

Articles

Professional Conduct and Legal Ethics

Attorney Discipline and Disability Process and Procedure—Part I
by Alec Rothrock

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This article provides an overview of the Colorado attorney discipline system, including the relevant governing bodies, the intake process, settlements, investigations, and formal proceedings. A version of this article appeared in *Essays on Legal Ethics and Professional Conduct and Lawyers' Professional Liability in Colorado: Preventing Legal Malpractice & Disciplinary Actions*, published by CBA–CLE.

The primary purpose for disciplining lawyers is to "protect the public, not to punish the offending lawyer."¹ This two-part article discusses the procedural rules and standards applicable in attorney discipline and disability proceedings in Colorado, primarily the Colorado Supreme Court's Rules Governing Discipline and Disability, C.R.C.P. 251.1 *et seq.* Part I provides an overview of the Colorado attorney disciplinary system, including a discussion of the relevant governing bodies, the intake process, diversion, investigations, and proceedings. Part II, which will be published in the March 2007 issue, will discuss summary adjudications, options for avoiding disciplinary proceedings, disability inactive status, and reinstatement and readmission.

This article does not cover nondisciplinary proceedings for suspension for failure to: (1) pay child support;² (2) pay annual registration fees;³ or (3) maintain compliance with continuing legal education requirements.⁴ It also does not attempt to address the myriad substantive disciplinary issues that all lawyers face under the Colorado Rules of Professional Conduct, except as they arise from noncompliance with the procedural rules. Finally, this article does

not discuss disciplinary procedures in other jurisdictions, such as the Tenth Circuit and the U.S. District Court for the District of Colorado.⁵

The Players

The following is a discussion of the various participants in the Colorado attorney regulation process. Each plays an important role in the system the court adopted in 1999.

The Colorado Supreme Court

"The Colorado Supreme Court, as part of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public."⁶ Unlike other professions, which are regulated by legislative acts and administrative rules implementing them, the court's regulation of the practice of law is an important element of its status as an independent branch of state government.

The Supreme Court Advisory Committee

The Supreme Court Advisory Committee (Advisory Committee) is a permanent committee of the court; its general responsibility is to oversee the disciplinary system on behalf of the court. The Advisory Committee handles concerns or complaints about the disciplinary system as a whole; it is not the appropriate body to which to address concerns or complaints about individual cases.

The Advisory Committee comprises:

- the Chair and Vice-Chair of the Attorney Regulation Committee (discussed below)
- two Justices of the Court (currently, Justices Nathan B. Coats and Michael L. Bender)
- eight members of the Bar
- one member of the public
- one representative of the CBA Ethics Committee
- one "Respondent Bar" member of the CBA Attorney Regulation Policy Committee
- one member of the hearing board pool (discussed below).

The Advisory Committee supervises a three-person "management committee" to coordinate "administrative matters within all programs of the attorney regulation system."⁷ The Advisory Committee meets every two to three months, as necessary, in open meetings in the court's conference room.

The Attorney Regulation Committee

The Attorney Regulation Committee is a permanent committee of the court. It has nine members (six lawyers and three members of the public), who are appointed by the court. Its principal function is to consider and act on requests by the Office of Attorney Regulation Counsel (OARC) to file a formal complaint against a lawyer or to "divert" disciplinary matters to the "alternatives to discipline" program.⁸ As discussed below, the Attorney Regulation Committee is not limited to approving or disapproving the action recommended by the OARC. The Committee also considers conditional admissions of misconduct in which the stipulated sanction is private admonition⁹ and reviews, in quasi-appellate fashion, matters dismissed by the OARC after investigation.¹⁰ The Attorney Regulation Committee is an important check on the exercise of the OARC's discretion.

The Office of Attorney Regulation Counsel

The OARC serves at the pleasure of the court and is subject to its authority.¹¹ Under the Rules Governing Discipline and Disability, the court exercises its police function through the Regulation Counsel, who serves as the head of the OARC. Unless otherwise specified, Regulation Counsel and the OARC are referred to interchangeably as "the OARC."

The principal function of the OARC is to field, investigate, and prosecute, as appropriate, disciplinary complaints against Colorado lawyers.¹² The OARC also handles the following:

- 1) proceedings involving the transfer of lawyers to disability inactive status;¹³

- 2) claims with the Attorneys' Fund for Client Protection, which exists to mitigate losses caused by the dishonest conduct of lawyers arising from a client-lawyer relationship;¹⁴
- 3) unauthorized practice of law proceedings;¹⁵
- 4) hearings on the fitness of a Bar applicant for admission to the Colorado Bar;¹⁶ and
- 5) proceedings against magistrates for violation of the Colorado Code of Judicial Conduct.¹⁷

The OARC also acts as special counsel to the Commission on Judicial Discipline.¹⁸

The Office of the Presiding Disciplinary Judge

The Presiding Disciplinary Judge (PDJ) serves at the pleasure of the court.¹⁹ The PDJ "presides over attorney regulation proceedings and issues orders together with a two-member hearing board at trials and hearings."²⁰ The PDJ also decides whether to approve "conditional admissions of misconduct" between the OARC and respondent lawyers when the stipulated form of discipline is disbarment, suspension, or public censure, or a range of discipline that includes any of these forms of discipline.²¹ The PDJ reviews proposed diversion agreements that the OARC and a respondent lawyer reach after the OARC has filed a formal complaint against the respondent lawyer.²²

The PDJ presides over: (1) contempt proceedings for violation of orders relating to suspended and disbarred lawyers and lawyers on disability inactive status;²³ (2) disability inactive proceedings;²⁴ and (3) proceedings for suspension of a lawyer's license for nonpayment of child support, which are not considered disciplinary in nature.²⁵ The PDJ also serves as a hearing master in unauthorized practice of law proceedings.²⁶

Disciplinary Hearing Boards

Three-member disciplinary hearing boards adjudicate formal disciplinary cases.²⁷ The three members consist of the PDJ and two people selected randomly from a pool of hearing board members drawn from the Bar and the public, who are appointed by the court to serve two-year terms.²⁸ If the PDJ has recused himself or herself in the case, a presiding officer is selected at random from the pool of hearing board members.²⁹ At least one of the hearing board members in addition to the PDJ must be a lawyer.³⁰ Hearing board members are not compensated for their services.

Lawyers Licensed to Practice Law in Colorado

C.R.C.P. 251.1(a) and (b) state:

All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of this state and of the United States, are charged with obedience to those laws at all times.³¹ Every lawyer licensed to practice law in the State of Colorado is subject to the disciplinary and disability jurisdiction of the Supreme Court in all matters relating to the practice of law.³²

Lawyers licensed to practice law in Colorado fund the attorney regulation system through annual registration fees.

