing trend in recent years to discipline attorneys for trial unethical conduct, including contempt of court. Such unethical conduct has taken many forms. However, the following cases exemplify some of the most common types of unethical conduct reported:

CRIMINAL DEFENSE

In re McAlevy (I), 69 *N.J.* 349 (1976) (defense counsel's threat of physical violence to prosecutor in court and in-chambers attack on opposing counsel - severe public reprimand).

In re McAlevy (II), 94 *N.J.* 201 (1983) (disruptive and insulting conduct by defense counsel during a criminal trial and willful failure to appear for a peremptory trial date - three months suspension).

In re Yengo, 92 *N.J.* 9 (1983) (vacation trip to Bermuda by defense counsel during middle of complex criminal trial without knowledge of the court - public reprimand).

In re Milita, 99 *N.J.* 336 (1985) (defense counsel in negotiations with assistant prosecutor offered in jest to make contribution to assistant prosecutor's favorite charity in exchange for lenient plea, and also misrepresented himself to prosecution witness in order to speak with the witness - six month suspension and supervised practice for two years).

In re DeMarco, 125 *N.J.* 1 (1991) (during the course of the trial, the defense counsel exhibited a pattern of abusive and unwarranted behavior directed at the trial judge resulting in attorney being found guilty of two counts of contempt - public reprimand).

CRIMINAL PROSECUTION

In re Shafir, 92 *N.J.* 138 (1983) (assistant Prosecutor forged supervisor's name on internal Plea Disposition form and misrepresented information to another assistant prosecutor to consummate a plea bargain - public reprimand).

Matter of McDonald, 99 *N.J.* 78 (1985) (plaintiff's attorney served as prosecutor in municipal court on bad check charges and failed to disclose to Court that defendant made partial restitution for bad checks prior to trial - public reprimand).

In re Kress, 128 *N.J.* 520 (1992) (municipal prosecutor contributed to the improper dismissal of a charge of driving while intoxicated. Prosecutor allowed case to be dismissed because police officers wanted to "dump" the case - three month suspension).

CIVIL ACTIONS

In re Mezzacca, 67 *N.J.* 387 (1975) (vilification, intimidation, abuse and threats to administrative tribunal - public reprimand).

In re Vincenti (I), 92 *N.J.* 591 (1983) (repeated discourteous, insulting and degrading verbal attacks on judge, opposing counsel, parties, witnesses, court officers and clerk - one year suspension).

In re Vincenti (II), 114 *N.J.* 275 (1989) (verbally threatened opposing counsel, challenged him to a fight, engaged in vulgar name-calling (including racial innuendos) of opposing counsel and his investigator and used threatening, abusive and vulgar language directed to trial judge's law clerk - three month suspension).

In re Grenell, 127 *N.J.* 116 (1992) (attorney brought frivolous criminal complaints in one matter, made a false statement of material fact to a tribunal, and in four cases engaged in abusive language toward adversaries and disrespectful behavior toward judges - two year suspension).

In re Gaffney, 138 *N.J.* 85 (1994) (attorney engaged in conduct prejudicial to the administration of justice, baiting a judge by accusing him of lying in open court, using profanity, grossly neglected two matters, failed to act diligently and failed to keep his clients reasonably informed - 30 month suspension).

*In re Vincenti (III),*152 *N.J.* 253 (1998) (attorney engaged in extremely disruptive and discourteous behavior during hearing of matter concerning termination of parental rights, indicating that no improvement had taken place after prior suspensions imposed for the same kind of behavior - disbarment).

The various Rules of Professional Conduct that deal particularly with an attorney's obligation in litigation settings include *R.P.C. 3.1* through *3.9.*

These ethics cases involving trial unethical conduct violations are of two types: (a) contempt proceedings and (b) all other cases where litigants, adversaries and judges bring to the Ethics Committee's attention matters that may constitute trial unethical conduct. When filed, these matters should be dealt with as follows:

Contempt Proceedings. These cases should be forwarded to the OAE for docketing. They will not be processed until all direct appeals, if any, from the underlying contempt have been concluded. This is so because contempt findings, being criminal in nature and requiring the criminal standard of proof, are conclusive evidence of a respondent's willful unethical conduct. *I n re McAlevy,* 94 *N.J.* 201 (1983)*; In re Rosen,* 88 *N.J.* 1 (1981). Consequently, such matters should be held in abeyance by the OAE pending the resolution of any appeals. In the event that the contempt citation is overturned on appeal, the OAE may refer the case to an Ethics Committee to review the matter thoroughly and issue an investigative report in order to determine whether or not it should proceed with the matter notwithstanding the reversal by an appellate court. In most of these cases the Ethics Committee will likely determine not to proceed further. However, an appellate dismissal is not conclusive and the Ethics Committee will have to make a fresh review.

Other Trial Unethical Conduct. In all other cases of trial unethical conduct which occur during the course of litigation, the Ethics Committee should proceed in accordance with *R.1:20-3(f)* entitled *"Related Pending Litigation."* Generally, no action should be taken until the conclusion of the trial. Normally, however, upon the conclusion of the trial, ethics proceedings should commence immediately notwithstanding any appeal of the underlying litigation, unless there is some likelihood that the appellate proceedings will produce a determination as to the propriety of the conduct in question.

Section 46 Neglect Cases

The two categories that are responsible for the largest number of ethics grievances relate to allegations of neglect and lack of communication by attorneys. Under *R.P.C. 1.1* simple acts of negligence or neglect, while certainly not condoned, do not constitute unethical conduct. Rather, they may be grounds for civil action against the attorney.

However, where the degree of negligence is not simple, but rises to gross negligence, or where the simple negligence is not isolated and thus forms a pattern of negligence, then disciplinary action is warranted. Some recent cases in this area include:

> *Matter of O'Gorman,* 99 *N.J.* 482 (1985) (respondent exhibited a pattern of neglect in nine separate matters, most of them including failure to keep clients informed of the status of their cases and failure to fulfill the contracts of employment he had undertaken - three year suspension).
>
> *Matter of Templin,* 101 *N.J.* 337 (1985) (an attorney had pattern of neglect involving four matters, including misrepresentation of the status of cases to clients, after his neglect resulted in default, failure to return client files, and failure to notify a client of change in trial date resulting in dismissal of case - one year suspension).
>
> *In re Martin,* 118 *N.J.* 239 (1990) (respondent had pattern of neglect in seven matters from 1980 through 1985, by routinely failing to request discovery or to answer interrogatories, failing to keep clients informed of the status of their cases and entering settlement agreements without client's consent - six month suspension).
>
> *In re Brantley,* 123 *N.J.* 330 (1991) (attorney exhibited gross neglect and pattern of neglect in four matters as well as lack of diligence, failure to communicate properly, and misrepresentation regarding the status of a litigated matter - one year suspension).

In re Depietropolo, 127 *N.J.* 237 (1992) (respondent engaged in a pattern of neglect in five matters, making misrepresentations, failing to communicate with clients, and failing to cooperate with the disciplinary authorities - two year suspension).

In re Riva, 157 *N.J.* 34 (1999) (respondent was grossly neglectful in one instance in which a default judgment was entered against his clients and he made misrepresentations to them, after practicing law for 20 years with no prior ethics history - reprimand).

It should be noted in investigating these cases that gross neglect and a pattern of neglect are often accompanied by other ethical violations, the most common of which are misrepresenting the status of the matter to the client or failing to communicate with clients.

Section 47 Improperly Notarized Documents

This small area of the law has resulted in a surprisingly large number of ethics infractions by attorneys. Essentially there are five steps involved in taking the jurat to an affidavit or in subscribing an acknowledgment, which are:

(1) the personal appearance by the party before the attorney;

(2) the identification of the party;

(3) the assurance that the party signing is aware of the contents of the document;

(4) the administration of the oath or acknowledgment by the attorney; and

(5) execution of the jurat or certificate of acknowledgment by the attorney in the presence of the party.

Unless all of these steps are complied with, the notarization process is both legally and ethically defective and will subject the attorney to disciplinary sanctions. As the Supreme Court stated in *In re Surgent*:

> [W]e take this opportunity to disabuse the bar of any lingering notion that the plain and unmistakable requirements regarding the execution of jurats and taking of acknowledgments need not be met in all respects. 79 *N.J.* 529, 532 (1979).

Sanctions generally range from admonitions to public reprimands. In recent years, absent harm or prejudice, a public admonition is the usual sanction. For specific disciplinary cases in point see *In re Conti, 75 N.J.* 114 (1977) (public reprimand); *Matter of Pamm*, 118 *N.J.* 556 (1990) (public reprimand); *In re VanRye,* 124 *N.J.* 664 (1991) (three month suspension); *In re Marra,* 134 *N.J.* 521 (1993) (public reprimand) and *Matter of Lolio,* 162 *N.J.* 496 (2000) (three month suspension for over 200 incidents).

Chapter 6 Complaint Stage

Section 48 Complaint

If the Ethics Committee chair determines that there is a "reasonable prospect of a finding of unethical conduct by clear and convincing evidence," the chair must direct that a complaint be filed. *R.1:20-4(a).* The only exceptions to this rule are: minor unethical conduct that is diverted pursuant to *R.1:20-3(i)(2),* and discipline by consent under *R.1:20-(b).*

A complaint may be brought only in the names of the Ethics Committee or the OAE. *R.1:20-4(b).* It must be in writing and filed with the committee secretary or special ethics master. *R.1:20-4(d).* Complaints should usually be prepared by the Ethics Committee investigator. A complaint may be signed by any Ethics Committee member, the secretary, the chair, or, when filed by the Office of Attorney Ethics, the Director or his designee. *R.1:20-4(b).* All complaints are required to contain as part of the allegations:

> the name and address of the grievant, if any;
>
> the name, address and county of practice of the respondent and the year admitted to practice in New Jersey;
>
> the facts constituting fair notice of the nature of the alleged unethical conduct by respondent; and
>
> the Rules of Professional Conduct or other authority asserted to have been violated.

In cases where the respondent does not file an answer, the facts set forth in the complaint are deemed admitted. *R.1:20-4(f)(1).* **For this reason, it is important that the facts be set forth in the complaint with sufficient detail to make clear the nature of the unethical conduct alleged.** See **Figure 33**. If there are not sufficient facts in the complaint, the DRB will remand the matter for filing of an amended complaint.

Consolidated complaints are specifically permitted. A single complaint may be filed against multiple respondents "if they are members of the same law firm or if the allegations are based on the same general conduct or arise out of the same transaction or series of transactions." *R.1:20-4(c).* However, it must be emphasized that each respondent must be individually named. It is not sufficient simply to name the law firm alone. In unusual instances, such as an out-of-state law firm practicing in New Jersey under a trade name (*RPC 7.5*), it may be appropriate to charge not only the individual attorney, but also the right of the firm to use the name. If in doubt, the investigator should communicate with the Statewide Coordinator or OAE Liaison.

