

**SUMMARY OF COMMENTS OF THE SECTION ON CRIMINAL LAW AND
INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR
REGARDING PROPOSED PROCEDURES FOR CONDUCT OF DISCIPLINARY
HEARINGS BY THE SUPERIOR COURT DISCIPLINARY COMMITTEE FOR
APPOINTMENTS UNDER THE DISTRICT OF COLUMBIA CRIMINAL JUSTICE ACT**

The Section on Criminal Law and Individual Rights submits the attached comments for approval by the Board of Governors.

The Section supports the enactment of CJA Disciplinary Procedures as an important step in advancing the quality of indigent defense services and the integrity of the compensation process in the Superior Court. However, because of the significant direct and collateral consequences which can result from disciplinary actions by the CJA Disciplinary Committee, the Section believes that additional procedural due process protections should be added to the proposed disciplinary procedures. These additional protections should include the following: early notice to the respondent of a complaint and an opportunity to provide a written response; the right to discovery; the right to compulsory process; the right to confrontation and cross examination; the separation of the adjudicative function from the investigative and prosecutorial function, and a statement of express guidance regarding the selection of appropriate sanctions. The Section also believes that the composition of the disciplinary committee should be expanded to include members of the bar other than judicial officers. This expansion could be readily achieved by an appropriate amendment to Superior Court Criminal Rule 44-I(g).

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Steering Committee of the
Section on Criminal Law and
Individual Rights of the
District of Columbia Bar ¹

February 19, 1993

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Criminal Law and Individual Rights of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."

¹ These comments were principally prepared by Blair G. Brown, Chair of the Section's Criminal Rules and Legislative Committee. Other members of the Steering Committee who participated in the preparation of these comments are: Laurie B. Davis, Grace M. Lopes, Cynthia Wimer-Lobo, Charles Rust-Tierney, and Nkechi Taifa. Also participating in the preparation was J. Michael Ryan, a member of the Section.

CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION



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Rights of the Homeless

February 19, 1993

BY HAND

Honorable Ricardo Urbina
Chair, CJA Disciplinary Committee
Superior Court of the
District of Columbia, Room 3520
500 Indiana Avenue, N.W.
Washington, D.C. 20001

RE: Proposed Procedures For Conduct Of Disciplinary Hearings
By The Superior Court Disciplinary Committee For
Appointments Under the District Of Columbia Criminal
Justice Act

Dear Judge Urbina:

The Criminal Law & Individual Rights Section of the District of Columbia Bar ("the Section"), by this letter, sets forth its comments regarding the Proposed Procedures For Conduct Of Disciplinary Hearings By The Superior Court Disciplinary Committee For Appointments Under the District Of Columbia Criminal Justice Act ("the Proposed Procedures"). We thank you for extending the comment period so that our views may be considered.¹

¹ The views expressed herein represent only those of the Criminal Law & Individual Rights Section of the District of Columbia Bar, and not those of the District of Columbia Bar, or of its Board of Governors.

The Section supports enactment of CJA Disciplinary Procedures as an important step in advancing both the quality of indigent defense services in the Superior Court and honesty in the compensation of service providers.² The interests of all concerned parties -- indigent defendants, the Court, the public, and the overwhelming majority of those who provide CJA services competently and honestly -- are advanced by disciplining those few attorneys, investigators, experts, or other providers who do not meet the Court's standards.

However, it is equally important that discipline be fairly imposed. There are serious direct and collateral consequences which can result from disciplinary action by the CJA Disciplinary Committee. The possible direct consequences include temporary or permanent suspension from CJA compensation, which can be a devastating financial loss. As the Committee well knows, many attorneys and investigators appointed under the Criminal Justice Act derive a very high percentage of their income from CJA cases.

Severe collateral consequences may also flow from disciplinary action. For lawyers, of course, disciplinary action by the Bar may result from a finding of misconduct by this Court's CJA Disciplinary Committee. Similarly, for experts, disciplinary action by this Court could result in adverse action by a licensing or regulatory authority. In addition, certain findings effectively could foreclose an expert or investigator from rendering services in any case, whether CJA or retained, due to the deleterious impact of those findings on the expert's reputation for competence and credibility. We are concerned as well about the potential chilling effect some findings could have on the zealous representation of indigent defendants by ethical counsel, experts, and investigators.

All of the aforementioned direct and collateral consequences of discipline imposed by this Court may be entirely appropriate if warranted by the conduct at issue. However, because the interests of CJA service providers in the outcome of the disciplinary process

² While the introduction to the Proposed Procedures states that "the complaints referred to the Disciplinary Committee will be primarily voucher-related matters," the Proposed Procedures apply to "any . . . conduct which violates the District of Columbia Criminal Justice Act, the Plan For Furnishing Representation To Indigents Under The District Of Columbia Criminal Justice Act or any guideline promulgated by the Superior Court Board of Judges for the implementation of the Plan." Superior Court Rule of Criminal Procedure 44-I(g). Accordingly, a service provider could be disciplined for a violation of the Defense Practice Standards, which are part of the Criminal Justice Act Plan.