The Pre-Investigation or "Central Intake" Phase

The "central intake" or pre-investigation phase of attorney discipline proceedings begins when a request for investigation is filed. The OARC then conducts an initial review of the allegations against the attorney and determines how to proceed in the matter.

Request for Investigation

Attorney discipline proceedings commence with the filing of a "request for investigation," formerly called a "grievance,"³³ with the OARC. Under the Rules Governing Discipline and Disciplinary Proceedings, C.R.C.P. Chapter 20, a request for investigation is the initial

accusation of ethical misconduct. It may be made by "any person."³⁴ There is no requirement that the "complaining witness" have "standing" to file a request for investigation. Colo. RPC 8.3 sets forth a lawyer's duty to report certain misconduct of other lawyers.³⁵ That rule does not require lawyers to report their own misconduct,³⁶ unless it results in a criminal conviction³⁷ or discipline imposed in another jurisdiction.³⁸

Except for written reports of misconduct made by state judges, the OARC asks that requests for investigation be made by telephone, to be supplemented by written information if requested by the OARC.³⁹ The OARC will accept written requests for investigation, however, and lawyers often prefer to make their requests in writing.

It is important to distinguish between a request for investigation and a "complaint." A request for investigation is the initial report of alleged misconduct, and is usually made by telephone. It is not the written document known as a "complaint," which is the pleading filed by the OARC with the Office of the PDJ after a full investigation and authorization to proceed by the Attorney Regulation Committee. This is discussed below.⁴⁰

C.R.C.P. 11 and its statutory analog, CRS §§ 13-17-102 *et seq.*, do not apply to requests for investigation or to pleadings filed in a formal action. However, C.R.C.P. 11 does apply in formal disciplinary actions,⁴¹ although the court has stated that only in a "rare circumstance" will an OARC lawyer be found to have violated C.R.C.P. 11.⁴²

Immunity

Communications (written and verbal) relating to attorney misconduct, lack of professionalism, or disability that are made to the court, the PDJ, the OARC, or any official participant in the disciplinary process, as well as testimony given in disciplinary proceedings, are protected by an absolute privilege, and "no lawsuit shall be predicated thereon."⁴³ The only exception to this rule is where: (1) a complaint has not been filed and served on the respondent lawyer; (2) the person giving the testimony or making the communications does not treat them as confidential; and (3) the testimony or communications were made in bad faith or with reckless disregard of their truth or falsity.⁴⁴

Confidentiality

Before the filing and service of a complaint—in other words, when the only charges are those of the complaining witness in the form of a request for investigation—the OARC and the other branches of the disciplinary system are required to maintain the confidentiality of disciplinary "proceedings."⁴⁵ This confidentiality restriction does not apply to the complaining witness, the complaining witness's lawyer, or anyone else not affiliated with these government participants in the disciplinary system⁴⁶ absent a protective order entered for good cause shown.⁴⁷ For example, this may mean that a respondent lawyer is powerless to stop a complaining witness from talking about a matter in the media.

This confidentiality restriction prohibits the OARC from disclosing the "pendency, subject matter, and status of an investigation" unless:

- 1) the respondent has waived confidentiality;
- 2) the proceeding is based on allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;
- 3) the proceeding is based on allegations that have become generally known to the public; or
- 4) there is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession.⁴⁸

Other confidentiality provisions permit the OARC to disclose otherwise confidential information to correct false or misleading statements about disciplinary proceedings,⁴⁹ respond to requests from agencies authorized to investigate the qualifications of lawyers,⁵⁰ and supply data to the National Regulatory Data Bank.⁵¹

Determination to Proceed

On the initiation of a request for investigation, the OARC must decide whether any of the allegations against the lawyer would, if proved by clear and convincing evidence, constitute grounds for discipline.⁵² Making this initial review is one of approximately five lawyers in the OARC's "Central Intake" division. Central Intake is authorized to "make inquiry regarding the underlying facts,"⁵³ but generally does not conduct interviews beyond that of the respondent lawyer. Instead, Central Intake usually requests the respondent lawyer to submit a written response, of preferably no more than five pages, to which the complaining witness may and usually does respond in writing. OARC provides the respondent lawyer with a copy of all of these written exchanges.

A final decision on how to proceed in a matter comes after a meeting of the Central Intake lawyers and the Regulation Counsel or the Chief Deputy Regulation Counsel. Officially, the decision is that of the Regulation Counsel.

If the respondent lawyer and the complaining witness submit written responses, disposition of the matter may take several weeks after initiation of the request for investigation. In contrast, where the request for investigation clearly does not rise to the level of conduct constituting grounds for discipline, the OARC may dismiss a matter within a day or two of its initiation, sometimes without even alerting the respondent lawyer of the initial request for investigation. Especially when the Central Intake lawyer is leaning toward dismissal, it is common for him or her to hold a brief telephone interview with the respondent lawyer to confirm facts.

If the OARC decides that some or all of the allegations would constitute grounds for discipline, it must determine whether to investigate the matter or to offer the respondent lawyer a written agreement diverting the matter to the "alternatives to discipline" program discussed below.⁵⁴ If the OARC decides to investigate, it sends a form letter to that effect to the respondent lawyer, with a copy to the complaining witness. If the OARC decides to offer a diversion agreement to the respondent lawyer, it might send a letter to the respondent lawyer explaining why the matter is appropriate for diversion but not dismissal. The OARC typically does not send a copy of this letter to the complaining witness. If the OARC offers a diversion agreement and the respondent lawyer accepts, the OARC sends a letter to the complaining witness generally advising that the matter was diverted to a particular diversion program.

If, on the other hand, the OARC decides that none of the allegations would constitute grounds for discipline or that the OARC cannot prove any misconduct by clear and convincing evidence, the OARC will dismiss the matter.⁵⁵ In this situation, the OARC sends a letter to the complaining witness that gives some explanation of the OARC's decision. The letter may express concerns about the respondent lawyer's conduct. The OARC also may dismiss a request for investigation conditioned on the respondent lawyer's agreement to attend ethics school.

Settlement

The vast majority of disciplinary matters or cases settle long before they ever get to a hearing board. There are several reasons for this, not the least of which is the financial and emotional cost of fighting charges of misconduct.

Substantial credit is due the system created by the Colorado Supreme Court in 1998. It encourages settlement. In particular, the "diversion" program, which provides an alternative to discipline, is perhaps the most successful feature of Colorado's attorney discipline system. By focusing on rehabilitation instead of punishment, the diversion program has all but eliminated the unnecessary battles of the "old system," when lawyers fought to avoid even the mildest of private discipline.