Section 49 Reluctant Grievants

Occasionally, an Ethics Committee will encounter a recalcitrant grievant who, by the time the matter is ready to be heard, has been compensated and wishes to "drop" the grievance. It is important to remember that *R. 1:20-7(d)* states "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 any grievance". Therefore, the Committees must make an independent determination regarding the alleged unethical conduct involved. In such cases, the Ethics Committee should proceed and should subpoena the grievant to testify at the hearing whenever that testimony would be at all helpful in the presentation of the matter. *In re Katz*, 90 *N.J.* 272, 281 n.3 (1982). Where a grievant has been subpoenaed but does not appear, the presenter should move to enforce the subpoena in accordance with *R.1:9-6. R.1:20-7(i)(4).* See also Section 34.

Section 50 Filing and Service

Immediately upon receipt of the complaint, the secretary shall serve a copy on respondent and respondent's attorney, if any. **Figure 34** shows the form of letter to be used. Service on the respondent may be made either personally or by certified mail, return receipt requested, and regular mail. *R.1:20-7(h).* If service is made by certified mail, it must be forwarded to the respondent at the address listed in the NEW JERSEY LAWYERS DIARY AND MANUAL or the address shown on the official Annual Attorney Registration Statement authorized by *R.1:20-1(c),* if that address is more current. Service may also be made "by serving respondent's counsel, if any, by regular mail." *R.1:20-7(h).* The secretary should also immediately forward a copy of the complaint and service letter to the OAE and a copy to the grievant by regular mail, and to the vice chair, presenter, and any special ethics master. Because all ethics matters become public on filing and service of the complaint, consolidated complaints involving multiple grievants or respondents may be filed and served without redacting any portion of the complaint. *R.1:20-4(c).* Where the OAE is the presenter, service will be made by the OAE. *R.1:20-4(d).* The secretary or the OAE shall send a copy of every complaint to the respondent's law firm (unless a sole practitioner) or public agency employer in accordance with *R.1:20-9(j).* The investigative report is not served with the complaint, but is discoverable. See Section 58.

Section 51 Respondents Who Disappear or Fail to Attend Hearing

Respondents in ethics matters disappear occasionally. This most commonly occurs in serious cases where the respondent has been temporarily suspended from practice for a serious ethical violation such as misappropriation. A respondent's flight does **not** divest the Ethics Committee of jurisdiction, which continues regardless of the attorney's physical location. *R.1:20-7(l).* These cases must be adjudicated and not held in abeyance until the respondent surfaces. In situations where it appears that the respondent has left or closed his or her law office, the respondent's home address

may be obtained from the Statewide Coordinator or OAE liaison. When complaints sent by regular mail to the respondent's law office and home addresses are returned by the Post Office, the OAE should be contacted for permission to publish notice of the complaint, **Figure 35,** in a newspaper in the respondent's former locality as well as in a legal newspaper. When service has been accomplished, these cases often proceed by default when no answer is forthcoming. It should be noted, however, that service by mail or publication must be shown before the DRB will accept a certification of the record. Likewise, if the respondent disappears after filing an answer to the complaint but before a hearing is scheduled, permission to publish notice of the hearing, **Figure 36**, should be obtained from the OAE liaison or Statewide Coordinator. When the respondent has been properly notified of the date by mail or publication, the hearing should go forward even if respondent does not appear. Facts regarding notice to the respondent should be placed on the record. If the respondent files an answer contesting the facts but indicates in advance an intention not to appear, he or she should be advised that attendance is mandatory. *R. 1:20-6(c)(2)(D).* See also Section 61.

Section 52 Answer

Within 21 days after service of the complaint, the respondent is required to file an original and one copy of a written, verified answer with the secretary and one copy with the presenter. The secretary will thereafter forward a copy of the answer to the grievant(s), and to the Office of Attorney Ethics, the vice chair, the hearing panel chair or any special ethics master if the respondent has not provided them with copies. The attorney is required by *R. 1:20-4(e)* to verify the answer using specific language in the rule and to set forth:

(1) a full, candid and complete disclosure of all facts reasonably within the scope of the formal complaint;
(2) all affirmative defenses, including any claim of mental or physical disability and whether it is alleged to be causally related to the offenses charged;
(3) any mitigating circumstances;
(4) a request for a hearing either on the charges or in mitigation; and
(5) any constitutional challenges to the proceedings.

The Complaint Service Letter, **Figure 34**, explicitly states these requirements so that there can be no claim of misunderstanding as to respondent's rights and obligations. The letter further underlines the attorney's right to counsel or, if indigent, to assigned counsel, as well as the right to secure subpoenas. The respondent is further warned that failure to secure personal or assigned counsel will **not** be accepted by the trier of fact as reason for adjourning an ethics hearing. The service letter also states **prominently** the consequences resulting from a failure to answer. The consequences are explained in Section 54.

Section 53 Extension of Time

For purposes of computing the expiration of the 21 day answer period, the

provisions of *R.1:3-1 et seq.* are generally applicable. With respect to extensions of time to answer, however, it should be noted that the consent provision of *R.1:3-4(a)*, ordinarily allowing the parties to consent in writing to an enlargement of time, is **not applicable** to ethics matters. *R.1:20-4(e)* specifically provides that:

> For good cause shown, the vice chair or the special ethics master, if one has been appointed, may, on written application made within twenty-one days after service of the complaint, extend the time to answer.

The Statewide Coordinator should be notified of any extension to answer that is given. The Supreme Court has directed that an extension of time to answer an ethics complaint may be granted by the Ethics Committee "for good cause and then only for a definite and reasonably short interval." *In re Kern*, 68 N.J. 325, 326 (1975).

Section 54 Failure to Answer and Certification of the Record; Failure to Verify

After service of the complaint upon the respondent, the secretary and the vice chair will maintain an appropriate "tickler" system to follow the matter. In the event respondent fails to answer within 21 days (or any extension thereof), the secretary may, but is not required to, mail to the respondent one follow-up "five day letter" notifying the respondent of the Ethics Committee's right to seek sanctions for failure to answer. The form to be used is shown in **Figure 37**. It should be noted that the last sentence of the letter serves to amend the complaint to charge a violation of *RPC 8.1(b)* by reason of respondent's failure to file an answer. This amendment, together with the respondent's subsequent failure to answer after five days, satisfies due process with a minimum of inconvenience to the Ethics Committee.

The question then becomes: what action, if any, should the Ethics Committee take if respondent fails to answer after a "five day" letter has been sent? The best response is that, unless the presenter or ethics counsel or the hearing panel or special master determines, pursuant to *R.1:20-6(c)(1)*, that a hearing should be held, no hearing is required. In such event, "the pleadings together with a statement of procedural history" and any exhibits submitted by the presenter are certified to the Disciplinary Review Board by the vice chair or secretary. *R.1:20-4(f)(1)*. Before certifying the record, however, the secretary should communicate with the statewide coordinator or the OAE liaison to ensure that it has served respondent with the complaint at his/her most current address. All papers should be sent to OAE liaison counsel for transmission to the Board. The form for certification of the record, usually completed by the secretary, is shown in **Figure 38.** It is important that the record certified to the Board **NOT** include a copy of the investigative report or incorporate it by reference into the record. Rather, the complaint certified to the Board pursuant to *R. 1:20-4(f)(1)* must be sufficiently factually detailed to support the charges made therein.

When a hearing is appropriate, the matter should be scheduled in the normal course. At the same time, the secretary should prepare and forward to the OAE liaison a certification of the record (Failure to Answer), **Figure 38**, paragraphs 1 through 5.

Copies of the initial service letter and the "five day" follow-up letter are to be annexed to the Certification.

If the respondent files an answer that has not been verified, the secretary should send the respondent or respondent's counsel the appropriate portion of the Non-Conforming Answer letter shown in **Figure 39** together with the Verification form, **Figure 40**. If verification is not provided within ten days of the letter, "the defect shall be deemed a failure to answer as defined within these Rules." *R.1:20-4 (e).* Certification of the record may be made in such cases. An answer that fails to follow *R. 1:20-4(e)* in other respects, e.g. failing to give a factual account, should be addressed by sending the appropriate portion of the letter shown in **Figure 39**.

Section 55 Designation of Presenter

Following the filing of a complaint and receipt of an answer, the chair (usually acting through the secretary) should immediately designate an attorney as presenter. *R.1:20-4(g)(1).* In almost all cases, the investigating member should be designated as presenter. If not designated as presenter, the investigating member cannot sit as a member of the hearing panel. *R.1:20-4(g)(1).* In rare cases of complex or difficult matters, the chair may request the Director to assign an OAE ethics counsel to present the matter. *R.1:20-4(g)(1).*

Section 56 Grievant's Personal Attorney

Rule 1:20-4(g)(3) provides that the grievant may be represented by a privately retained attorney at the grievant's expense. The grievant's attorney is entitled to be present at all times during the hearing with the client. *R.1:20-4(g)(3) and R.1:20-6(c)(2)(D).* While the grievant is entitled to be counseled by his or her own privately retained attorney, the presenter alone will conduct the prosecution of an ethics complaint. The grievant's attorney may not examine witnesses or otherwise participate in the hearing.

Section 57 Respondent's Counsel - Assignment for Indigents

The respondent is also entitled to be represented by a New Jersey attorney or, with the permission of the Disciplinary Review Board, by an attorney admitted *pro hac vice. R.1:20-4(g)(2).* If the respondent is unable to retain counsel by reason of indigence, the respondent may apply to the Assignment Judge of the vicinage where the respondent practices or formerly practiced seeking the appointment of assigned counsel. *R.1:20-4(g)(2).* Both the Complaint Service Letter (**Figure 34**) and the Notice of Formal Hearing (**Figure 46**) advise the respondent of this right. In the event that respondent wishes to apply for assigned counsel, he or she must do so by notifying the vice chair and any special ethics master "within 14 days after service of the formal complaint." The application submitted to the Assignment Judge shall be supported by a certification and "shall contain a current statement of all assets and liabilities, any bankruptcy petition and orders, and copies of the respondent's state and federal income and business

tax returns for the prior three-year period." Any counsel designated by the Assignment Judge to represent a respondent is required to serve without compensation. *R.1:20-4(g)(2).* The respondent must serve the vice chair, the special master if one has been appointed and the presenter or ethics counsel with a copy of the application for the assignment of counsel.

Section 58 Discovery

R.1:20-5(a) governs discovery procedures. It provides that discovery is available to both presenter and respondent -- provided respondent has filed an answer in compliance with *R. 1:20-4(e)* – as of right simply by making a written request. To be discoverable, the information sought must be "relevant" and also "within the possession, custody or control" of the party. *R.1:20-5(a)(2).* Discoverable material need not be copied, but must simply be "made available for inspection and copying" by a party. Discovery of financial books and records required to be maintained by an attorney pursuant to *R.1:21-6* is available at any time pursuant to the mandate of subsection (g) of that rule.

