Two Case Studies in the Exercise of Discretion in Lawyer Discipline Systems

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Introduction

Discretion in discipline: The obvious short answer is, "but of course!" Any system of finite resources, structured to regulate human behavior in all of its complexity on the basis of a set of rules, will inevitably incorporate the exercise of discretion. There's nothing particularly interesting about that. Several subsidiary questions are interesting: At what points is discretion exercised? Who exercises that discretion? What criteria limit the exercise discretion? What checks and balances exist to assure that relevant actors are discharging their discretion responsibly and with integrity?

This brief paper will examine the points within two lawyer discipline systems where discretion is exercised. One system is hypothetical—one governed by the ABA Model Rules for Lawyer Disciplinary Enforcement (Model Rules).[1] The other is the system best known to the author—Indiana's.[2]

Intake and Facial Screening for Merit

Model Rules

Central Intake Model: Model Rule 1(B)(4)—"There is hereby established a central intake office, which shall determine whether the facts stated in a complaint or other information regarding the conduct of a lawyer provide grounds for further

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1. The ABA Model Rules for Lawyer Disciplinary Enforcement are available on-line at: http://www.abanet.org/cpr/disenf/contents.html (last visited April 14, 2009). So far as I am aware, no jurisdiction has adopted the pure ABA Model Rules for Lawyer Disciplinary Enforcement. Louisiana may be the closest. Throughout this paper, the ABA Model Rules for Lawyer Disciplinary Enforcement will be referred to as the Model Rules. Reference to the ABA Model Rules of Professional Conduct will be as the Model Prof. Cond. Rules.

2. The procedures governing Indiana's lawyer discipline system are set out in Indiana Admission and Discipline Rule 23. http://www.in.gov/judiciary/rules/ad_dis/index.html#_Toc202257372 (last visited April 14, 2009). As one might expect, most state lawyer discipline systems are quite similar broadly speaking. Having been designed by judges and lawyers, it should come as no surprise that they reflect a strong commitment to the basic due process principles of notice and an opportunity to be heard. But in the details, there is great diversity in how systems differ, including the ability to investigate absent a third party complaint, the role of probable cause bodies, reliance on volunteers, the use of multiple- or single-member hearing bodies, formality of hearings, direct involvement by state high courts, availability of consent discipline, etc. For example, Indiana's system has more direct high court involvement than the Model Rules contemplate.

action by any agency designated by the court under Rule 1(A)[3] and (a) dismiss the complaint; or (b) forward it to the appropriate agency or agencies."

Model Rule 1(B)(5)(1) pre-supposes the existence of "written guidelines for dismissal of complaints," although the Model Rules themselves do not specify the content of such guidelines. The guidelines are to be issued by disciplinary counsel.[4] Consultation requirements and the process for developing the guidelines are not addressed in the rules. Model Rule 1(B)(5)(b) requires that, in addition to a copy of the dismissal guidelines, the central intake office will provide a complainant whose complaint is dismissed "a concise written statement of the facts and reasons for referral of the complaint to an agency other than the disciplinary agency."

Model Rule 3(A) establishes appeal procedures when central intake disposes of a complaint in a way that is not satisfactory to the complainant. The appeal must be taken within thirty days of notice of the disposition decision to a hearing committee chair, "who may approve, modify or disapprove the dismissal, or direct that the matter be investigated by disciplinary counsel."[5] Disciplinary counsel may appeal the review decision of a hearing committee chair to a second hearing committee chair, whose decision is final.[6]

Whether coming from central intake or from some other source, disciplinary counsel must evaluate information alleging lawyer misconduct. In addition to the authority to make referrals to other appropriate agencies, disciplinary counsel may dismiss if "the information, if true, would not constitute misconduct or incapacity."[7] Otherwise, disciplinary counsel must conduct an investigation. There is no provision for complainant appeal if disciplinary counsel decides to dismiss a complaint on its face.