In addition, as in the system it replaced, conditional admissions of misconduct—agreements between the OARC and the respondent lawyer—resolve substantial numbers of disciplinary matters. So, too, does mediation. Most mediation is handled free of charge by a handful of mediators approved by the OARC, who have substantial experience in the attorney regulation system, including former Colorado Supreme Court justices and former members of the Grievance Committee in the old system.

The Diversion Program

Participation in the diversion program is, in theory, available at any time in the life of a disciplinary matter. Participation is wholly voluntary on the part of the respondent lawyer and requires no admission of misconduct. It is based on a written agreement with the OARC,

breach of which by the respondent lawyer may result in reinstatement of the disciplinary matter.⁵⁶

Participation in the diversion program does not constitute attorney discipline.⁵⁷ Successful completion of a diversion program is treated as if the disciplinary proceedings never occurred⁵⁸ and the records are expunged. In addition, C.R.C.P. 251.13(i) provides that the "files and records resulting from the diversion of a matter shall not be made public except by order of the Supreme Court." However, for the guidance of the Bar, four times each year (January, April, July, and October) the OARC publishes summaries of some anonymous diversion and private admonition cases in *The Colorado Lawyer*, entitled "Matters Resulting in Diversion and Private Admonition."

Generally, a respondent lawyer qualifies for the diversion program if:

- 1) the "presumptive form" of discipline does not rise to the level of suspension; and
- 2) the respondent lawyer's misconduct does not involve any of the following:
 - misappropriation of funds
 - a serious crime
 - family violence
 - loss of money, legal rights, or property (unless the respondent lawyer agrees to pay restitution as a condition of diversion)
 - misconduct similar to that for which the respondent lawyer was disciplined within the past five years
 - dishonesty, deceit, fraud, or misrepresentation
 - a pattern of similar misconduct.⁵⁹

In addition, diversion generally is not available if the lawyer has been publicly disciplined within the last three years.⁶⁰

The "presumptive form" of discipline often is debatable. After all, dismissals are not published, and hearing board decisions are not binding precedent,⁶¹ so the OARC focuses on Colorado Supreme Court disciplinary decisions, the vast majority of which date back to the pre-1998 era when the court issued all final decisions in disciplinary cases. Perhaps because of the nature (disagreeable) and volume (high) of these cases, some of the court's older disciplinary decisions do not reflect the care and subtlety characteristic of the court's disciplinary decisions today, in which the court's role is primarily that of an appellate tribunal.

The specific diversion program most frequently offered by the OARC is its one-day ethics school, for which a respondent lawyer avoids discipline and earns seven continuing legal education (CLE) ethics credits for a current charge of \$300, plus a relatively modest (currently \$91) cost to defray the costs of administering the diversion program.⁶² OARC prosecutors teach ethics school and the newer "trust account school." Other programs include:

mediation, fee arbitration, law office management assistance, evaluation and treatment through the attorneys' peer assistance program, evaluation and treatment for substance abuse, psychological evaluation and treatment, medical evaluation and treatment, monitoring of the attorney's practice or accounting procedures, continuing legal education, [and] the multistate professional responsibility examination.⁶³

The OARC has wide discretion to offer diversion and, at least at the Central Intake stage, the exercise of that discretion essentially is unchecked.

Alcohol-related offenses: The OARC struggles with how to deal with lawyers convicted of alcohol-related driving offenses, which may be harbingers of substance abuse. When a lawyer with no prior alcohol-related driving convictions self-reports a first conviction pursuant to C.R.C.P. 251.20(b), the OARC reviews a number of factors to determine whether diversion or discipline is appropriate. Although a conviction for driving under the influence of intoxicating liquor constitutes grounds for discipline under C.R.C.P. 251.5(b) and Colo. RPC 8.4(b),⁶⁴ the OARC typically will offer a diversion agreement that monitors the lawyer's compliance with the terms of probation in the criminal case. Factors that the OARC considers in deciding whether to offer a diversion agreement include the lawyer's blood alcohol content (BAC), other alcohol-related offenses, serious bodily injury to the lawyer or others, and whether the conviction is a misdemeanor or a felony.

In the event of aggravating circumstances, such as a high BAC or resistance to arrest, the OARC also may require the lawyer, as a condition of a diversion agreement, to obtain an independent evaluation and to comply with the evaluator's recommendations. If the impaired lawyer's driving causes serious bodily injury to a third party, the OARC will seek public discipline. One Colorado Supreme Court case, *In re Kearns*,⁶⁵ which involved a serious collision between a motorcyclist and an inebriated lawyer, holds that public censure is the appropriate form of discipline, at least under the circumstances present in that case. However, the OARC narrowly construes *Kearns* and will seek a period of suspension if the circumstances are even slightly less mitigating than those in *Kearns*. The PDJ seems receptive to the OARC's position in these cases.⁶⁶

Conditional Admissions of Misconduct

Conditional admissions of misconduct are disciplinary settlements reached when the respondent lawyer does not qualify for the diversion program, perhaps because the presumptive form of discipline exceeds public censure or the conduct involves theft of funds or dishonesty. Similar to the diversion program, settlement predicated on a conditional admission of misconduct is available at any time in the disciplinary process until final action by a hearing board.⁶⁷ Conditional admissions are conditional because they must be accepted by a higher authority to become effective. When the conditional admission calls for private admonition, the Attorney Regulation Committee decides whether to approve it.⁶⁸ In all other instances (public censure, suspension, or disbarment), the PDJ must approve it.⁶⁹

A conditional admission of misconduct takes the form of an affidavit,⁷⁰ which forms an agreement between the OARC and the respondent lawyer. The OARC styles the document as a "stipulation, agreement and affidavit." In it, the lawyer must: (1) admit misconduct constituting grounds for discipline; (2) acknowledge the disciplinary proceedings pending against the lawyer; and (3) state that the admission is "freely and voluntarily made, that it is not the product of coercion or duress, and that the attorney is fully aware of the implications of the attorney's admission."⁷¹

When the PDJ considers a conditional admission, either party may request a hearing.⁷² Hearings tend to take place when the conditional admission contains an acceptable range of disciplinary sanctions, as opposed to one level of discipline. In that case, the purpose for the hearing is to persuade the PDJ to accept the conditional admission and to set the form of discipline at the desired end of the spectrum. The OARC must give written notice of the hearing to the respondent lawyer and to the complaining witness, who has a right to "be present at the hearing and to make a statement, orally or in writing, to the Presiding Disciplinary Judge regarding the form of discipline."⁷³ The PDJ has broadly construed the term "complaining witness" to include any victim of the attorney's misconduct.