All responses to discovery requests shall be served within 20 days after receipt of a written request. *R.1:20-5(a)(5).* There is a continuing duty of both parties to keep current all discovery materials. *R.1:20-5(a)(5).*

The following relevant information within the possession, custody or control of a party is discoverable:

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

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

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

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

(E) police reports and any investigation reports (including the DEC investigator's report); and

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

the expert will testify and a summary of the grounds for each opinion. *R.1:20-5(a)(2)(A).*

For limitations on the use of expert witnesses see Section 67.1.

The rule does not require disclosure of a party's "work product consisting of internal reports, memoranda or documents made by that party or that party's attorney or agents, in connection with the investigation, prosecution or defense of the matter." *R.1:20-5(a)(3).* Nor does the rule require discovery of statements made by respondent to that person' s attorney or agent. It also does not authorize discovery of "any internal manuals or materials prepared by the Office of Attorney Ethics or the Disciplinary Review Board." Written interrogatories, depositions (except those to perpetuate testimony) and requests for admissions are not available in disciplinary proceedings. *R.1:20-5(a)(4).* The trier of fact may enforce discovery orders (including those in a pre-hearing management order) by excluding evidence from a hearing. Expert testimony "shall" be excluded due to non-compliance with discovery obligations, "except on good cause shown." *R.1:20-5(a)(6).*

All contested discovery motions shall be in writing addressed to the hearing panel chair or to the Ethics Committee chair if no hearing panel chair has been named. *R.1:20-5(a)(7).* Interlocutory appeals are only available for constitutional issues. *R.1:20-5(a)(7)* and *R.1:20-16-(f)(1).*

Section 59 Subpoenas

Both respondent and presenter or ethics counsel are entitled to the issuance of subpoenas to testify as well as subpoenas for the production of books and records. *R.1:20-7(i).* Both are to be given some latitude in the issuance of subpoenas deemed relevant to the presentation of their case. Forms of subpoenas have been approved by the OAE and the Court. See **Figures 41** and **42**. Subpoenas are to be issued in the name of the Supreme Court and may be signed by the secretary, any committee member, the Director or ethics counsel. There is no attendance or mileage fee for such subpoenas. *R.1:20-7(i)(3).*

Occasionally a grievant will, because of time or other considerations, become reluctant to participate in the formal hearing of a matter. (See generally Section 49). This should not deter a presenter from subpoenaing the grievant or any other similarly recalcitrant witness. The purpose of ethics proceedings is to determine the true facts of a particular case. The presenter, therefore, should not be bound by the attitude of a recalcitrant, if not obviously hostile, witness. Moreover, many witnesses who express a clear reluctance to testify from the safe distance of a telephone are not nearly as reluctant once they have been served by an officer of the Court with formal process. In this regard it should be noted that the sheriff of any county is specifically required by statute (*N.J.S.A. 22A:4-9*) to serve a subpoena issued by a duly constituted ethics committee without payment of any fee. A *pro forma* letter to the sheriff requesting statutory service is included as **Figure 43**. It should be noted that free service is only afforded to requests by the Ethics Committee. Respondents must secure service of all

subpoenas, either by the sheriff or private process servers.

Subpoenas may be served any place within the State of New Jersey by a person 18 or more years of age by delivering a copy thereof to the person named. *R.1:20-7(i)(3).* Subpoenas may also be served upon an attorney who is a witness or a party by certified mail, return receipt requested. Subpoenas issued by the Ethics Committee may be enforced by the Superior Court in the manner provided by *R.1:9-6* as in the case of a subpoena of a public officer or agency. *R.1:20-7(i)(4).*

While both respondent and presenter are allowed some latitude in the issuance of subpoenas deemed relevant to the presentation of their cases, the Disciplinary Review Board Chair, during the investigation of a matter, or the hearing panel chair or special master, after filing of a complaint, may request a showing of good cause for the issuance of subpoenas and may deny the issuance of subpoenas where "the subject testimony or documentation is patently irrelevant or if compliance would be unreasonable or oppressive." *R.1:20-7(i)(5)(A).* There are no interlocutory appeals from such actions; nevertheless, any objection thereto will be preserved until the conclusion of the matter and may be considered in an appeal. *R.1:20-7(i)(5)(B).* All motions to quash or limit testimony or to protect a witness must be addressed to the Disciplinary Review Board Chair during investigation or to the panel chair or special master after filing a complaint. *R.1:20-7(i)(5)(A).*

Section 60 Special Masters

When the hearing of a complex ethics matter may take more than three days or when the case should be tried continuously from day to day until conclusion, the Director may seek appointment of a special ethics master. *R.1:20-6(b)(1).* Such masters have all the power and authority of a hearing panel under *R.1:20-6(b)(4).*

When the Ethics Committee chair believes that designation of a special ethics master may be appropriate, the chair should forward to the Statewide Coordinator a completed Request for Special Master. **Figure 44**. If approved, the Director will request the Chief Justice to appoint a former Ethics Committee chair, vice chair, secretary, hearing panel chair or former Board member or retired judge to serve. The Director will then write to the special master with copies to the Ethics Committee and the respondent. In order to maximize the effectiveness of the process, it will be the responsibility of the Ethics Committee secretary to select, in consultation with the special master, the location for the hearing, to arrange for the attendance of a court reporter and issuance of subpoenas and to notify the presenter and respondent. All subsequent hearing days shall be scheduled by the special master.

Chapter 7 Ethics Hearings

Section 61 Hearing Stage: Necessity for Hearing

The second stage of New Jersey's attorney disciplinary system is the hearing stage. At this stage, findings of fact and conclusions of law determine the respondent's guilt or innocence of the charges alleged in the complaint. A hearing is not held automatically whenever a complaint if filed. Under *R.1:20-6(c)(1),* a hearing is **necessary only:**

if the pleadings raise genuine issues of material fact, or

if the respondent's answer requests an opportunity to be heard in mitigation, or

if the presenter or ethics counsel requests to be heard in aggravation.

Thus, if a respondent fails to file an answer or to verify an answer in accordance with *R.1:20-4(e),* or files an answer that does not raise any genuine issues of material fact and does not request a hearing in mitigation, no hearing is required, unless the presenter or ethics counsel requests an opportunity to present facts in aggravation. Where no hearing is necessary, the rule provides that the pleadings, together with a statement of procedural history, shall be filed by the secretary or vice chair with the Board for its consideration in determining the appropriate sanction to be imposed. *R.1:20-6(c)(1).* In practice, the record is sent to the OAE liaison attorney for transmittal to the Board. See also Section 90.

Section 62 Designation and Appointment of Hearing Panel

Each year in September the Ethics Committee chair should designate pre-set hearing panels. **A hearing panel shall not have more than three members, one of whom must be a public member**. *R. 1:20-6(a)(1).* The mandatory requirement of a public member on a hearing panel was established by the Supreme Court to insure public participation at all stages of the matter. This requirement cannot be waived. The pre-set panel may also include one alternate attorney member who sits only when an attorney member is unable to do so, and an alternate public member who sits only when the public member is unable to do so. *R.1:20-6(a)(1).* Ethics committees may not sit "*en banc*" at a hearing. Hearing panels should be chosen so that experienced members are combined with novice members. An attorney member will be designated as chair of the panel. In some committees, the attorneys alternate the role of chair, so that while the attorney who served as chair of the first matter is writing the panel report, the other attorney may be setting up the hearing of another matter. A list of the members and alternates for each panel should be prepared and distributed to the officers and members of the committee and the Statewide Coordinator.

After filing a complaint and receiving an answer (or after the expiration of the time therefore, in unusual cases where a hearing is required even though no answer has been filed), the vice chair will designate a hearing panel in rotation from the

hearing panel list. The secretary will forward to the hearing panel chair a detailed Appointment Letter (**Figure 45**) attached to which will be a Hearing Transmittal Checklist (**Figure 49**).

At this point, the hearing panel chair takes over the conduct of the proceedings, including scheduling initial and subsequent hearings dates, as well as administrative and decision-making functions. These functions conclude when the panel renders its report and the hearing panel chair transmits the entire record to the secretary. The secretary then removes the case from the Ethics Committee's docket, serves the report on the parties and transmits the file to the OAE. It should be noted that some Ethics Committees find it more convenient for the secretary or vice chair to schedule the initial hearing date and for the hearing panel chair to then assume responsibility for granting adjournments or scheduling subsequent hearing dates. Either procedure is acceptable. It is always the vice chair's responsibility to oversee matters in the hearing stage and to report on the progress of hearings to the Statewide Coordinator.

Section 63 Public Proceedings

All ethics hearings are public under *R.1:20-9(b).* The rules contemplate reasonable public access; that is, the public may not be barred from attending. As with any judicial proceeding, however, seating may be limited. The public has no right to participate in or interrupt the hearing in any way. (See *N.J.S.A. 2C:33-8* "Disrupting Public Meetings".)

The public is not entitled to attend pre-hearing conferences or deliberations of the trier of fact, nor proceedings in which a protective order has been issued. *R.1:20-9(b). Rule 1:20-9(g)* recognizes that in extremely unusual circumstances, it may be necessary to issue protective orders for good cause shown to maintain the confidentiality of what would normally, under the rules, be public. The exception to this general rule of openness should be strictly construed and limited only to the most exceptional reasons. Consequently, the standard of "good cause" has been adopted. This standard makes clear that attorney-client privilege is not an exception to the general rule of openness. Rather, only exceptionally sensitive matters warrant a protective order, for example, trade secrets or matters involving the testimony of minors regarding sexual unethical conduct. Where a complaint has been filed, the trier of fact will entertain all applications. Pursuant to *R.1:20-6(c)(2)(A),* it is the obligation of the trier of fact "to inform every court reporter, witness and party of any protective order that has been issued and the effect thereof."

Section 63.1 Cameras at Hearings

In an Advisory Letter dated March 27, 1997, the Administrative Director of the Courts advised that the Supreme Court approved the request of New Jersey Network to televise a District Ethics hearing, subject to these conditions:

> [The television station] must give ten days advance notice of its intention to televise a specific hearing, and must provide written assurance that respondents' names will not be

mentioned in the broadcast, and that respondents will not be shown on camera.

Where still photography will be used, the same rules that apply in court proceedings apply here, namely: (1) sound muffled equipment must be used; (2) the camera must be stationary and (3) if the camera becomes disruptive, coverage may be discontinued. Of course, this will not change the results of a properly entered protective order in an appropriate case, but such order should be as narrow as possible to accommodate the rights of the news media where possible.