Indiana

The Indiana Supreme Court Disciplinary Commission is an agency of the Indiana Supreme Court charged with investigative and prosecutorial responsibilities. The Disciplinary Commission is a board of nine Supreme Court-appointed members that meets monthly and acts as a board of directors and a probable cause body. The administrator and chief disciplinary counsel is the Executive Secre-

3. Those agencies include "a lawyer discipline and disability system, a client protection fund, mandatory arbitration of fee disputes, voluntary arbitration of lawyer malpractice claims and other disputes, mediation, lawyer practice assistance, and lawyer substance abuse counseling." Model Rule 1(A).

4. Model Rule 4(B)(7).

5. A disciplinary board of nine members is appointed by the state high court to oversee the discipline process. See generally, Model Rule 2. The disciplinary board, in turn, appoints three or more hearing committees by geographic region, designating a chair for each committee. Model Rule 2(B)3). For a description of the hearing committee chair's review authority, see Model Rule 3(E)(1).

6. Model Rule 3(E)(1).

7. Model Rule 11(A).

tary. An initial claim of misconduct presented for investigation is known as a "grievance."[8]

A grievance is initially screened by the Executive Secretary or a staff attorney and is subject to facial dismissal by the Executive Secretary if "it raises no substantial question of misconduct."[9] The Executive Secretary's dismissal decision is subject to the "approval of the Commission."[10] Both grievant and respondent are notified of the dismissal.

No grievant appeal of the Executive Secretary's dismissal decision is contemplated by rule. In practice, a dismissal decision will be re-scrutinized by the Executive Secretary if the grievant complains about a dismissal. In appropriate cases, further consultation occurs between the Executive Secretary and the Commission and may result in re-opening a dismissed case for investigation.

Even in the absence of a third party grievance, the Executive Secretary can initiate an investigation by preparing a grievance on the authority of any member of the Disciplinary Commission or the Commission as a body.[11]

"Misconduct" is not formally defined. Implicitly, it is, "[a]ny conduct that violates the Rules of Professional Conduct or the Code of Judicial Conduct heretofore adopted or as hereafter amended by this Court or any standards or rules of legal and judicial ethics or professional responsibility then in effect or hereafter adopted by this Court. . . ."[12]

If a grievance is not dismissed under this standard, it is opened for investigation, with notice to the respondent, who has an obligation to respond and otherwise cooperate.

Discussion: The lawyer discipline system is not blessed (cursed?) with infinite resources. In light of limited resources, there is always a need to allocate finite resources in a reasonable way so as to optimize the public protection function of the lawyer discipline process. Initial complaint screening is an important point in the process where resource allocation decisions come into play. According to the statistics kept by the ABA Center for Professional Responsibility in its annual Survey on Lawyer Discipline Systems, 4.06% percent of complaints coming into disciplinary system nationally result in a formal charge of misconduct.[13] The system is like a funnel with a very wide top and a fairly narrow bottom. Between the two, claims of lawyer misconduct are eliminated, either on their face or following an investigation, that are viewed as being non- or less-meritorious. Because the human and financial resources of the disciplinary system are not very elastic,

8. Proceedings involving lawyer disability are also contemplated under Indiana's lawyer regulatory regime. Ind. Admis. Disc. R. 23(25). This paper will not discuss those proceedings.

9. Ind. Admis. Disc. R. 23(10)(a)(1).

10. *Id.*

11. Ind. Admis. Disc. R. 23(10)(a).

12. Ind. Admis. Disc. R. 23(2)(a).

13. *See* 2007 Survey on Lawyer Discipline Systems, Chart I, *available at* http://www.abanet.org/cpr/discipline/sold/chart-1.pdf (last visited April 14, 2009).

every hour spent saying "no" to a complaint is roughly an hour less time to spend pursuing a (more) meritorious case to a conclusion that protects the public. Taken to the extreme, lavishing resources on lengthy and customized explanations to non-meritorious complainants about why their complaints were dismissed might result in marginally fewer discontented, unsuccessful complainants, but it will be at the cost of scant remaining resources to effectively pursue serious, meritorious claims of lawyer misconduct. This is not meant to downplay the value of articulating reasons for dismissal as an internal means of reserving facial dismissal for truly non-meritorious cases. It is often a balancing act between the two: responsibly, but efficiently, disposing of low-merit complaints in a way that maximizes the resources available for investigating cases with probable merit and prosecuting cases of true merit.