If the Attorney Regulation Committee or the PDJ accepts a conditional admission, the respondent lawyer is disciplined accordingly and the disciplinary proceedings are concluded.⁷⁴ The conditional admission is confidential if the Attorney Regulation Committee accepts a conditional admission for private admonition before the filing of a complaint against the respondent lawyer.⁷⁵ If the Attorney Regulation Committee or the PDJ rejects the conditional admission, the underlying disciplinary proceedings resume.⁷⁶ Neither the Attorney Regulation Committee nor the PDJ has the authority to dispose of the matter in any way inconsistent with the parties' agreement in the conditional admission. That said, the likelihood is high that a conditional admission will be approved.

The Investigation Phase

If the OARC determines not to proceed with an investigation, the matter is dismissed and there is no right to appeal from that decision.⁷⁷ As a practical matter, if the complaining witness challenges a decision to dismiss, the Regulation Counsel or Chief Deputy Regulation Counsel will review a dismissed matter a second time.

If the OARC determines to proceed with an investigation, the matter is assigned for that purpose to one of the prosecutors in that office or to one of the two Deputies Regulation Counsel. The OARC requires that all further communication regarding the matter be directed to the assigned prosecutor. At that point, the OARC is obligated to give the respondent lawyer "written notice that the attorney is under investigation and of the general nature of the allegations made against the attorney."⁷⁸

The same rule states that the respondent lawyer must file a written response to the allegations within twenty days. In practice, this submission is optional if the respondent

lawyer filed a written response to the request for investigation at the initial intake stage. After the OARC begins its investigation, "the target attorney has a duty to cooperate and participate throughout the investigation."⁷⁹

The investigative process takes anywhere from two months to one year, depending on the caseload of the assigned prosecutor and the complexity of the matter. The OARC's internal policy is to complete the investigative process within eight months, absent extenuating circumstances. One example of extenuating circumstances is when the OARC, often on the request of a respondent lawyer, holds an investigation in abeyance pending the resolution of a criminal or civil matter involving allegations substantially similar to those involved in the disciplinary investigation.

During the investigation, the prosecutor, often assisted by a non-lawyer investigator, collects and reviews documents; interviews or deposes witnesses, including the respondent lawyer; and solicits and considers written submissions from the respondent lawyer (or his or her counsel) and the complaining witness. The prosecutor has authority to administer oaths and issue subpoenas pursuant to C.R.C.P. 45.⁸⁰ Authority to rule on any challenge to a subpoena lies with the PDJ; authority to issue contempt citations for noncompliance or interference with a subpoena lies with the court, on recommendation of the PDJ.⁸¹ Respondent lawyers are considered parties to investigative proceedings and are entitled to receive copies of documents produced during the process.⁸² Respondent lawyers who fail to cooperate in the investigative stage are subject to immediate administrative (nondisciplinary) suspension by the court (not the PDJ).⁸³

At the conclusion of the investigation, the OARC may dismiss the allegations or recommend: (1) a private admonition; (2) the filing of a formal complaint against the respondent lawyer; or (3) that the respondent lawyer be offered a diversion agreement.⁸⁴ In contrast to the initial intake phase, ultimate authority to make these decisions lies with the Attorney Regulation Committee.⁸⁵ If the OARC decides to dismiss a matter, that decision is subject to review by the Attorney Regulation Committee for abuse of discretion. Similarly, it is up to the Attorney Regulation Committee to order private admonition, authorize the OARC to file a formal complaint, or accept a proffered diversion agreement.⁸⁶

Proceedings Before the Attorney Regulation Committee

If, after conducting an investigation, the OARC decides to recommend to the Attorney Regulation Committee that it impose private admonition or authorize the filing of a formal complaint, the OARC is required to submit to the Attorney Regulation Committee a written report of investigation in support of the recommendation.⁸⁷ At monthly meetings where the assigned prosecutor presents the OARC's position, the Attorney Regulation Committee considers reports of investigation and relatively informal "appeals" from dismissals and diversion agreements. The respondent lawyer is not entitled to appear at Attorney Regulation Committee meetings. However, before the meeting, the respondent lawyer is entitled to receive a copy of the report of investigation from the OARC and to submit a written response of five pages or fewer.

In considering a report of investigation recommending private admonition or authority to file a formal complaint, the Attorney Regulation Committee's function is to determine whether there is reasonable cause to believe grounds for discipline exist.⁸⁸ The Attorney Regulation Committee must consider:

- 1) whether the misconduct can be proven by clear and convincing evidence;
- 2) the level of injury;
- 3) whether the respondent lawyer has a prior disciplinary history; and
- 4) whether the conduct involves "misrepresentation, conversion or commingling of funds, acts of violence, or criminal or other misconduct that ordinarily would result in public censure, suspension or disbarment"—circumstances that generally warrant disciplinary proceedings.⁸⁹

The Attorney Regulation Committee is not limited to ordering private admonition or authorizing a formal complaint. The Attorney Regulation Committee also may: (1) order further investigation; (2) dismiss the matter with a written explanation to the complaining witness; or (3) offer the respondent lawyer a diversion agreement.⁹⁰ If the Attorney

Regulation Committee orders private admonition, the respondent lawyer has a right to demand that the private admonition be vacated and a complaint be filed against him or her.⁹¹ The respondent lawyer must make this demand on the OARC within twenty days after the "letter of admonition was mailed to the admonished attorney or personally read to the attorney."⁹²

If the Attorney Regulation Committee authorizes the OARC to file a complaint, C.R.C.P. 251.31(f) requires the respondent lawyer to "make written disclosure to the attorney's current firm and, if different, to the attorney's law firm at the time of the act or omission giving rise to the matter, of the fact that . . . a disciplinary proceeding as provided for in these rules has been commenced."⁹³ This notice must be given within fifteen days after the OARC's notice to the respondent lawyer that the Attorney Regulation Committee authorized the complaint.⁹⁴

Formal Proceedings

If the Attorney Regulation Committee authorizes the filing of a formal complaint, the OARC prepares and files the complaint with the Office of the PDJ.⁹⁵ At that point, the proceeding is public except for the deliberations of the PDJ, a hearing board, or the court, and except for information covered by a protective order.⁹⁶

Nature of Disciplinary Actions

A disciplinary action is sui generis, neither civil nor criminal.⁹⁷ The standard of proof is clear and convincing evidence, which is a standard higher than a preponderance of the evidence but lower than proof beyond a reasonable doubt.⁹⁸ Because disciplinary proceedings are quasi-criminal in nature, lawyers are entitled to procedural due process, including the right to fair notice of the charges against them.⁹⁹ However, procedural due process appears to be the only feature of the criminal system found in the disciplinary system. The court has held that the exclusionary rule¹⁰⁰ and double jeopardy¹⁰¹ do not apply in disciplinary proceedings, and that respondent lawyers do not have a right to trial by jury¹⁰² or the "full panoply of rights afforded to an accused in a criminal case."¹⁰³

The complaint filed by the OARC must "set forth clearly and with particularity the grounds for discipline with which the respondent is charged and the conduct of the respondent which gave rise to those charges."¹⁰⁴ Pleading with particularity is the standard applicable to averments of fraud or mistake under C.R.C.P. Rule 9(b). Former Presiding Disciplinary Judge Roger L. Keithley construed this rule to require:

that the charging document in a disciplinary case set forth both a factual basis for the charges and the legal basis upon which the People seek discipline. Procedural due process requires fair notice of the charge. Fair notice of the charge envisions not only a recitation of the facts revealing the offensive conduct but also the identification of the legal prohibition that proclaims such conduct violative of the rules applicable to a lawyer's conduct.¹⁰⁵

See accompanying sidebar entitled "Grounds for Discipline."