Section 64 Hearing Room

Prior to commencing an ethics hearing, arrangements must be made by the hearing panel chair (or by the secretary) for a hearing room, OAE approved court reporter, etc. A pre-hearing conference may be held to streamline the proceedings. Prisoner complaints provide unique problems that are discussed in detail in Section 20 entitled "Prisoner Grievances."

The hearing panel chair (or the secretary) should reserve an appropriate room for hearing of the matter. If available, arrangements should be made with the trial court administrator of the vicinage in which the hearing is to be held to use a courtroom or administrative hearing room. Likewise, many municipal court courtrooms are available during the day. Alternatively, if the local bar association maintains offices with a conference room, request may be made to use these facilities. The physical setting of the hearing should reflect the seriousness of the proceedings. The hearing panel chair or any Ethics Committee member may offer a conference room in his or her law office. In no event should the respondent's or respondent's counsel's law office ever be used.

Section 65 Constitutional Issues

Where one or more constitutional issues are raised in respondent's answer, the questions "shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board." *R.1:20-4(e).* However, the respondent is allowed to make a record at the hearing stage of those facts reasonably necessary to a proper consideration of the constitutional questions at the time of final review pursuant to *R.1:20-16(f).* When respondent seeks to make such a record before a hearing panel, the Ethics Committee retains the right to rule on the admissibility of evidence just as in the main disciplinary case. Likewise, applications for discovery and for the issuance of subpoenas prior to hearing are governed by the same standards that apply to the main disciplinary proceeding. A respondent's request is entitled to no greater consideration because it is cloaked in constitutional garb; it must still meet traditional legal tests of relevancy and materiality. A respondent may seek interlocutory relief on the constitutional issues in accordance with *R.1:20-16(f)(1).* The filing of a motion for interlocutory relief does not stay the disciplinary proceedings unless the Supreme Court specifically grants a stay pending its resolution of the motion.

Section 66.1 Contract Shorthand Reporters

Any questions about the hiring of court reporters or the ordering of transcripts should directed to the Office of Attorney Ethics. Please call the District Ethics Committee Unit at the OAE (609 530-4261) for information and approval ***before*** you take any action to locate or hire a court reporter, or to order a transcript. That step must be taken in order to have in place the payment arrangements for any service, and the authorization for payment to be issued by the State following provision of such services.

Section 66.2 Panel Chair's Responsibility

It is the responsibility of the panel chair to notify the court reporting agency in writing at least 48 hours prior to the initial day of hearing, usually by sending a copy of the Notice of Formal Hearing (**Figure 46**). Notice of the initial day of a disciplinary hearing must be given in writing, by facsimile or mail. The notice must designate:

- The full name of the case
- All docket numbers
- Location
- Date
- Time

Section 66.3 Cancellation of Hearings

Hearings may be canceled by notifying the court reporting agency **at least 24 hours in advance** of the time scheduled for the hearing, either in writing, by facsimile transmission or by telephone, including leaving an appropriate message with an answering service or voice mail. The panel chair is responsible to provide this notice.

Section 66.4 Ordering Transcripts

All transcripts must be **ordered in writing** specifying the full name of the case, all docket numbers, the hearing dates and, to the extent known, the name of the court reporter involved. Further details concerning ordering transcripts are contained in **Section 88** entitled "Transcripts." **Expedited transcripts should not be ordered without permission from the Statewide Coordinator.**

Section 66.5 Delivery Time/Follow-Up

Standard delivery at normal rates is as follows:

30 days

It is the responsibility of the panel chair who orders transcripts to follow up and insure that delivery is received within the time periods specified above. Any substantial delay beyond the above delivery times should be brought to the attention of the Statewide Coordinator.

Section 66.6 Payment

Bills for services rendered by the above court reporting services are forwarded directly to the Office of Attorney Ethics on a monthly basis. Committee members should not make any payments directly.

Section 67 Unusual Expenses

Occasionally, the presenter or the chair of the hearing panel will deem it necessary to incur expenses for the appearance of expert witnesses or out-of-state witnesses whose testimony is important. Likewise, in some proceedings it is necessary to obtain transcripts of ancillary court proceedings. In such events, **advance authorization** must be obtained from the OAE prior to making any financial commitments. Such requests for authorization should specify the exact nature of the expenses, the need therefor, as well as the estimated cost. Failure to obtain authorization in advance may result in personal liability for the service by the contracting member.

Section 67.1 Expert Witnesses; Limitations on Use

In a few cases it will be necessary for the presenter to engage the services of an expert, as, for example, when the authenticity of a signature is in question. It should be noted, however, that the use of expert witnesses on the "ultimate issue" before the panel – whether or not particular conduct is unethical – is not appropriate. *State v. Moore,* 273 N.J. Super. 118, 127 (App. Div. 1994), *cert. denied* 137 N.J. 311 (1994). See also *New Jersey Rules of Evidence,* 2004 Edition, Rule 702[1].

Section 68 Committee on Attorney Advertising Hearings

The Supreme Court's Committee on Attorney Advertising (CAA) was established under *R.1:19A-1 et seq.* to answer requests by attorneys for advisory opinions relating to proposed advertisements and to handle all grievances concerning advertisements by attorneys. Under *R.1:20-3(e)* an Ethics Committee may not act upon such grievances, but shall refer them to the Secretary of the Committee on Attorney Advertising, Administrative Office of the Courts, P.O. Box 037, Trenton, New Jersey 08625. (See generally Section 32).

Conversely, the CAA may refer advertising matters for hearing and report by Ethics Committees under *R.1:19A-4(e),* where there are material facts in dispute. In this case a complaint is prepared and served by the CAA before the matter is referred to an Ethics Committee. On receipt the Ethics Committee secretary will docket the matter. The CAA may present it to the panel or request the appointment of a presenter. The Ethics Committee will hold a hearing and report to the CAA its findings of fact on the issues presented.

In one other instance, the CAA is empowered to refer advertising grievances to the ethics committee for both investigation and hearing. This occurs where the grievance has aspects of both advertising and other ethical issues not normally within the CAA's jurisdiction under *R.1:19A-4(h).* In these cases the CAA has the discretion to accept the entire matter or to refer it in its entirety to the appropriate Ethics Committee.

Section 69 Pre-Hearing Conferences

To streamline the hearing of an ethics matter, it is often helpful for the hearing panel chair or special ethics master to consult jointly in advance with the presenter and respondent, or counsel, if any. In this way the central issues can be focused and stipulations and documents agreed upon. Pre-hearing conferences are discretionary in standard cases and are held "at the request of the presenter, the respondent or the trier of fact." *R. 1:20-5(b)(1).* In complex cases pre-hearing conferences are required. Pre-hearing conferences can be conducted by telephone conference call or in person. As with any adjudicatory process, no conference shall be held *ex parte.*

Pre-hearing conferences are to be held on 14 days written notice, within 45 days after the time for filing an answer to a complaint. *R.1:20-5(b)(1).* **Participation is**

mandatory for all parties at any pre-hearing conference and may not be waived for any reason. No transcript is made except in unusual circumstances.

Prior to the conference, the presenter and respondent shall file a report with the trier of fact with a copy to the adversary. *R. 1:20-5(b)(2).* The report shall set forth:

> the name, address and telephone number of any person expected to be called at the hearing, including character witnesses and experts,
>
> the name, address and qualifications of any expert expected to testify and the subject matter thereof,
>
> a copy of any expert's report or, if none, a statement of the facts and opinions and a summary of the grounds for each opinion.

R.1:20-5(b)(3) lists the issues to be addressed at a pre-hearing conference. A case management order must follow within seven days after the conference, which order constitutes part of the record. *R. 1:20-5(b)(4).* One of the most important objectives of the pre-hearing conference is to set a date for hearing "within 60 days" thereafter, except in extraordinary circumstances. *R.1:20-5(b)(5).*

The trier of fact may enforce the case management order and "may bar the admissibility of any evidence offered that is in substantial violation of the case management order." *R.1:20-5(c).*

A motion to dismiss may be entertained at the pre-hearing conference under *R. 1:20-5(d).* See further discussion in Section 90.

Section 70 Judges as Witnesses

Judges are an extremely valuable resource and special care must be taken in those few instances in which a judge must be called as a fact witness. The testimony of judges must be **limited solely to testimony as fact witnesses.** They are ethically prohibited from testifying as character witnesses under Canon 2B of the Code of Judicial Conduct. Additionally, the Supreme Court has issued an administrative directive which prohibits Superior Court judges from testifying as expert witnesses in attorney disciplinary proceedings, even when their testimony is sought with respect to mixed questions of opinion and fact (*e.g.* as to whether motions filed by an attorney in a particular case were frivolous or unnecessary).

Where the presenter or respondent (or counsel) is unable to reasonably stipulate facts of which only the judge has personal knowledge, a judge may be requested (even subpoenaed, with the prior approval of the Director) to testify. Every effort should be made to accommodate the judge's schedule so as to minimize the loss of bench time. Where reasonable to accommodate the judge's schedule, the hearing may convene at the judge's chambers or other court area.

Section 71 Scheduling Formal Hearings

Immediately after the hearing panel has been appointed, the hearing panel chair should consult with the presenter and respondent, or counsel, if any, to decide whether a pre-hearing conference is necessary, to discuss discovery or other problems and to schedule the date, time and location of the hearing. Scheduling is accomplished by sending a Notice of Formal Hearing in the form designated in **Figure 46** to all interested parties. The hearing should not begin unless all parties have been given at least 25 days advance written notice. *R.1:20-6(c)(2)(A).* Moreover, no hearing shall be held at all unless a written complaint, or in lieu thereof, a written Stipulation of Facts (citing the disciplinary rules asserted to have been violated) has been filed and served before the date of the hearing. *R.1:20-4(b) and (d).*

A respondent is specifically required by court rule to set forth in the answer all claims of medical disability (both mental and physical), as well as any affirmative defenses. *R.1:20-4(e).* At hearing respondent has the burden of proof on such issues, *R.1:20-6(c)(2)(C),* and must be prepared to furnish expert testimony if necessary. To insure that every respondent is on notice, and to avoid remands by the Supreme Court or Disciplinary Review Board, a paragraph addressing these issues has been added to the Notice of Formal Hearing. Moreover, the complaint service letter (**Figure 34**) also contains language regarding these issues.

Section 72 Procedures at Hearing

Generally, important ethical violations reach the hearing stage. Other matters lacking either in merit or proof are dismissed at the conclusion of the investigation stage. Grievances with merit, but which represent minor infractions without substantial factual dispute, will usually be disposed of by diversion. Cases of minor unethical conduct that require hearings are dealt with separately in Section 77.