The threshold dismissal standard under the Model Rules is whether "the information alleges facts which, if true, would constitute misconduct or incapacity." This is roughly the typical standard for dismissal of civil complaints for failure to state a claim upon which relief can be granted.[14] This standard, while seemingly allowing little discretion, inevitably brings disciplinary counsel discretion into play at two, perhaps three, levels. The first level is factual. This standard suggests that disciplinary counsel has no discretion to make any credibility determinations on the face of a complaint no matter how fabulous the allegations. This author would suggest that in the real world of screening complaints, some degree of discretion is exercised to eliminate outlying cases on the basis of complainant credibility when, for example, the complaint makes outrageous factual claims that would, in the ordinary course, tend to have documentary support, yet none is present.

The second level of exercising discretion is whether a given set of facts constitutes a violation of the Rules of Professional Conduct. Consider the following two examples: Model Prof. Cond. Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The rule's reference to reasonableness suggests that it contemplates a negligence standard.[15] In the civil liability arena, the doctrine of proximate cause acts to limit the cases that are worth pursuing as civil claims for damages due to professional negligence. The disciplinary system is generally not a substitute for private compensation mechanisms. Rather, it is forward-looking, with the goal of protecting future clients and others from harm as a result of, as in this example, lawyer incompetence. Because of this, the fact that a lawyer's incompetence in the case at issue caused no harm is not controlling over the analysis of whether the public needs protection from similar incompetence in the future that may cause significant harm. In other words, the doctrine of proximate cause is not significantly operative in a lawyer discipline regime. In this sense, a strict reading of Model Prof.

14. *See* Fed. R. Civ. P. 12(b)(6) and its state counterparts.
15. *See* Model Prof. Cond. R. 1.0(h) ("reasonable" defined).

Cond. R. 1.1 would capture significantly more cases than would be attractive as civil malpractice cases.

If every complaint, liberally construed, were to be investigated on a claim of simple negligence without regard to the harm it caused or other considerations, there would be very few complaints dismissed at the initial screening stage. Yet, in the real world of case screening, the author would suggest that criteria beyond a theoretical violation of Model Prof. Cond. R. 1.1 come into play that result in screening out complaints at the outset. Some of these considerations, none of which are controlling, include: (1) whether the respondent lawyer has a pattern of prior, similar complaints or whether it is an isolated situation; (2) whether the underlying representation had merit; (3) the materiality of the incompetence—whether it was purely procedural or collateral to the matter on its merits versus threatening to the merits; and (4) whether the harm was cured.

Similar considerations could come into play with complaints about diligence under Model Prof. Cond. R. 1.3, which also incorporates a negligence standard, and complaints about communication under Model Prof. Cond. R. 1.4, which also incorporates a negligence standard.

Take the specific example of a lawyer who allows a statute of limitations run. One could argue that this is a violation of Model Prof. Cond. R's. 1.1 and 1.3 because it is not competent or reasonably diligent lawyering to allow a jurisdictional time limit to pass while a case is entrusted to a lawyer. As a matter of civil liability, the case would be fairly straight-forward, its viability limited only by value of the case within the case. As a disciplinary matter, surrounding circumstances would likely dictate whether the matter is summarily dismissed or moves further into the system. Some of those considerations would be: (1) whether the lawyer was forthcoming and candid with the client about the missed deadline; (2) whether the lawyer is insured or otherwise in a position to satisfy a civil liability judgment; (3) whether the lawyer has a history of previous discipline, especially discipline for incompetence or non-diligence; (4) whether the lawyer has been the subject of previous complaints raising questions about incompetence or non-diligence, even if those cases were dismissed. The value of the client's underlying case would normally play an insignificant role in evaluating the client's complaint. Properly handled by the lawyer (except for the error of having missed the deadline in the first place), the disciplinary complaint might well be dismissed and the complainant relegated to his or her civil remedies.