Grounds for Discipline
<p>Grounds for discipline are set forth in C.R.C.P. 251.5. They are not limited to violations of the Rules of Professional Conduct and include:</p> <ol style="list-style-type: none">1. Any act or omission that violates a criminal law. Conviction of a crime is not a prerequisite to disciplinary action, and acquittal in a criminal proceeding is not a bar to a disciplinary prosecution.¹ Conviction of a crime also violates Colo. RPC 8.4(b), but only if the criminal act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."² The absence of this element of proof in C.R.C.P. 251.5 makes Colo. RPC 8.4(b) somewhat superfluous and subjects Colorado lawyers to discipline for conduct that would not subject lawyers to discipline in states that adhere to Rule 8.4(b) but lack a rule similar to C.R.C.P. 251.5.2. Any act or omission that violates an order of discipline or disability. Similarly, Colo. RPC 3.4(c) prohibits a lawyer from knowingly disobeying an obligation

under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Unlike C.R.C.P. 251.5, a violation of Colo. RPC 3.4(c) requires proof of a "knowing" state of mind on the part of the lawyer.

3. "Failure to respond without good cause shown to a request by the committee, the Regulation Counsel, or the Board of Trustees of the Colorado Attorneys' Fund for Client Protection or obstruction of the [Attorney Regulation Committee], the Regulation Counsel, or the [Hearing] Board or any part thereof in the performance of their duties. Good cause includes, but is not limited to, an assertion that a response would violate the respondent's constitutional privilege against self-incrimination."³ The OARC often charges respondent lawyers with a violation of this rule when they fail to respond to requests for information. The OARC also charges violation of Colo. RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and Colo. RPC 8.1(b) (failure to respond reasonably to a lawful demand for information from a disciplinary authority).

4. Other unenumerated "acts or omissions amounting to unprofessional conduct."⁴ There do not appear to be any published decisions in which a lawyer was disciplined under this broad standard.

1. C.R.C.P. 251.5(b).

2. See *People v. Andersen*, 58 P.3d 537, 541 (Colo. PDJ 2000) ("Not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated.").

3. C.R.C.P. 251.5(d).

4. *Id.*

The respondent lawyer's answer to the complaint is due twenty days after service of the disciplinary complaint, unless additional time is allowed. C.R.C.P. 251.15(a) requires the respondent lawyer either to admit or deny every "material allegation" in the complaint, or request that the allegation be made with more particularity. It also requires the respondent lawyer to set forth in the answer any affirmative defenses and any other "objection" to the complaint, including a failure to charge misconduct constituting grounds for discipline.

One such defense is the disciplinary statute of limitations. C.R.C.P. 251.32(i) requires the complaining witness to "file" a request for investigation within five years of the time the complaining witness "discovers or reasonably should have discovered the misconduct,"¹⁰⁶ thereby focusing on the "knowledge or negligence" of the complaining witness.¹⁰⁷ Presumably, to "file" means or includes the initial telephone call or letter that initiates the disciplinary process. The court has commented that the meaning of C.R.C.P. 251.32(i) is "far from clear" because, among other things, it does not set forth the consequences of "filing" an untimely request for investigation, namely whether it is a bar to discipline.¹⁰⁸

C.R.C.P. 251.32(i) further states that the statute of limitations does not apply to misconduct alleging "fraud, conversion, or conviction of a serious crime, or [to] an offense the discovery of which has been prevented by concealment by the attorney."¹⁰⁹ According to the court, by expressing these exceptions in "broad, generic terms," C.R.C.P. 251.32(i) "restricts the effect of any intended time bar to less serious kinds of misconduct."¹¹⁰ Highlighting the breadth of the exception, "fraud" includes "virtually any kind of deception or unfair way of inducing another to surrender rights or property."¹¹¹ Not surprisingly, there is no published decision barring any claims on the basis of C.R.C.P. 251.32(i).

Disclosures and Discovery

Disciplinary cases proceed much like civil actions in a state district court. Except as otherwise provided in the Rules Governing Discipline and Disability, C.R.C.P. Chapter 20, the Colorado Rules of Civil Procedure and Colorado Rules of Evidence apply to disciplinary proceedings, as well as the "practice in this state in the trial of civil cases."¹¹²

Although the Rules Governing Discipline and Disciplinary Proceedings state that C.R.C.P. 16 and 26 do not apply in disciplinary proceedings, several portions of C.R.C.P. 16 and 26 are incorporated by reference or paraphrased. Established by tradition and not rule, the "at-issue conference" and the order entered as a result of it are similar to the case management conference and case management order described in C.R.C.P. 16. Unlike civil cases, however, it is at the at-issue conference that the parties and the PDJ set the trial date, which, in turn, drives the deadlines for pretrial motions, stipulations, trial briefs, witness and exhibit lists, and stipulations. Trial management orders in disciplinary cases are similar to those in civil cases, except that the former are set only on request of one of the parties or on order of the PDJ.¹¹³

Similarly, the Rules Governing Discipline and Disability Proceedings require initial disclosures similar to those required in C.R.C.P. 26. They also specifically incorporate several subsections of C.R.C.P. 26 to govern the discovery process, with no substantive deviations.¹¹⁴ The court has stated that much of the case law interpreting C.R.C.P. 26 is equally applicable in the disciplinary context.¹¹⁵ The rule imposing a duty to supplement disclosures and discovery responses in disciplinary proceedings, C.R.C.P. 251.18(f)(4)(g), essentially is identical to C.R.C.P. 26(e).