What remains, therefore, are the most serious ethics cases. While some cases will be dismissed after hearing, the overwhelming majority of cases will result in a recommendation for discipline. All such cases will be reviewed by the Supreme Court's Disciplinary Review Board. All recommendations for disbarment will also be automatically reviewed by the Supreme Court. The Board and sometimes the Court will review the hearing report together with all exhibits and the full transcripts of the proceedings. Consequently, the efforts of all participants, whether presenter, panel member, special master or respondent's counsel, should not only reflect favorably upon the profession, but should be a credit to the individual participant as well.

Section 73 Conduct of Formal Hearing

Hearings are conducted formally and publicly. Only in exceptional cases may a protective order (Section 63) be entered [*R.1:20-9(g)*]to close all or part of the hearing to the public. Hearings are presided over by the hearing panel chair or special ethics master. Strict rules of evidence need not be observed, but the residuum evidence rule

applies. *R.1:20-7(b).* See also *Weston v. State,* 60 N.J. 36, 51 (1972). The proceedings should be conducted in a dignified manner and the appearance of counsel should be entered on the record at the outset. All witnesses must be duly sworn by the trier of fact or court stenographer. Each witness should state name, address and telephone number for the record. In special circumstances, the testimony of a witness may be taken by telephone or videotape. *R.1:20-6(c)(2)(A).*

All applications for rulings should be directed to the panel chair [*R.1:20-6(a)(4)(C)*] who, after consultation with the members of the hearing panel, shall rule thereon, except for constitutional questions. *R.1:20-16(f).* There are no interlocutory appeals from the decisions of a hearing panel, except for constitutional issues. Requests for sequestration of witnesses should be granted routinely by the trier of fact unless inappropriate in the particular circumstances of the case. *R.1:20-6(c)(2)(D).* OAE personnel, when not testifying as fact witnesses, are not to be sequestered. Both the grievant and respondent have the right to be present at all times during the hearing with counsel. *R.1:20-6(c)(2)(D).* The grievant may not be sequestered, nor may administrative staff assist in the prosecution of the matter. Insofar as applicable, the rules governing procedure in civil actions, including opening statements, offers of proof, the order of presentation of witnesses, and closing arguments, are to be followed. The respondent's appearance at all ethics hearings is mandatory and cannot be waived. *R.1:20-6(c)(2)(D).* When a respondent fails to appear after proper notice, however, the hearing should go forward. In that case the panel chair should place on the record the facts concerning notice given to the respondent of the hearing and efforts to reach the respondent before going forward.

For the hearing of any matter by a panel, the panel must consist of only three members of the Ethics Committee, one of whom must be a public member. *R.1:20-6(a)(1) and (2).* The requirement of a public member is mandatory and cannot be waived. The alternate members of the panel must be available for the initial hearing. On the day set for the hearing, but not before, the hearing panel chair may release the alternates if not needed. All issues are determined by a majority of the membership sitting on the panel. *R.1:20-6(a)(3)(C).*

R.1:20-6(a)(2) provides that, when by reason of absence, disability or disqualification, the number of members of the panel able to act is less than a quorum, the following procedures are to apply depending upon when in the hearing process the problem develops:

(A) if the hearing has not commenced, the alternate panel member shall be substituted;

(B) if the hearing has commenced but all evidence has not been received, the vice chair may designate a substitute panel member to permit the orderly conclusion of the proceedings provided that the substitute shall have the opportunity to review the entire record including the transcript of the proceedings to date;

(C) if all evidence has been received, the matter may be determined by the remaining two members of the panel provided their decision is unanimous. In the event of disagreement, the vice chair shall designate a substitute panelist who, after reviewing the entire record of the proceedings, shall be eligible to vote thereon.

Special care should be taken so that all evidence is appropriately marked and preserved. If more than one case is being heard by the panel at the same time, the markings of exhibits should make clear the distinction. **All exhibits admitted into evidence at the hearing should be lodged with the hearing panel chair, who alone shall be responsible for their custody.**

Section 74 Requests for Adjournment

Any request for adjournment must be in writing, stating with specificity the facts on which it is based. *R.1:20-7(k).* Once an ethics matter has been scheduled for hearing, requests for adjournments should be directed to the special master or hearing panel chair or, if absent or unavailable, to the vice chair of the Ethics Committee. Because both the complaint service letter (**Figure 34**) as well as the notice of formal hearing (**Figure 46**) advise the respondent of the right to obtain counsel or, if indigent, the right to have counsel assigned, there should be no adjournments granted for such reason. As with requests for extensions of time to answer, requests for adjournment of a hearing should be granted only for "good cause shown." *R.1:20-7(k).*

In unusual cases where requests for adjournment are due to alleged trial conflicts on the part of respondent, or any participant, the hearing panel chair or special master should communicate directly with the judge or the assignment judge in order to determine what arrangements can be made for the release of the attorney from a trial commitment. In this regard *R.1:20-8(g)* affords disciplinary matters "precedence over administrative, civil and criminal cases." This is a rule of reason, however, and requires only "reasonable accommodations." All disciplinary participants are required to give "reasonable advance notice of potential litigation conflicts to the assignment judge or to the particular judge or officer in charge of the litigation." The Supreme Court's policy is that officers and trustees of the New Jersey State Bar Association be excused from trial commitments on the day of a scheduled trustees' and officers' meeting, provided reasonable notice is given to the trial court. The policy also applies to members of Judicial and County Prosecutor Appointments Committees who need to attend their meetings and to members of the General Council who plan to attend the annual or semi-annual Bar Association General Council meetings. This policy by extension applies to ethics hearings.

Section 75 Burden of Proof; Burden of Going Forward

Rule 1:20-6(c)(2)(C) provides that the burden of proof in proceedings seeking

discipline or transfer to disability inactive status is generally on the presenter, as is the proof of aggravating factors. The respondent, however, bears the burden of going forward on defenses, including any mitigating factors, any claims of mental and physical disability, and whether such disability is causally related to the offense charged. Because both the complaint service letter (**Figure 34**) and the Notice of Formal Hearing (**Figure 46**) apprise the respondent fully of these obligations, adjournments should almost never be granted for these reasons.

Section 76 Standard of Proof

The standard of proof in disciplinary matters is one of **clear and convincing evidence.** *R.1:20-6(c)(2)(B)* and *In re Pennica,* 36 N.J. 401,419 (1962). All charges of ethical unethical conduct and affirmative defenses must meet this standard.

Section 77 Minor Unethical conduct Hearings

In cases of minor unethical conduct, if an attorney does not qualify or is not approved or declines diversionary treatment, the matter is processed by the filing of a complaint. *R.1:20-3(i)(2)(C).* The matter is handled in the same manner as standard and complex matters, except that no pre-hearing conference is held.

Section 78 Timetable

Hearing reports should be filed with the secretary of the Ethics Committee, together with exhibits and any necessary transcripts, within 60 days after the conclusion of the final day of the hearing. The entire hearing process should be concluded within 183 days after the date the answer is due. *R.1:20-8(b).*

In order to meet this timetable the trier of fact is encouraged, at the conclusion of the final day of hearing, to dismiss the parties and retain the court reporter. After the panel members discuss the matter, a decision can usually be reached. Thereafter, the court reporter should be recalled and the trier of fact should dictate a draft of the panel's decision. The oral decision, once transcribed, usually needs to be revised. The simple expedient of recording the decision and rationale will be of great assistance in producing a report within the 60 day time frame. **The shorthand reporter should be instructed to have the draft decision separately bound.**

Section 79 Report of Findings

There are two primary findings that a trier of fact may make: either the attorney has been found guilty of unethical conduct by clear and convincing evidence or not. This decision is made by a majority vote of a hearing panel. *R.1:20-6(a)(3)(C).* In either event, the panel chair must prepare a written, dated report containing findings of fact and conclusions on each issue presented. *R.1:20-6(c)(2)(E).* Any member of a hearing panel who does not concur in the findings of fact or conclusions of the majority may prepare a separate report.

The hearing panel report need only be signed by the panel chair provided it is unanimous; otherwise, each hearing panel member must sign the report making clear whether that member is in the majority or the minority. The panel chair should submit the report (**Figure 48**), together with the completed Hearing Transmittal Checklist (**Figure 49**), to the secretary.

Section 80 No Unethical Conduct

If the trier of fact concludes that the respondent is not guilty of unethical conduct [*R.1:20-6(c)(2)(E)(i)*], the original and three copies of written findings and conclusions titled "Hearing Report Dismissing Complaint" must be filed with the secretary **together with all original exhibits.** No transcripts of the hearing are ordered unless the report is dictated, in which event only that portion, separately bound, is ordered. The secretary of the Ethics Committee will forward a copy of the dismissal report together with the post-hearing dismissal letter (**Figure 47**) to the grievant. The original report and a copy of the dismissal letter are sent to the OAE liaison. A copy of the report and the dismissal letter will be retained by the secretary and copies will be sent to the presenter, the respondent and the vice chair of the Ethics Committee. A copy of the dismissal letter only is sent to the Statewide Coordinator. In consolidated (i.e multiple) grievance cases, where the hearing panel' s report makes findings and conclusions on each grievance, the entire report may be sent to each grievant, because the matter is public. *R.1:20-4(c)* and *R.1:20-9(a).*

Section 81 Findings of Unethical Conduct

In the event that the trier of fact concludes that the respondent has engaged in unethical conduct, it must then determine whether or not such conduct can be adequately disciplined through an admonition, or whether reprimand, censure, suspension or disbarment is necessary. *R.1:20-6(c)(2)(E)(ii) and (iii).* **After** the panel has made an independent determination that the respondent has engaged in unethical conduct, the OAE should be contacted in order to determine whether the respondent has been previously disciplined and, if so, the nature of such discipline. *R.1:20-7(n).* Categories of discipline are set forth in *R. 1:20-15A(a).* Private reprimands were abolished on July 14, 1994. They are equivalent to the current sanction of admonition. Upon request, a letter from the OAE certifying the results of an ethics check for prior discipline will be forwarded to the trier of fact with copies to the presenter and respondent. In this regard, the respondent should be advised at the time a hearing is commenced that, in the event the panel finds unethical conduct, it will request a records check from the OAE for the purpose of recommending the appropriate discipline. Within five days after the OAE submits any record of discipline, either the presenter or respondent may submit written argument on the effect thereof on the sanction to be recommended.

Section 81.1 Hearing Panel Report Recommending Admonition

In the event that the trier of fact finds that there has been unethical conduct for

which an admonition constitutes adequate discipline [*R.1:20-6(c)(2)(E)(ii)*], the hearing panel report embodying findings of fact and conclusions should be issued under the caption "Hearing Report Recommending Admonition." **No letter of admonition should be prepared or issued by any ethics committee.** All admonitions are issued only by the Disciplinary Review Board.