A second example pertains to complaints over fees. Any unreasonable fee violates Model Prof. Cond. R. 1.5(a). Client complaints about fees will usually state a facial claim under Model Prof. Cond. R. 1.5(a). Until fully investigated, it is difficult for disciplinary counsel to be able to distinguish between an unreasonable fee and an unreasonable reaction by a client to a bill for a reasonable fee. Many bar counsel have established formal or informal criteria for identifying fee disputes that are relegated to civil litigation or some alternative form of fee dispute arbitration or mediation. In theory, armed with a favorable civil judgment, the complainant could return to disciplinary counsel and renew the unreasonable fee complaint. However,

it is unusual for disciplinary counsel to reconsider a matter for disciplinary action after it is resolved civilly unless the civil judgment demonstrates that the lawyer's conduct involved elements of fraud or dishonesty that would implicate other rule prohibitions. On other hand, bar counsel may be inclined to exercise discretion to more closely examine, and in appropriate cases, prosecute unreasonable fee cases that present questions about the reasonableness of wide-spread or institutionalized fee practices within a particular segment of the legal community.

By formal or informal policy, some disciplinary counsel take certain categories of complaints arising from criminal representations off the table. There are two such primary complaint types. One involves the handling of a criminal defense representation by current, usually appointed, counsel. The other involves complaints about effectiveness of defense counsel (typically, but surprisingly not always, following the client's conviction). With respect to the former, many disciplinary counsel take a policy stance that it is inappropriate to intercede in an on-going representation; that concerns about the performance of current counsel should be addressed to the appointing court or administrative office. With respect to the latter, many disciplinary counsel apply a type of exhaustion analysis holding that a complaint about effectiveness of counsel is not ripe for consideration as a discipline matter until the complainant has exhausted direct appeals and post-conviction remedies.

If the Model Rule screening standard were honored to the letter, these policies for screening out complaints would violate it. One could argue that it is not adequately protective of the rights of other or future clients if disciplinary counsel turn a blind eye to incompetence by criminal defense counsel until a complaining party has been convicted and has also exhausted direct appeals and collateral attacks on judgment raising ineffective assistance of counsel. Moreover, to the extent disciplinary counsel look to the complaining client to return only after successfully overturning a conviction, the system will have disregarded many cases of poor performance by defense counsel where the ineffectiveness was found to be harmless error. That said, in a world of finite resources, there is something to be said for relegating the complaining criminal defendant to his or her post-conviction relief options, not so much for the purpose of returning only if the conviction is overturned, but after the record of alleged ineffectiveness is fully developed in that context so as to conserve resources that would otherwise be spent developing that record so the complaint can be properly evaluated.

Comparatively, the Model Rules seem to impose a relatively strict standard on disciplinary counsel for moving complaints into investigation, whereas the Indiana rules seem to recognize a greater degree of disciplinary counsel discretion by including the word "substantial" in the initial screening standard. On the other hand, oversight of disciplinary counsel discretion to dismiss cases appears to be more rigorous in Indiana than under the Model Rules. Under the Model Rules, disciplinary counsel's decision to dismiss without investigation is not subject to review, whereas in Indiana, disciplinary counsel's facial dismissals are subject to approval of the Disciplinary Commission.

Investigation

Model Rules

Disciplinary counsel must conduct an investigation if "the information alleges facts which, if true, would constitute misconduct or incapacity."[16] The Model Rules are silent on whether a respondent has any appeal rights from disciplinary counsel's decision to investigate a matter rather than dismiss it on its face. Presumably, there are no appeal rights or other mechanisms to challenge that decision. Indeed, it is unlikely that the respondent will even be aware that disciplinary counsel is screening a complaint when it is at the initial evaluation stage. "Misconduct" is not a defined term, as such. The term is implicitly defined in Model Rule 9(A)(1): "It shall be a ground for discipline for a lawyer to violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers."