The reality is that discovery disputes are far less common in disciplinary proceedings than in civil actions. One reason is that, except for its work product,¹¹⁶ the OARC maintains an "open file" policy. Respondent lawyers or their counsel are allowed to review the OARC's file and usually have done so during the investigative phase. Also, Colo. RPC 1.6(c) permits respondent lawyers, "to the extent the lawyer reasonably believes necessary," to reveal "information relating to the representation," including information protected by the attorney-client privilege, to defend themselves in attorney discipline proceedings. Further, removal of respondent lawyers from the purview of the confidentiality rule eliminates the fear that they may compound their problems by talking about a disciplinary matter with someone else.

However, discovery disputes with third parties are just as contentious as in civil cases, and sometimes more so. Subpoenas served on other lawyers for documents and information about clients justifiably concern the subpoenaed lawyers, who may or may not benefit from the exception to Colo. RPC 1.6 mentioned above. Also, the Colorado Supreme Court has expressed concern for, and a willingness to step in to protect, complaining witnesses served with oppressive discovery requests by the respondent lawyer.¹¹⁷

Unique Aspects of Disciplinary Cases

Some elements of the disciplinary process are unique. For example, if the "mental or physical condition of the attorney in question has become an issue in the proceeding," and the OARC files a motion showing "reasonable cause," the PDJ may order a physical or mental examination of the respondent lawyer by a "suitable licensed or certified examiner"¹¹⁸

In addition, in civil cases, particularly cases involving alleged breaches of fiduciary duty by lawyers, lawyers routinely testify as expert witnesses regarding standards of legal ethics in the local legal community. Former PDJ Roger L. Keithley routinely excluded expert testimony of this kind in disciplinary cases on the theory that it constituted opinion on a question of law, which generally is inadmissible and uniquely within the PDJ's expertise.¹¹⁹ Keithley generally admitted expert testimony of lawyer-experts if relevant to describe the standard of care or practice in a given area.

Pretrial and Trial Proceedings

Disciplinary cases move fast. Depending on the length of the trial, trial settings may be no more than four or five months away. If the allegations involved in a disciplinary proceeding are "substantially similar" to those of a pending civil or criminal case, it is within the PDJ's discretion to defer the disciplinary proceedings until the conclusion of the civil or criminal proceedings.¹²⁰ Allowing common issues of fact or law to be decided in another action can avoid duplication of effort. However, an acquittal or verdict in the respondent lawyer's favor "shall not alone justify the termination of disciplinary proceedings."¹²¹

In fact, collateral estoppel benefits the OARC more than it does the respondent lawyer. A ruling unfavorable to a respondent lawyer in a criminal case or another proceeding in which the standard of proof is clear and convincing evidence or beyond a reasonable doubt is binding on the respondent lawyer in a disciplinary case.¹²² However, a ruling favorable to the respondent lawyer in a civil case is not binding in a disciplinary case, because the Bar was not a party or privy to the civil case¹²³ and the standard of proof in a civil case usually is

lower (preponderance of the evidence) than that applicable in a disciplinary case (clear and convincing evidence).¹²⁴

The PDJ handles all pretrial proceedings, including motions and objections at trial.¹²⁵ Except where any other judge would abstain from participation in a case,¹²⁶ the PDJ sits on one of the three-member hearing boards that adjudicate disciplinary cases.¹²⁷ Disciplinary trials take place in the PDJ's courtroom. The Colorado Rules of Evidence are applicable, although, as in civil cases, the level of obedience to them depends on the PDJ. Motions *in limine* are common, even though, unlike a civil case tried to a jury, the PDJ is one of three triers of fact.

The respondent lawyer may be compelled to testify, except if it would be "in violation of the respondent's constitutional privilege against self-incrimination."¹²⁸ Also, the OARC gives the complaining witness notice of the hearing, and the complaining witness has a right to make a written or oral statement if there is a finding of misconduct.¹²⁹

Hearing board members can and often do ask questions of witnesses directly, without the filter of the judge as in a civil jury trial. Hearing board members also ask questions of counsel for the parties, particularly during closing arguments. The parties are permitted but not required to file trial briefs.¹³⁰ Whether it has filed a trial brief, by custom, before closing argument, the OARC submits three copies of a "packet of legal authority" to the hearing board, containing copies of cases, rules, and standards from the ABA Standards for Imposing Lawyer Sanctions, which is the "guiding authority for selecting the appropriate sanction to impose for lawyer misconduct."¹³¹

At a disciplinary trial, the parties offer evidence and argument on two discrete issues: (1) violations of the Rules of Professional Conduct; and (2) sanctions. With respect to the latter, character witnesses are common. In cases where the existence of violations turns on the evidence or otherwise is hotly contested, it can be awkward for a respondent lawyer to offer evidence and argue about sanctions based on misconduct that he or she contends never occurred.

Hearing Board Decisions

Within sixty days after trial, the hearing board is required to prepare an opinion setting forth findings of fact and the decision.¹³² The decision is final, appealable, and "considered for all purposes an order of the Supreme Court"¹³³—except that it lacks stare decisis effect.¹³⁴ Post-hearing motions are subject to C.R.C.P. 59 and decided by the PDJ, who is required to "consult" in the matter with the other members of the hearing board but is not, according to the rule, required to accept their views.¹³⁵ Usually, the PDJ prepares the opinion, except where the PDJ files a dissenting opinion. In that case, the two members of the majority who make up the quorum¹³⁶ decide how to prepare it.

A hearing board has the power to: (1) dismiss the complaint; (2) order private admonition, public censure, a period of suspension, or disbarment; or (3) send the case to the alternatives to discipline program, subject to the respondent lawyer's agreement.¹³⁷ Private admonition is an "unpublished reproach."¹³⁸ Public censure is a reproach that is published with other "grievance decisions and made available to the public."¹³⁹ Suspension must be for a definite period not to exceed three years.¹⁴⁰ Disbarment is the revocation of a lawyer's license for "at least" eight years.¹⁴¹

Public disciplinary decisions are published in *The Colorado Lawyer*, LEXIS®, Westlaw, and, except for cases in which the PDJ has approved a stipulation for discipline reached by the lawyer and the OARC, *The Pacific Reporter*. The PDJ sends copies of disbarment and suspension orders to "all courts in this state,"¹⁴² which includes the local federal court. Suspension is a temporary suspension of a lawyer's license, which may be stayed in whole or in part.