The original and four copies of the "Hearing Report Recommending Admonition," together with the original and four copies of all exhibits entered into evidence should be filed with the secretary. The secretary will retain a copy of the report and will file the original and three copies of the report and exhibits with the OAE, with a copy of the cover letter to the Statewide Coordinator. The panel chair should complete the Hearing Transmittal Checklist (**Figure 49**) and submit it also to the secretary. A copy of the report only must be served by the secretary upon the grievant, the respondent or counsel, the presenter and vice chair. **No transcripts of hearings are ordered,** unless the trier of fact chooses to dictate its decision, in which event the original and three copies of only that portion, separately bound, are ordered.

The Board will consider the Ethics Committee's recommendation in due course and the Board will give notice prior to its consideration to all interested parties. *R.1:20-15(f)(4).* If the Board determines that the admonition is appropriate, it will issue the admonition and will so notify the Ethics Committee. Except in minor unethical conduct cases, the Board may determine that greater discipline is appropriate, and it may direct that the matter be set down for oral argument before it upon notice to all parties. *R.1:20-15(f)(4).* In such event the Ethics Committee will be given notice to appear.

The Board routinely requires the respondent to reimburse, in whole or in part, the reasonable and necessary expenses and administrative costs (pursuant to *R.1:20-17)* that have been incurred in the prosecution of disciplinary proceedings leading to a finding of unethical conduct. Once reimbursement is ordered by the Board or the Court, Counsel to the Board furnishes the respondent with an itemization of expenses, together with a statement of disciplinary costs indicating the necessity for incurring the expense. The respondent is required within 20 days to reimburse all basic administrative costs and those expenses as to which there is no dispute by check payable to the Disciplinary Oversight Committee. Thereafter, the matter of any disputed charges will be considered by the Board without oral argument.

Section 81.2 Hearing Panel Report Recommending Reprimand, Censure, Suspension or Disbarment

If the hearing panel finds that there has been unethical conduct for which an admonition does not constitute adequate discipline [*R.1:20-6(c)(2)(E)(iii)*], it must then prepare an original and four copies of its report containing findings of fact and conclusions, which report is designated "Hearing Panel Report Recommending Reprimand/Censure/Suspension/Disbarment." **Figure 48**. An original and four copies of all exhibits entered into evidence are also submitted to the committee's secretary. The panel chair should complete the Hearing Transmittal Checklist (**Figure 49**) and submit it also to the secretary.

If the trier of fact has not already done so, the secretary shall order the original and four copies of the transcript of hearing. The transcript, together with the original and four copies of the hearing report (as well as the same number of copies of exhibits entered as evidence) and any briefs, are to be filed with the OAE, with a copy of the cover letter to the Statewide Coordinator. A copy of the report only must be forwarded by the secretary to the grievant, the respondent (or counsel), the presenter and vice chair. Where multiple grievances are consolidated for hearing, the entire report may be sent to each grievant, since the matter is public. *R.1:20-4(c) and R.1:20-9(a).* The Board will see to it that both the presenter, ethics counsel and the respondent receive all exhibits and transcripts at the appropriate time. *R.1:20-15(f)(1).*

The trier of fact should make a specific recommendation of the sanction to be imposed. *R.1:20-6(c)(2)(E)(ii and (iii).* Where various charges or complaints against one respondent are consolidated for hearing, one recommendation for sanction should be made, covering all of the unethical conduct found by the panel. Categories of discipline are set forth in *R. 1:20-15A(a).*

Section 82 Form and Content of Hearing Panel Report

The hearing report should contain a factual and legal analysis of the case and should arrive at one of the conclusions set forth in *R.1:20-6(c)(2)(E).* While the form of reports may differ somewhat, all must deal with the following topics and subjects:

Procedural History. The hearing report must set forth the important procedural aspects of the case including:

> The name and principle law office address of the respondent for jurisdictional purposes.
>
> The date on which the complaint was filed in order to satisfy the requirements of *R.1:20(d).* A copy of the complaint should be annexed.
>
> The fact that the respondent has answered or has been given an opportunity to answer pursuant to *R.1:20-4(e).* A copy of any answer should be annexed. NOTE: In the event that there has been any difficulty with service upon the respondent, this should be mentioned as well as the exact manner of service.
>
> The date(s) on which the hearing was held, the names of the panel members, the name of respondent's counsel, if any, and the name of the presenter.

Synopsis of Allegations. It should not be necessary for the Disciplinary Review Board or the Supreme Court to wade through the entire complaint before reading the

hearing report. Therefore, the body of the report should contain a synopsis of the allegations against respondent. This will enable the reader to quickly focus on the next section of the report.

Findings of Fact and Conclusions. The report must contain the panel's analysis of the evidence and testimony and explain its conclusions as to **every** allegation set forth in the complaint. After stating the fact findings, the report should state those conclusions as to each allegation with citations to specific statutes, court rules or Rules of Professional Conduct. It is not sufficient, however, to state bare legal conclusions without stating with specificity each of the facts which form the basis for the legal conclusion that there was or was not unethical conduct under a certain *RPC*. For example, if credibility was a factor, this should be made clear, together with the factual basis that supports it.

In reviewing the testimony and exhibits, any special events should be noted such as the fact that a witness was subpoenaed and failed to appear, including the reasons therefor.

The presenter bears the burden of proving unethical conduct charged as well as any aggravating disciplinary factors. A respondent is specifically required by court rule to set forth in the answer all claims of medical disability (both mental and physical) as well as any affirmative defenses. The respondent has the burden of proof on these issues and must be prepared at hearing to furnish proofs, which may include expert testimony. *R.1:20-6(c)(2)(B)* and *(C)*. The hearing report should, on its own, address any such specific issues presented. If no proofs are offered on a issue, that issue must be resolved against the party having the burden of proof.

Determination. The report must ultimately contain the panel's determination to recommend specific discipline. Finally, the report must be signed and dated by the hearing panel chair. A dissenting member may prepare a separate minority report.

Section 83 Post-Hearing Proceedings Before the Disciplinary Review Board

A member of the Ethics Committee will be required to appear before the Board in the event oral argument is called for. No appearances are required of the Ethics Committee when appeals of dismissals or motions for temporary suspension are considered.

When a Hearing Report that recommends a reprimand, censure, suspension or disbarment has been filed, the presenter will be duly notified of the date oral argument has been scheduled. The respondent will likewise be advised of the date of appearance. The presenter must be thoroughly familiar with the factual basis underlying the Ethics Committee's recommendation, as well as all evidence which has been considered by the hearing panel.

The presenter should understand that the members of the Board have read and

are fully familiar with the hearing report and underlying transcripts. Therefore, the presentation should be concise and to the point and should take from five to ten minutes. The presentation should briefly highlight the nature of the allegations and any particularly important evidence or exhibits. Like any appellate body, the Board may have questions. Of course the respondent, or his or her counsel, will have a similar opportunity following the presenter's presentation. If, during the respondent's presentation, statements are made that require rebuttal, permission should be requested from the Board for appropriate rebuttal. The presenter should always be prepared to recommend the quantum of discipline that is appropriate and, where possible, to support this with precedent. This recommendation may be the same as or different from that recommended by the hearing panel.

All hearing reports recommending discipline considered by the Board are heard *de novo* on the full record below. *R.1:20-15(f).* The Board is required to render a formal decision on each matter, and a copy of the Board's decision will be served by it upon the committee's secretary, the respondent, and the grievant(s) in due course. The issuance of the Board's decision may take three to six months. The OAE will provide a copy of the decision to the presenter, all panelists and the committee's officers.

Section 84 Post-Hearing Proceedings Before the Supreme Court

On receipt of a decision and recommendation by the Board for disbarment, the Supreme Court automatically issues an order to show cause to the respondent to review the matter. *R.1:20-16(a).* Thereafter, a briefing schedule is established and oral argument is heard in the Supreme Court Courtroom in Trenton. In all other cases, the decision of the Board is final on the entry of an order by the Court, unless the Supreme Court grants a petition for review. *R.1:20-16(b).*

All ethics matters argued before the Supreme Court are presented exclusively by ethics counsel of the OAE. If the Court determines to impose discipline, a written opinion or order is filed by the Court. Such final actions by the Court represent the culmination and conclusion of the disciplinary process. The OAE will provide a copy of the Court's opinion to the chair, vice chair and secretary for dissemination to the Ethics Committee members.

Chapter 8 Ancillary Matters

Section 85 Supplies and Emoluments for Secretaries

Through funds allocated annually by the Supreme Court, on recommendation of the Disciplinary Oversight Committee (*R.1:20B-1 et seq.*), the OAE pays usual expenses incurred by Secretaries through pre-established emoluments. Out of this stipend Secretaries are expected to provide the following ordinary committee expenses: postage, photocopying, file folders, telephone calls, stationery and envelopes. The OAE supplies index cards, District Ethics Committee Manuals, Attorney Grievance Forms and Ethics Information Pamphlets to the Secretary as needed, as well as one ICLE volume containing all opinions of the Supreme Court's Advisory Committee on Professional Ethics and the most recent edition of Kevin Michels' *New Jersey Attorney Ethics*.

Emoluments are paid to secretaries quarterly at the end of the quarter. Shortly after the 15th of the last month of a quarter, an OAE voucher (**Figure 50**) is forwarded to the secretary for signature. When returned to the OAE, this voucher serves as an invoice that supports the quarterly payment. That payment is transmitted by check of the Disciplinary Oversight Committee. At the end of the calendar year the OAE forwards to each secretary a form 1099 to report the amount of emoluments paid as required by law. Because the emolument is not compensation [*R. 1:20-3(c)*], but reimbursement for costs, it will be offset for tax purposes by the annual expenses incurred by the secretary.

Section 86 Unusual Expenses

The OAE will review additional requests for expenditures by Ethics Committee members on a case by case basis. Usually, these requests will relate to employment of an interpreter or, in unusual cases, the payment of travel expenses for out-of-state witnesses whose testimony is crucial to the Ethics Committee's determination of a serious matter. All such requests must be submitted to the OAE in **advance** with an estimate of the amount and an explanation of the necessity for incurring the expense. Ethics Committee members are personally responsible for costs they authorize without OAE prior approval.

Section 87 Fees for Service of Process

In the event that it is necessary for the presenter or investigator to issue and serve subpoenas anywhere in the state, such process may be forwarded to the sheriff of the appropriate county in order to effectuate service. By statute, the sheriff is not permitted to accept any fee for service of subpoenas issued on behalf of the committee.

In this regard, *N.J.S.A. 22A:4-9* provides as follows:

> Whenever any duly authorized ethics committee of a county or State bar association which has been recognized as such by the Supreme Court, shall require the service of a process of subpoena issued pursuant to section 22A:2-4 of this Title,

every sheriff or other office serving said process shall not require the payment of any fee for making such service.