Disciplinary counsel appears to have complete discretion to formally investigate on the basis of information coming to his or her attention by a method other than third-party complaint, or to investigate additional allegations of misconduct that come to light during an investigation into an unrelated matter. Indeed, disciplinary counsel has an affirmative duty to "evaluate" all information for possible investigation, whether it comes from third-party complaints or other channels. "The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity."[17] As a procedural matter, if further action beyond dismissal or holding a matter in abeyance is contemplated, disciplinary counsel must provide notice and an opportunity to be heard (presumably by a written response) if matters not previously disclosed to a respondent will be relied upon as the basis for a charge of misconduct.[18]

Indiana

Grievances that raise a "substantial question of misconduct" are formally investigated.[19] The respondent has no appeal rights from the Executive Secretary's decision to investigate.

In investigating a matter, the Executive Secretary is not limited to the allegations raised in the grievance. Instead, he "shall be permitted to inquire into the professional conduct of the attorney generally."[20] However, if the Commission is to consider formally charging a respondent with misconduct that was not raised in the initial grievance, the respondent must be notified of the additional charges under consideration and given an opportunity to respond in writing.[21]

16. Model Rule 11(A).
17. Model Rule 11(A).
18. Model Rule 11(B)(2).
19. Ind. Admis. Disc. R. 23(10)(a)(2).
20. Ind. Admis. Disc. R. 23(10)(d).
21. *Id.*

Post-Investigation Screening

Model Rules

After investigation, disciplinary counsel has three options: dismiss, refer to an alternatives to discipline program, or recommend some type of discipline, including probation, admonition, filing of formal charges, transfer to disability inactive status or a stay.[22] The respondent has no right to have disciplinary counsel's post-investigation dispositional decision reviewed. Disciplinary counsel's decision to do anything other than dismiss or refer to an alternatives to discipline program must be in the form of a recommendation to the chair of a hearing committee. The complainant has a right of appeal to the chair of a hearing committee to have disciplinary counsel's disposition decision, typically one to dismiss, reviewed. Disciplinary counsel's recommendation or the complainant's appeal may be approved, disapproved or modified by the hearing committee chair. Disciplinary counsel may appeal any hearing committee chair's decision to a second hearing committee chair, whose decision is final.[23] Interestingly, the Model Rules do not set forth any specific standard for disciplinary counsel to use in making a dismissal decision or a charging recommendation. And the Model Rules do not set forth a specific standard for the hearing committee chair to use in reviewing disciplinary counsel's recommendation to charge or a complainant's appeal of a dismissal decision.

Once a complaint is investigated, it appears that disciplinary counsel has unfettered discretion to dismiss a matter, subject to standard-less review of a complainant's appeal to a hearing committee chair, and standard-less authority to recommend charging, subject to unfettered review discretion by a hearing committee chair.

Indiana

After preliminary investigation, including receipt of a written response from the respondent, the Executive Secretary shall dismiss "with the approval of the Commission" if he determines that there is "no reasonable cause to believe that the respondent is guilty of misconduct."[24] Otherwise, the matter is docketed for further investigation and review by the Disciplinary Commission.

Discussion: Many of the considerations discussed in connection with initial screening apply at the stage of screening after investigation. The difference, of course, is that there is less of a need to read between the lines of a sometimes-inarticulate complaint. Often, the lawyer's response sheds considerable new light on the situation or provides a clarification of issues sufficient to make a well-informed decision whether to dismiss or move the file further along in the process.

Under the Model Rules, discretion in making that judgment rests in the first instance with disciplinary counsel if the matter is to be dismissed, subject to the complainant's right to seek review by a hearing committee chair. There is no spe-

22. Model Rule 11(B)(1).
23. *See generally* Model Rule 11(B)(3).
24. Ind. Admis. Disc. R. 23(10)(b).

cific standard to guide disciplinary counsel or the hearing committee chair in deciding to dismiss a complaint. Presumably it is the same standard as used at the outset: do the facts (as now established by investigation) constitute misconduct?[25] This standard clearly leaves considerable room for discretion on disciplinary counsel's or the reviewing committee chair's part in evaluating the provability of the material facts by the applicable standard of proof.[26] It seemingly leaves less room to exercise prosecutorial discretion to dismiss cases that present meritorious, but *de minimus* claims, or to dismiss for other sound policy reasons.