Hearing boards also have the power to order the respondent lawyer to make restitution or a refund, and to pay the costs of a disciplinary proceeding.¹⁴³ In one case, former PDJ Roger L. Keithley dissented to that portion of a disciplinary opinion ordering the respondent lawyer to make restitution, stating:

Prior Colorado cases ordering restitution uniformly involve either conduct involving the taking of client property without authorization, failing to promptly return client property or engaging in some act or failure to act which resulted in the client expending additional funds which would not have been required if the attorney had satisfied their

[sic] professional obligations.¹⁴⁴

Hearing boards also have the power to order probation. Probation is a form of discipline imposed in conjunction with a suspension that is stayed, in whole or in part.¹⁴⁵ Ordinarily, it may not exceed three years.¹⁴⁶ Probation is ordered when the respondent lawyer: (1) is "unlikely to harm the public during the period of probation and can be adequately supervised"; (2) "[i]s able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute"; and (3) "[h]as not committed acts warranting disbarment."¹⁴⁷

The order imposing probation must set forth the conditions of probation, violation of which may result in imposition of the full period of suspension.¹⁴⁸ C.R.C.P. 251.7 sets forth thirteen types of conditions that may be imposed as part of a respondent lawyer's probation, including practice monitoring, restitution, successful completion of the Multistate Professional Responsibility Examination, medical or substance-abuse evaluation or treatment, abstinence from drugs or alcohol, and avoidance of further violations of the rules of professional conduct.¹⁴⁹ The PDJ will enter an order showing that the respondent lawyer has successfully completed probation on the filing of an affidavit to that effect by the respondent lawyer, and served on the OARC, within fifteen days of the expiration of the probation period.¹⁵⁰

Appeals

Under C.R.C.P. 251.27, the Colorado Supreme Court has appellate jurisdiction of every final decision of a hearing board in which public censure, suspension, or disbarment is ordered.¹⁵¹ By negative inference, a hearing board decision ordering dismissal of the complaint or private admonition is not subject to appeal. In at least one case, however, the court accepted for review the OARC's appeal of a hearing board's dismissal of a disciplinary complaint, invoking the court's plenary power over the disciplinary process under C.R.C.P. 251.1(d). In other disciplinary cases, the court has accepted review of nonfinal decisions pursuant to its plenary authority and C.A.R. 21.¹⁵²

A notice of appeal is due within twenty days of the date of mailing of the decision being appealed or of any one of the post-trial orders set forth in C.R.C.P. 251.27(g), which is almost identical to C.A.R. 4(a).¹⁵³ C.R.C.P. 251.27(g) also sets forth an excusable neglect provision identical to that in C.A.R. 4(a) for untimely notices of appeal.

C.R.C.P. 251.27(m) states that, except as otherwise provided in the Rules Governing Discipline and Disability and "to the extent practicable," disciplinary appeals are to be conducted "in conformity with" various specific Colorado Appellate Rules, including C.A.R. 31 and 32 regarding the time for filing and the form of briefs, respectively, and C.A.R. 34 on oral argument. Applications for stay of a hearing board decision pending appeal are to be filed in the first instance with the hearing board, unless the applicant shows that it would not have been "practicable" to have done so, in which case the application is made directly to the court.¹⁵⁴ Applications for stay "should be granted except where an immediate suspension has been ordered, or when no conditions of probation and supervision while the appeal is pending will protect the public."¹⁵⁵ In one case, a hearing board denied a respondent lawyer's request for a stay pending her appeal from an order of disbarment based on conversion, notwithstanding the respondent's offer to obtain a practice or financial monitor, post a \$100,000 bond, and comply with any other conditions required by the hearing board.¹⁵⁶

In deciding a disciplinary appeal, the court may issue an opinion. It also may issue an order without opinion summarily affirming the decision below.¹⁵⁷

Conclusion

Part I of this article has summarized the procedures applicable to the attorney discipline process in Colorado. Part II will discuss summary adjudications when respondent attorneys fail to participate in the proceedings or have engaged in conduct that triggers immediate suspension. It also will discuss possible options to avoid or forestall the disciplinary process, including proceedings to transfer a lawyer to disability inactive status. Part II will conclude with a discussion of the process for reinstatement after suspension and readmission after disbarment.

NOTES

1. *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002).
2. C.R.C.P. 251.8.5.
3. C.R.C.P. 227A(4). See *People v. Winslow*, 2006 Colo. Discipl. LEXIS 49 (Colo. PDJ Sept. 8, 2006) (ninety-day suspension for lawyer who continued to practice law while under suspension for failure to pay annual registration fees and failure to comply with continuing legal education requirements). See also *Sitcov v. District of Columbia Bar*, 885 A.2d 289 (D.C. 2005) (denying lawyer's request to make administrative suspension for nonpayment of Bar dues retroactive, apparently because of extended period of time lawyer practiced while under suspension).
4. C.R.C.P. 260.6. See *Winslow*, *supra* note 3.
5. See generally Fed.R.App.P. 46(b) and (c); 10thCir.R. 46.6; D.C.Colo.LCivR 83.5 and 83.5.1; D.C.Colo.LCrR 57.7 and 57.1.1.
6. *Colorado Supreme Court Grievance Committee v. District Court*, 850 P.2d 150, 152 (Colo. 1993).
7. C.R.C.P. 251.34. The authorization for the management committee is located in C.R.C.P. 251.34(b)(2). The management committee consists of the clerk of the court (currently, Susan J. Festag); the Regulation Counsel (currently, John S. Gleason); and the Presiding Disciplinary Judge (PDJ) (currently, William R. Lucero).
8. C.R.C.P. 251.2, 251.12, and 251.13.
9. C.R.C.P. 251.22(a).
10. C.R.C.P. 251.11, 251.12.
11. C.R.C.P. 251.3(a). See *Breiner v. Sunderland*, 2006 Haw. LEXIS 490 (Haw. Sept. 22, 2006) (granting lawyer's petition for writ of prohibition and ordering removal of assistant disciplinary counsel from disciplinary investigation, due to abusive investigative methods).
12. C.R.C.P. 251.3(c)(4).
13. *Id.*
14. C.R.C.P. 252.2, 252.10(a).
15. C.R.C.P. 231(a).
16. C.R.C.P. 201.10.
17. C.R.M. 5(h).
18. For a general discussion of the Commission on Judicial Discipline, see <http://www.courts.state.co.us/supct/committees/judicialdiscipline.htm>.
19. C.R.C.P. 251.16(a).
20. See <http://www.coloradosupremecourt.com/PDJ/pdj.htm>.
21. C.R.C.P. 251.22(a).
22. C.R.C.P. 251.13(c).
23. C.R.C.P. 251.16(c)(8).
24. C.R.C.P. 251.23.
25. C.R.C.P. 251.8.5.