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are substantial, the process which is due should also be substantial.³ The procedural due process protections which are already included in the Proposed Procedures are important and should remain. These include notice of charges, the right to be present and to offer evidence, the right to counsel, the right to a verbatim record, the requirement that testimony be sworn, a clear and convincing evidentiary standard, and a timely decision. However, the Section believes that additional protections should be included in the Proposed Procedures. These additional safeguards are similar to some of those afforded respondents in disciplinary investigations by Bar Counsel and in hearings before the District of Columbia Board On Professional Responsibility.⁴ The additional protections should include:

(1) Early Notice To Respondent of Complaint and An Opportunity To Provide A Written Response.⁵ The Procedures should include requirements that the respondent be served a concise statement of the complaint upon its receipt by the Chairperson of the Disciplinary Committee and be afforded an opportunity to file a written response. This procedure could result in the swift

³ The Section does not take a position on whether the additional due process protections proposed in this letter are required as a matter of law, although it is likely that the disciplinary procedures will be challenged at some point on procedural due process grounds. In considering what process is due, the factors identified in Matthews v. Eldridge, 424 U.S. 319 335 (1976) are instructive:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

⁴ Where appropriate, we cite, and enclose a copy of, the analogous provisions of the Board Rules of the District of Columbia Court of Appeals Board On Professional Responsibility ("Board Rules"), promulgated pursuant to Section 4(e)(10) of Rule XI of the District of Columbia Court of Appeals Rules Governing The Bar ("D.C. Bar Rules").

⁵ Compare Board Rule 2.7.

resolution of complaints which may require only a simple explanation. It could also provide notice to the respondent of potential conflicts of interest if the complaint arises from an active representation.

(2) Discovery.⁶ The respondent should be entitled to discover as early as practicable any relevant documents and the identities of any material witnesses known to the Committee.

(3) Right to Compulsory Process.⁷ The Section believes that compulsory process is essential in order to ensure full development of evidence at the hearing. For example, third parties may be essential to corroborating the provision of services by a CJA service provider.

(4) Confrontation and Cross-Examination.⁸ The respondent should be permitted an opportunity to confront and cross-examine any person or document providing or containing adverse information.

(5) Separation of Adjudicative Function From Investigative and Prosecutorial Functions.⁹ The Proposed Procedures provide that the members of the Committee or panel serve as investigators, prosecutors, and judges. As in disciplinary proceedings before the D.C. Bar, the adjudicative role should be separate and other persons should assume principal responsibility for investigating and presenting the evidence against the respondent.

(6) Sanctions. Some guidance, however general, should be expressed in the Procedures regarding the selection of sanctions. These might include the gravity of the offense, the prior disciplinary record, if any, of the respondent, and information regarding his or her general character and competence.

The Committee should also consider initiating a change in Superior Court Criminal Rule 44-I(g) which would permit members of the Bar other than the judiciary to serve on the CJA Disciplinary Committee or a panel. The experience of practitioners may be very helpful to the Disciplinary Committee in assessing a service

⁶ Compare Board Rule 3.1.

⁷ Compare Board Rule 3.2.

⁸ Compare D.C. Bar Rule XI, Section 8(d) (in D.C. Court Rules Annotated).

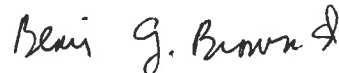
⁹ Compare D.C. Bar Rule XI, sections 4 (Board On Professional Responsibility) and 5 (Hearing Committees) with D.C. Bar Rule XI, section 6 (Bar Counsel).

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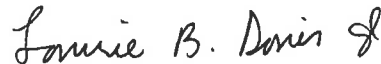
provider's conduct. A committee performing similar CJA regulatory functions in the United States District Court for the District of Columbia includes current practitioners among its members.

Thank you for affording the Section the opportunity to comment on the Proposed Procedures. Do not hesitate to call us if we can be of further assistance.

Sincerely yours,



Blair G. Brown
Chair, Criminal Rules &
Legislative Committee



Laurie B. Davis
Co-Chair, Steering
Committee



Grace M. Lopes
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BOARD RULES OF THE DISTRICT OF COLUMBIA COURT
OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY

2.7 Notification to Respondent

Bar Counsel shall promptly notify respondent in writing when a formal investigation into respondent's conduct has been docketed. This notice shall include a copy of the complaint or other documents upon which the investigation is based and a request for a written response from respondent.

Discovery and Preservation of Testimony

3.1 Discovery Entitlement and Access

During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the files of Bar Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Bar Counsel. Respondent may, upon two working days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent.

3.2 Discovery from Non-Parties

The Chair of the Hearing Committee before which a case is pending (or the Chair of the Board on Professional Responsibility), if the matter is not before a Hearing Committee) may, upon request of respondent, authorize discovery from non-parties by deposition or by production and inspection of documents. Such requests must be made by written motion. Such motions shall be granted only if respondent demonstrates that respondent has a compelling need for the additional discovery in the preparation of respondent's defense and that such discovery will not be an undue burden on the complainant or other persons. Bar Counsel shall make available to respondent subpoenas to compel attendance of such witnesses and the production of such books, papers, and documents as may be necessary to implement discovery authorized under this Rule. Service of such subpoenas shall be arranged by respondent.