Under the Indiana rules, the standard for dismissal after investigation is roughly the same as under the Model Rules with the similar procedural check and balance of Commission approval. What is especially curious under Indiana's rule is that the threshold screening standard "substantial question of misconduct" arguably allows for greater exercise of prosecutorial discretion than the standard for screening after investigation: whether the respondent is guilty of misconduct. While, as noted, misconduct has been implicitly defined as a violation of a Rule of Professional Conduct, perhaps the use of the word "guilt," a word we normally associate with the criminal justice system, suggests the availability of prosecutorial discretion similar to that exercised by prosecutors in the criminal system.

Formal Charging Decision

Model Rules

After investigation, disciplinary counsel may determine that a formal charge of misconduct should be filed.[27] This is in the form of a recommendation to the chair of a hearing committee "selected in order from the roster established by the board."[28] The chair may approve, disapprove, or modify the recommendation.[29] If disciplinary counsel disagrees with the reviewing chair's action, he or she may appeal to a second hearing committee chair who either approves disciplinary counsel's recommendation or ratifies the first hearing chair's action.[30] That decision is final. If the hearing chair's review results in approval of a recommendation to file a formal charge, disciplinary counsel is to prepare and file a formal charging complaint.[31]

Indiana

After such additional investigation as is appropriate, the Executive Secretary submits a report of the investigation and recommendation to the Disciplinary Commission.[32] "If the Commission determines that there is not reasonable cause to be-

25. *See* Model Rule 11(A).
26. "Clear and convincing evidence." Model Rule 18(C).
27. Model Rule 11(B)(3).
28. *Id*.
29. *Id*.
30. *Id*.
31. Model Rule 11(D).
32. Ind. Admis. Disc. R. 23(10)(c).

lieve that the respondent is guilty of misconduct, the grievance shall be dismissed," with notice to the grievant and respondent.[33] If the Commission determines that there is "reasonable cause to believe the respondent is guilty of misconduct which would warrant disciplinary action," the Executive Secretary prepares and files a formal complaint charging misconduct.[34] The Executive Secretary has no authority to formally charge a lawyer with misconduct in the absence of a finding of reasonable cause by the Disciplinary Commission.

There is an interesting gap between the Commission's dismissal standard and its standard for authorizing a formal charge of misconduct: the "which would warrant disciplinary action" language. In theory, the Commission could be hamstrung by a finding that there is reasonable cause to believe the respondent is guilty of misconduct, but not misconduct that would warrant disciplinary action. In practice, the Commission has viewed itself as having the discretion to dismiss a grievance in cases where there are considerations warranting no formal disciplinary action, notwithstanding that there is reasonable cause to believe the lawyer technically violated a Rule of Professional Conduct.

Discussion: The Model Rules and the Indiana rules differ considerably both procedurally and substantively in the exercise of discretion to formally charge misconduct. Procedurally, under the Model Rules, the decision to charge belongs to disciplinary counsel subject to a review by a single hearing committee chair. If disciplinary counsel wishes to charge but strikes out with the reviewing chair, he or she has a second bite at the apple by appealing to a second reviewing chair. By contrast, in Indiana, the Executive Secretary may charge only after consideration of the matter by the full Disciplinary Commission. If the Commission makes a no-charge decision, the Executive Secretary may not charge and has no further right of review or appeal.

The substantive standard for charging under the Model Rules is essentially non-existent. Obviously, the merits of a formal charge would ordinarily be considered, but the rules do not give any guidance other than to state that disciplinary counsel may recommend filing a formal charge. There is likewise no standard for review by the hearing officer chair. In Indiana, the standard that guides the Disciplinary Commission is "reasonable cause to believe the grievance is guilty of misconduct which would warrant disciplinary action." This standard implies that there are matters where there is reasonable cause to believe that some rule was violated, but nonetheless disciplinary action is not warranted. This clearly recognizes prosecutorial discretion, albeit discretion that has no detailed guiding standards. Presumably, the check on the integrity of the process is more procedural than substantive: the charging decision must be made by a committee of court-appointed members of the bar and lay public exercising their collective judgment.