Likewise, *N.J.S.A 22:2-4* states:

> Whenever any duly authorized ethics committee of a county or State bar association which has been recognized as such by the Supreme court, shall make any application pursuant to the Rules of the Supreme Court, the clerk of said court shall issue process of subpoena, or any further orders pursuant to said rules, without requiring the payment of any fee for the same.

For the above reasons, the OAE cannot generally reimburse the presenter or investigator either for mileage or service fees paid to a private agency, except in the most compelling circumstances and only with advance approval. A sample letter to the Sheriff requesting statutory service of the Committee's subpoena is shown in **Figure 43**. A respondent must, of course, pay for the service of subpoenas issued at the respondent's request.

Section 88 Transcripts

Section 88.1 Generally

Only the court reporting agencies contracted by the OAE and specified in Section 66 are authorized to transcribe ethics proceedings. Invoices for payment of contracts or arrangements made by committee members with other reporting services will not be honored by the OAE and will be the personal responsibility of the member entering into the arrangement.

Section 88.2 Ordering Transcripts

Any questions about the hiring of court reporters or the ordering of transcripts should directed to the Office of Attorney Ethics. Please call the District Ethics Committee Unit at the OAE (609 530-4261) for information and approval ***before*** you take any action to locate or hire a court reporter, or to order a transcript. That step must be taken in order to have in place the payment arrangements for any service, and the authorization for payment to be issued by the State following provision of such services.

Section 88.3 Verbatim Transcripts (Compressed Form)

The shorthand reporters are required to take down verbatim all that is said during every disciplinary proceeding, including reference to all exhibits. When a transcript is ordered, they are required to transcribe the notes verbatim without editing or correcting what was said. The transcript, when prepared and certified, is to be filed without prior submission for review or approval by the trier of fact or counsel.

Expedited transcripts should not be ordered without prior permission from the OAE. See also Section 66.

Section 89 Interpreters/Translators

In appropriate cases arrangements can be made for the appearance of interpreters or the translation of foreign language documents, with prior approval of the OAE. The trial court administrator of the local vicinage will provide the names of translators and interpreters who may be used. All such requests should be made several weeks in

advance of the required date. Translators and interpreters should submit a State of New Jersey voucher to the Ethics Committee member who hired the individual. After that member signs the voucher acknowledging receipt of the service, the voucher should be submitted to the OAE for payment.

Section 90 Motion Practice

Trial motion practice, like discovery, is limited in the disciplinary system. Except for motions to quash or enforce subpoenas [Section 59; *R.1:20-7(i)(4) and (5)*], motions for interlocutory review of constitutional issues [Section 65; *R.1:20-16(f)(1)*] and motions for medical examination [Section 100; *R.1:20-12(b)*], the rules recognize three specific motions.

Motions to dismiss may be either pre-hearing motions "addressed to the legal sufficiency of a formal complaint to state a cause of action as a matter of law or to jurisdiction" or motions to dismiss "at the conclusion of the . . . case in chief." *R.1:20-5(d).*

On rare occasions, after the filing of a formal complaint, either the respondent will produce additional information not reviewed by the investigator prior to the filing of the complaint, or an essential witness becomes unavailable. In such instances the presenter has the duty to determine whether, considering all of the now available evidence, unethical conduct can be proven by clear and convincing evidence. If this standard cannot be met, the presenter should move, either in writing, or, if a hearing has already been convened, on the record, to dismiss the complaint (or a particular count of a complaint) in the interest of justice. All such applications must be "supported by the presenter's certification of the facts supporting the motion and any relevant exhibits, and shall be decided by the trier of fact." *R. 1:20-5(d)(3).*

Section 91 Records Checks

All requests for records checks or certifications with respect to the ethical history of any attorney (other than disciplinary history discussed in Section 81) must be forwarded to the OAE for handling. Because of the confidentiality requirements of *R.1:20-9,* such requests must be made in writing and either signed by the attorney who is the subject matter of the request or contain the attorney's written duly acknowledged waiver in a form acceptable to the OAE. The Supreme Court has authorized the OAE to furnish appropriate records checks to admitting and disciplinary authorities of foreign bars and for other limited purposes. The OAE routinely issues a Certificate of Ethical Conduct like that shown as **Figure 51**. The OAE's certification covers only attorney, and not judicial, discipline. There is no fee for the issuance of this certificate.

The OAE's certificate is **not** a Certificate of Good Standing; that can be obtained only from the Clerk of the Supreme Court of New Jersey. Requests for such certificates must include a check for $10.00 payable to "Clerk of Supreme Court" and should be

addressed to Stephen W. Townsend, Clerk, Supreme Court of New Jersey, P.O. Box 970, Trenton, New Jersey 08625.

Section 92 Confidentiality; Public Proceedings; Public Records

Prior to the filing and service of a formal complaint in a disciplinary matter, the investigative process and all written records gathered and made must be kept confidential by the Director and disciplinary officials and committee members. However, for grievances filed on or after October 19, 2005, the **GRIEVANT** may make public statements regarding the disciplinary process, the filing and content of the grievance, and the result, if any, of the grievance. The Director may disclose the pendency, subject matter, and status of a grievance if:

the respondent has waived or breached confidentiality;

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

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

the Supreme Court has granted an emergent disciplinary application for relief (such as a motion for temporary suspension);

the matter becomes common knowledge to the public.

As noted in Section 22, "Public Records" and Section 63, "Public Proceedings," the rules contain a great deal of detail as to what portion of disciplinary records is public. The latter section also discusses the standard for securing protective orders under *R.1:20-9(h).*

Disclosure of evidence of criminal conduct is limited during the investigative stage to instances where an attorney has first been temporarily suspended and then only the OAE may disclose information based on ten days notice to the respondent. *R.1:20-9(f).* Otherwise, disclosure is available only by motion to the Disciplinary Review Board.

Section 93 Temporary Suspension Applications

The OAE processes all applications seeking the temporary suspension from the practice of law of a licensed attorney. Applications by way of emergent petition are made directly to the Court.

Section 94 Governing Standard

The rules provide that the touchstone of such an application is whether the attorney "poses a substantial threat of serious harm to an attorney, a client or the public." *R.1:20-11(a).* While this standard was drafted with a broad brush, it has been applied in only the clearest of cases. Ethics counsel will review any information submitted by an Ethics Committee in order to determine whether or not the facts warrant an application for temporary suspension.

Section 95 Matters That May Warrant Application

The clearest class of cases warranting application for the temporary suspension of an attorney have, in the past, involved obvious evidence of misappropriation of trust funds. **As noted in Section 44, any information indicating that an attorney may have engaged in financial improprieties with respect to his or her trust account should be immediately brought to the attention of the OAE's counsel to the Director for review.** All applications for temporary suspension that are based upon allegations of misappropriation of trust funds additionally request that all bank accounts maintained pursuant to *R.1:21-6* be restrained from further distribution and be transferred for deposit to the Superior Court Trust Fund where they bear interest at the legal rate.

Applications for transfer to Disability Inactive Status (a form of temporary suspension) are made in cases where an attorney has been judicially declared incompetent or has been involuntarily committed to a mental hospital. *R.1:20-12.* Likewise, other circumstances showing a mental or physical disability that render the attorney incapable of practicing law are reviewed by the OAE for conformity with the standards governing applications for transfer to Disability Inactive Status. (See Section 100).

Convictions of "serious crimes" merit the automatic imposition of temporary suspension from the practice of law as soon as the attorney's guilt has been determined. *R.1:20-13(b).* This is true even before the attorney has been sentenced or even though the criminal conviction is presently on appeal.

Temporary suspensions may also be secured where an attorney fails to cooperate in an investigation. See *R. 1:20-3(g)(3).* Additionally, the OAE is available to review the facts of any situation that the Ethics Committee feels may pose a danger to a client, the attorney or the public. Obviously, while the practice of law is a privilege and not a right, applications seeking the temporary suspension of an attorney for any reason must be carefully scrutinized. In this process, the Ethics Committee's factual conclusions are given significant weight because the Ethics Committee usually has dealt directly with both the attorney in question and the clients. They are, therefore, in an excellent position to judge the potential seriousness of a particular situation.

Section 96 Activities of Suspended Attorneys

Once an attorney has been suspended from the practice of law, no legal services can be performed and the attorney must comply with detailed rules, including notice to clients and adversaries. *R.1:20-20(a)* and *(b)*.

Section 97 Disbarment by Consent

Despite the fact that one or more grievances are pending, an attorney may admit the charges and consent to disbarment under *R.1:20-10(a)*. In such event the investigator or presenter should immediately communicate with the OAE liaison, as all disbarments by consent are handled by the OAE. The Director then processes the matter to the Court, together with a recommendation that it either be accepted or rejected. If the Disbarment By Consent is accepted by the Court, the order will indicate that the Court's action is equivalent to disbarment. Should the proffer be rejected by the Court the matter will be remanded for further proceedings.

A tendered Disbarment by Consent can only be entertained only if it is in the exact form that has been approved by the Court. **Figure 52**. By Court rule no disbarment by consent may be accepted unless the respondent first consults with an attorney. Further, the attorney must certify that the respondent is aware of the effect of executing the form and has done so knowingly, freely and voluntarily without disability. *R.1:20-10(a)(2)*. It should also be noted that in paragraph 3 of the form the respondent is required to admit a sufficient factual basis so that the Supreme Court is justified in imposing disbarment.

If the tender is made while a hearing is pending the respondent should be placed under oath and examined to be sure there is a complete understanding of the effect of the consent to disbarment. The trier of fact should be satisfied before adjourning the hearing that the respondent admits a sufficient factual basis to support disbarment. A transcript of that portion of the hearing together with the tendered Disbarment by Consent should be sent to the Director for review and transmission to the Court.

Section 98 Resignation Without Prejudice

A resignation without prejudice (*R.1:20-22*) can, by definition, never be accepted, or even entertained, while an ethics grievance is pending against an attorney. Rather, resignations without prejudice are specifically intended solely as a non-disciplinary method of withdrawing from the bar of this state. The proper form is shown in **Figure 53**.

Section 99 Reinstatement After Final Discipline

Section 99.1 Suspensions for Six Months or Less

Applications by a suspended attorney seeking reinstatement are not automatic. Under *R.1:20-21(b)*, where the suspension has been for a term of six months or less, however, the attorney may file a petition 40 days prior to the expiration of the period of suspension. Ordinarily this will enable the attorney to be reinstated at the end of the period of suspension. The respondent must comply with most other provisions of the reinstatement rule, including publication of notice of intent to seek reinstatement.

Section 99.2 Other Suspensions

By Court rule no petition can be filed with the Board by a suspended attorney until "after the expiration" of the time period provided for in the order of suspension. *R.1:20-21(a)*. This means that such suspensions will extend for at least one to two months longer than the term of suspension before the reinstatement process can be completed. This fact is expressly contemplated by the rules. The attorney will be required to complete a detailed petition and publish notice of intent to be reinstated pursuant to *R.1:20-12*.