33. Ind. Admis. Disc. R. 23(11)(a).
34. Ind. Admis. Disc. R. 23(11)(b) and (12)(c).

Referral to Diversion

Model Rules

In "lesser misconduct" matters[35], disciplinary counsel may, with the respondent's consent, refer a respondent to an Alternatives to Discipline Program[36] in lieu of filing a disciplinary action.[37] Criteria for making a referral include: whether the referral is likely to benefit the respondent and accomplish the goals of the diversion program, consideration of aggravating or mitigating factors, and previous use of diversion.[38] The disciplinary matter is held in abeyance pending successful completion of the diversion program or termination in the event of material breach, with the disciplinary proceeding going forward.[39]

Disciplinary counsel is not required to offer diversion and the respondent has no right to access diversion as an alternative to discipline. The complainant must be notified of the decision to refer a respondent to diversion and has a right to tender a statement in response to that decision for further consideration, but disciplinary counsel is not required to give the complainant's views any particular weight.

Indiana

Indiana does not have a formalized diversion or deferral program. Indiana does have a consent sanction for minor misconduct that results in a private administrative reprimand.[40] It is an available sanction only if the respondent consents and if the full Disciplinary Commission authorizes it. It cannot be finalized until the Supreme Court is notified of the plan to dispose of the matter in that fashion and does not register an objection within thirty days.

Interim Suspension for Threat of Harm

Model Rules

Disciplinary counsel may, and is seemingly required by the governing Model Rule, to seek emergency interim suspension "[u]pon receipt of sufficient evidence demonstrating that a lawyer subject to the disciplinary jurisdiction of this court has committed a violation of the [state Rules of Professional Conduct] or is under

35. Defined as not likely warranting suspension and not involving misappropriation, substantial prejudice, public discipline in the past three years, prior discipline for misconduct of the "same nature" in the past five years, dishonesty, deceit, fraud, misrepresentation, serious criminal conduct, or part of a pattern of similar misconduct. Model Rule 9(B).

36. Alternatives to discipline include fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education, ethics school or any other court authorized program. Model Rule 9(G)(1).

37. Model Rule 11(G)(1).

38. Model Rule 11(G)(3).

39. Model Rule 11(G)(6) and (7).

40. Ind. Admis. Disc. R. 23(12)(a).

a disability as herein defined and poses a substantial threat of serious harm to the public. . . ."[41]

Indiana

The Executive Secretary may only act to seek interim relief due to threat of harm upon a two thirds vote of the Disciplinary Commission. "If it appears to the Disciplinary Commission upon the affirmative vote of two-thirds of its membership, that: (i) the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and (ii) the alleged conduct, if true, would subject the respondent to sanctions under this Rule, the Executive Secretary shall petition the Supreme Court for an order of interim suspension from the practice of law or imposition of temporary conditions of probation on the attorney."[42]

However, if a lawyer is found guilty of a "crime punishable as a felony," the Executive Secretary, without any required approval of the Disciplinary Commission must file a notice of the guilty finding and a request for interim suspension with the Supreme Court.[43] The Court has discretion whether to enter an order of interim suspension, but the Executive Secretary has no discretion over requesting the suspension.

Discussion: There is little significant difference between the Model Rules and the Indiana rules in the substantive standard to be applied in seeking an interim suspension of a lawyer's law license. What is quite extraordinary is the contrast in the procedural protections. Keeping in mind that this process will often result in the suspension of a lawyer's license before there is a full adjudication on the merits, under the Model Rules, disciplinary counsel has the authority, maybe even the mandate, to seek interim suspension on his or her own say-so without any oversight of that decision. In Indiana, the Executive Secretary may seek interim suspension for threat of harm only upon approval of a super-majority of the Disciplinary Commission.

Discipline by Consent

Model Rules

If disciplinary counsel believes that it would be appropriate to resolve a matter by admonition or probation, and upon approval by a hearing committee chair, disciplinary counsel must give the respondent written notice and an opportunity to demand a hearing. If the respondent does not demand a hearing within fourteen days of the notice, he or she is deemed to have consented to the tendered proposal to resolve the matter with admonition or probation. If the respondent demands a

41. Model Rule 20(A).
42. Ind. Admis. Disc. R. 23(11.1)(b).
43. Ind. Admis. Disc. R. 23(11.1)(a)(3).

hearing, a complaint is filed and the matter goes through the formal adjudication process.[44]

Discipline by consent (on admitted facts and discipline) appears to by-pass disciplinary counsel and go to the disciplinary board for review and approval or rejection. It is not clear, what, if any, role disciplinary counsel plays in the process beyond transmitting a respondent's offer. The board is to take account of the views of the hearing committee if the matter has been assigned for hearing. If the matter involves discipline at a level of suspension or greater, it is subject to approval by the court.[45]

Indiana

Without filing a formal charging complaint, discipline for minor misconduct[46] in the form of a letter of private administrative admonition from the Executive Secretary may be administered upon a finding by the Disciplinary Commission that there is reasonable cause to believe the respondent is guilty of misconduct and if the Commission and the respondent both agree.[47] Before finalizing the admonition, though, notice must be given to the Supreme Court. The admonition is finalized if thirty days pass and the Supreme Court does not set aside the proposed admonition.[48]

As to other discipline, the Disciplinary Commission and the respondent may agree to the discipline to be imposed by submitting an agreement for discipline to the Supreme Court containing stipulated facts, an agreement to charges, and agreed disciplinary sanction. The Supreme Court may accept the agreement as tendered and issue a final order of discipline based on it, counter-propose an alternate disciplinary sanction which the parties may accept or reject, or reject the agreement altogether. An agreement cannot be used in evidence in the event the matter goes to contested hearing.[49]

Discussion: Discipline involving admonition or probation may be offered under the Model Rules by disciplinary counsel upon review and approval of a hearing committee chair. The proposed admonition or probation becomes final if the lawyer does not affirmatively request formal charges and a hearing. The Model Rules contain no standards to govern disciplinary counsel's exercise of discretion to offer resolution by way of admonition or probation, and the respondent has no

44. Model Rule 11(c).

45. Model Rule 21(A).

46. Minor misconduct is defined to exclude misappropriation, actual or likely material prejudice (loss of money, legal rights or valuable property rights) of a client or third person, public discipline in past three years, discipline for misconduct of the "same nature" in past five years, dishonesty, misrepresentation, deceit, fraud or conduct that would be a felony. Ind. Admis. Disc. R. 23(12)(a). This is a form of discipline, albeit procedurally stream-lined, and not a diversion or other alternative to discipline.

47. Ind. Admis. Disc. R. 23(12)(a).

48. Ind. Admis. Disc. R. 23(12)(b).

49. Ind. Admis. Disc. R. 23(11)(c).

rights to seek review of the disciplinary counsel's decision not to make such an offer.

After formal charges are filed, discipline by consent on an admitted case is in the form of a respondent's proposal to the board. The rule does not recognize a particular role for bar counsel in deciding whether the board should accept a respondent's proposal. There are no standards to guide the board in deciding to accept or reject a proposal for discipline on consent other than case precedent and, under a complete Model Rules regime, the ABA Standards for Imposing Lawyer Sanctions. A final check in cases of license suspension is the requirement of approval by the state supreme court.

Indiana has a similar consent procedure for minor discipline (applicable only to admonitions, not probation). The Executive Secretary has little formal decision-making authority in this context. The decision to offer a consent admonition rests with the Disciplinary Commission, guided by a fairly detailed definition of what does not constitute minor misconduct. A further check on the exercise of the Commission's discretion is a thirty-day period during which the Supreme Court may veto a decision to resolve a matter by administrative admonition.

Agreed discipline, other than administrative admonition, must be approved by the Disciplinary Commission. The Executive Secretary has no authority to make a binding agreement for discipline. All agreements for discipline are submitted to the Indiana Supreme Court for its review and approval—even those that call for reprimand or probation not involving suspension.