The Board by rule may, in an unusual case, designate an Ethics Committee to hold a hearing on the reinstatement petition and to furnish it with a report of findings and recommendations. Usually, however, the Board does not request that a hearing be held. Rather, the Ethics Committee and the OAE are contacted to determine whether there are any pending cases involving the subject attorney and whether there is any information known which would reflect either favorably or adversely upon the respondent's petition for reinstatement. Upon review of all of the evidence before it, the Board issues a report of findings and recommendations for review and ultimate action by the Court.

Section 99.3 Disbarments

Applications from disbarred attorneys can be entertained only by the Supreme Court itself, since there is no provision in any court rule for a disbarred attorney to apply for reinstatement. Furthermore, an attorney who has resigned with prejudice subsequent to April 1978, or consented to disbarment after October 1984, has signed a form which provides that the attorney contractually agrees never to seek reinstatement to the bar of this State.

Section 100 Mental or Physical Incapacity - Disability Inactive Status

Circumstances may come to the attention of an Ethics Committee, either as the result of pending proceedings or otherwise, which indicate the necessity for a medical examination. In such event the Ethics Committee should file a report with the OAE indicating the factual circumstances on which its recommendation for an examination is based. Thereafter, the OAE may apply to the Board, on notice, for an order that the attorney submit to an appropriate examination. If the respondent attorney is incapacitated and unable to practice law, the Board may recommend to the Supreme Court that the attorney be transferred to Disability Inactive Status. *R.1:20-12(b)*.

Section 101 Relationship with Prosecutors

It should be noted that the confidentiality provisions of *R. 1:20-9* do not prevent **grievants** from **independently** advising appropriate law enforcement officials of facts within their personal knowledge that might indicate criminal conduct on the part of an attorney. (But note that even if a grievant chooses to disclose that he/she has filed a grievance against an attorney in the matter, ethics committee members may not share non-public information with law enforcement officials, even after the Court's decision in *R.M. v. Supreme Court of New Jersey* and *R. 1:20-9(b)*, as amended.) Moreover, the Ethics Committee should encourage individuals who may have knowledge of criminal conduct to disclose this information directly and promptly to appropriate law enforcement officials. In fact, in misappropriation cases, *R. 1:28-3(a)(5)* requires all claimants to the Lawyers' Fund for Client Protection to disclose the relevant facts underying the claim in writing both to "appropriate law enforcement and disciplinary authorities." This disclosure must be made prior to the filing of a claim with the Fund and must be certified to the Fund on the claim form, falsification of which "shall be an absolute bar to any award by the trustees." Consequently, there is now great assurance of uniformity of disclosure in misappropriation cases to all interested agencies

Section 102 Relationship With Other Disciplinary Agencies

The OAE maintains a current liaison with all chief disciplinary counsel's offices throughout the United States, particularly in the sister States of Pennsylvania, New York and Delaware. Whenever it is determined that an attorney disciplined in this state is also admitted in another jurisdiction, a complete copy of the New Jersey disciplinary file is forwarded to that other disciplinary agency for the institution of appropriate reciprocal disciplinary proceedings. Moreover, in order to assure timeliness in reciprocal disciplinary matters, the OAE forwards a copy of its Quarterly Disciplinary Report to chief disciplinary counsel in Pennsylvania, New York and Delaware. Referrals to New Jersey are routinely made by other disciplinary agencies. As a result of this comity, citizens are protected beyond the boundaries of state lines.

Section 103 Immunity

All members and secretaries of Ethics Committees, the OAE and DRB, as well as "lawfully appointed designees and staff" (including special ethics masters, volunteer presenters and investigators, and former members who volunteer to be recalled to sit on hearing panels) are "absolutely immune from suit, whether legal or equitable in nature, based on their respective conduct in performing their official duties." *R.1:20-7(e).* Any ethics committee member who is sued civilly for conduct performed on behalf of the ethics committee should immediately contact the OAE's liaison attorney or the Statewide Coordinator. Likewise, absolute privilege and immunity from legal or equitable suit has been extended to grievants and witnesses for all "communications" and "testimony" given in ethics proceedings only to disciplinary officials. *R.1:20-7(f).*

Ethics grievances against ethics committee members and secretaries arising

from the processing of an ethics grievance are considered by the Disciplinary Review Board in connection with an appeal or other authorized review. *R.1:20-7(j).*

Section 104 Appointment of Attorney-Trustee To Protect Clients' Interests

Where an attorney is suspended or disbarred but fails to meet obligations to notify clients, adversaries or the judiciary under *R.1:20-20,* or is transferred to disability inactive status, or abandons the practice or dies without a partner or shareholder, a procedure now exists to take control of inventory and distribute the attorney's active files and the trust and business accounts. Under *R.1:20-19,* any interested party may petition the Assignment Judge in the vicinage where the attorney practiced for an order of appointment as "Attorney-Trustee" to protect clients' interests as directed further by court order. Where a responsible party is known to exist, that person may be appointed. Otherwise, it is the responsibility of the local bar association to seek appointment. **Figure 54** contains a form of petition. The Assignment Judge will appoint "one or more members of the bar of the vicinage where the practice is situate as trustee." *R.1:20-19(a).* Notice of such order must be given to the Director, Office of Attorney Ethics, to the Clerk of the Supreme Court and to the county bar association.

The primary purpose of the trusteeship is "to inventory the active files of the attorney and make reasonable efforts to distribute them to clients, to take possession of the attorney's trust and business accounts, to make reasonable efforts to distribute identified trust funds and, after obtaining an order of the court, to dispose of any remaining funds and assets as directed by the court. *R.1:20-19(b).* If the petitioner does not wish to marshal the assets of the law practice, this should be clearly stated in the petition of appointment.

The most important order of business for the Attorney-Trustee is to determine which files are active and which are not. A letter should be sent to all clients on active cases advising them to retrieve their files and consult with another attorney to complete the matter. The Attorney-Trustee is under no obligation to evaluate the case nor complete any legal work. The Attorney-Trustee may, however, with consent of the client, accept employment to take over any case. *R.1:20-19(e).* The Attorney-Trustee may also arrange with the local postmaster to forward respondent's mail. Likewise, the Assignment Judge will be able to secure a list of pending litigated matters so that judges and adversaries and clients are notified to take appropriate action.

In the usual case, the Attorney-Trustee will notify clients to retrieve active files. A receipt (**Figure 55**) should be secured before any file is distributed. Within 120 days after appointment, the Attorney-Trustee will file with the Assignment Judge an initial report on what has been accomplished. *R. 1:20-19(d).* At that time or whenever there are questions, an application for instructions may be made to the Assignment Judge. After all reasonable efforts have been made to distribute files, the Attorney-Trustee should request the Assignment Judge's approval to publish final notice in a local newspaper requiring that any clients who want their files pick them up within 30 days, after which the Attorney-Trustee is authorized to destroy all files. Notice should also be given to the respondent at any last known address and should require him or her to

arrange to pick up the remaining files within that 30-day period and advise that otherwise the files will be destroyed. The Attorney-Trustee may be discharged only after making a final report to the Assignment Judge.

During the trusteeship, certain out-of-pocket costs may be incurred such as postage, secretarial, moving, storage, publication of notice and so on. Reimbursement of up to $2000 of such expenses may be made to the Attorney-Trustee upon application to the Director. There are also two sources for reimbursing the Attorney-Trustee after the fact. The first, found in *R.1:20-19(e),* is the ability of the Attorney-Trustee, with the consent of a client, to complete any profitable legal matter that the respondent was handling. The second, found in *R.1:20-19(b) and (h),* allows the Attorney-Trustee to marshal any assets of the law practice, including, "all monies and fees due the attorney for the sole purpose of creating a fund for payment of reasonable fees, costs and expenses of the trusteeship . . ." After obtaining an order from the court, the Attorney-Trustee can sell the office equipment, law books, computers and other law property to create a fund for the Attorney-Trustee's reimbursement. The Attorney-Trustee is given a "priority as an administrative expense for all attorneys fees, costs and expenses awarded by the court." The Attorney-Trustee, on application to the Assignment Judge is entitled to reimbursement from the attorney for "actual expenses incurred . . . for costs including, but not limited to, reasonable secretarial, paralegal, legal, accounting, telephone, postage, moving and storage expenses and for reasonable hourly attorney's fees." *R.1:20-19(h).* Appropriate notice of such application must be given to the respondent or, if deceased, to a personal representative.

Section 105 Lawyers' Fund for Client Protection

Clients who have suffered out-of-pocket financial loss as the result of an attorney's dishonest conduct may file a claim with the Lawyers' Fund for Client Protection (hereafter the "Fund") after notifying the appropriate County Prosecutor and District Ethics Committee of the incident. *R.1:28-1 et seq.*

The Fund is a separate agency of the Supreme Court with its own distinct purpose, jurisdiction and procedures. Just as the Ethics and Fee Committees cannot pay claims, the Fund cannot discipline attorneys or settle fee disputes. The Fund does not pay claims based upon the negligence or malpractice of an attorney. A claimant must prove a loss suffered through the dishonest conduct of an attorney with whom the client had an attorney-client or fiduciary relationship. The attorney against whom the claim is made must be either suspended or disbarred, unless deceased or otherwise unavailable, for the Fund to have jurisdiction.

The Fund is administered by six Trustees (five attorneys and one public member) all of whom donate their time and talents. The Fund receives no tax revenues but rather pays its awards out of money paid by New Jersey attorneys each year as a demonstration of commitment to maintaining public confidence in the legal system. All client questions or requests for claim forms should be addressed to Lawyers' Fund for Client Protection, Richard J. Hughes Justice Complex, P.O. Box 961, Trenton, New Jersey 08625, (609) 292-8079. Claim limits are $250,000 per claimant. The aggregate

limit for all payments made on account of one attorney is $1,000,000.

Section 106 Americans With Disabilities Act (ADA)

The ADA is a federal law that is intended to protect qualified individuals with disabilities from discrimination on the basis of disability with regard to services, programs, or activities of all state and local governments. The Act requires Ethics Committees to insure that communications with individuals with disabilities are as effective as communications with others. For example, persons who are deaf or hard-of-hearing may require qualified interpreters or computer-aided transcription services as well as other assistance. Persons with vision impairments may require qualified readers or other assistance.

All requests for assistance under the ADA must be **immediately** referred to the Statewide Coordinator or the OAE liaison. Please include all background material and a brief written summary of the underlying matter. No hearing should be scheduled in any matter where assistance under the ADA has been requested until you have received a written decision concerning said request from the Office of Attorney Ethics.

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