26. C.R.C.P. 240. *E.g.*, *People v. Shell*, 2006 WL 3703177, ___ P.3d ____ (Colo. Dec. 18, 2006).
27. C.R.C.P. 251.18(b)(1).
28. C.R.C.P. 251.17(a)(1).
29. C.R.C.P. 251.18(b)(1).
30. *Id.*
31. C.R.C.P. 251.1(a).
32. C.R.C.P. 251.1(b).
33. "Grievance" was the term used in the disciplinary system that existed until 1998. The word "grievance" appears once in the current rules governing discipline and disability proceedings. See C.R.C.P. 251.6(c).
34. C.R.C.P. 251.9(a)(1).
35. Colo.RPC 8.3. See *generally* CBA Formal Opinion 64, "Duty of an Attorney to Report an Ethical Violation" (April 23, 1983, revised June 15, 1996), available at <http://www.cobar.org>.
36. *E.g.*, Connecticut Informal Opinion 97-38 (Dec. 23, 1997) (rule substantially identical to Colo. RPC 8.3 does not contain any requirement that a lawyer report himself or herself).
37. See *generally* C.R.C.P. 251.20 (lawyer convicted of a crime).
38. See *generally* C.R.C.P. 251.21 (discipline imposed by foreign jurisdiction).
39. See <http://www.coloradosupremecourt.com/Regulation/Complaints.htm> (procedures for filing a request for investigation); C.R.C.P. 251.9(a)(2) (specifying that requests for investigation by judges are initiated by the filing of a "report"). Requests for investigation made by the Attorney Regulation Committee are made on "motion."
40. C.R.C.P. 251.14.
41. *In re Trupp*, 51 P.3d 985, 990 and n.7 (Colo. 2002).
42. *Id.* at 988.
43. C.R.C.P. 251.32(e).
44. *Id.* See *In re Smith*, 989 P.2d 165 (Colo. 1999) (respondent lawyer who filed civil actions against complaining witnesses in disciplinary proceedings against him violated predecessor immunity rule and, therefore, ethical rule prohibiting conduct prejudicial to the administration of justice). See also *Diddel v. Davis*, No. H-04-4811 (S.D.Tex. 2006) (based on Texas statute and rule granting immunity to a "complainant or witness" in a disciplinary proceeding, dismissing lawyer's civil claims against individuals who assisted complainant in filing grievance against lawyer that was dismissed).
45. C.R.C.P. 251.31(b) and 251.31(p) (confidentiality applies to "officials and employees" of those entities). See also C.R.C.P. 251.31(g) (requiring the Office of Attorney Regulation Counsel (OARC) to treat as confidential "proceedings" pending with the OARC or the Attorney Regulation Committee); C.R.C.P. 251.31(h) (requiring the OARC to treat as confidential "proceedings that have been dismissed").
46. C.R.C.P. 251.31(a).
47. C.R.C.P. 251.31(e).
48. C.R.C.P. 251.31(b).
49. C.R.C.P. 251.31(k).

50. C.R.C.P. 251.31(l).
51. C.R.C.P. 251.31(o).
52. C.R.C.P. 251.9(b)(2).
53. C.R.C.P. 251.9(b)(3).
54. *Id.*
55. C.R.C.P. 251.9(b)(2).
56. C.R.C.P. 251.13(g).
57. C.R.C.P. 251.13(e).
58. C.R.C.P. 251.13(f). That is how the matter is treated if the respondent lawyer participates in the diversion program after the OARC has determined that it requires a full investigation pursuant to C.R.C.P. 251.9(b)(3). If the respondent lawyer participates in the diversion program before that point, the OARC "shall close the file." C.R.C.P. 251.13(f).
59. C.R.C.P. 251.13(b).
60. C.R.C.P. 251.13(b)(6).
61. *In re Roose*, 69 P.3d 43, 47-48 (Colo. 2003).
62. C.R.C.P. 251.13(d).
63. C.R.C.P. 251.13(a).
64. *People v. Rotenberg*, 911 P.2d 642, 643 (Colo. 1996).
65. *In re Kearns*, 991 P.2d 824 (Colo. 1999).
66. *E.g., People v. Halepaska*, 2006 Colo. Discipl. LEXIS 15 (Colo. PDJ May 6, 2006) (two-year suspension for lawyer who struck and seriously injured teenager standing behind parked car).
67. C.R.C.P. 251.22(a).
68. *Id.*
69. *Id.*
70. C.R.C.P. 251.22(b).
71. C.R.C.P. 251.22(b)(3).
72. C.R.C.P. 251.22(c)(1).
73. C.R.C.P. 251.22(c)(3).
74. C.R.C.P. 251.22(a).
75. C.R.C.P. 251.22(b).
76. C.R.C.P. 251.22(a).
77. C.R.C.P. 251.9(b)(3).
78. C.R.C.P. 251.10(a).

79. *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 305 (Colo. 2003).
80. C.R.C.P. 251.10(b)(2).
81. *Id.*
82. *Attorney E.*, *supra* note 79.
83. C.R.C.P. 251.8.6.
84. C.R.C.P. 251.11.
85. C.R.C.P. 251.12.
86. C.R.C.P. 251.11.
87. C.R.C.P. 251.12.
88. *Id.*
89. C.R.C.P. 251.12(e).
90. C.R.C.P. 251.12.
91. C.R.C.P. 251.6(d).
92. *Id.* The reference to a personal reading of a letter of admonition is antiquated verbiage that is inconsistent with the Attorney Regulation Committee's contemporary practices.
93. C.R.C.P. 251.31(f)
94. *Id.*
95. C.R.C.P. 251.14(a).
96. C.R.C.P. 251.31(c).
97. *People v. Morley*, 725 P.2d 510, 514 (Colo. 1986).
98. *People v. Distel*, 759 P.2d 654, 661 (Colo. 1988).
99. *People v. Robnett*, 859 P.2d 872, 875 (Colo. 1993). *See Burton v. Statewide Grievance Comm.*, 760 A.2d 1027 (Conn.App. 2000) (reversing reprimand where respondent lawyer's request for continuance of disciplinary hearing due to trial conflict was denied and hearing proceeded without her).
100. *People v. Harfmann*, 638 P.2d 745, 747-48 (Colo. 1981).
101. *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002).
102. *People v. Smith*, 937 P.2d 724, 727 (Colo. 1997).
103. *Harfmann*, *supra* note 100 at 747. *See generally* Chinaris, "Even Judges Don't Know Everything: A Call for a Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings," 36 *St. Mary's L.J.* 825, 870 (2005) (collecting disciplinary cases denying various Constitutional rights afforded criminal defendants).
104. C.R.C.P. 251.14(a).
105. *In re Lynch*, 35 P.3d 509, 513 (Colo. PDJ 2000) (citations omitted).
106. C.R.C.P. 251.32(i).
107. *In re Attorney D.*, 57 P.3d 395, 402 (Colo. 2002).

108. *Id.* The court also mentioned, in its "far from clear" comment, the fact that C.R.C.P. 251.32(i) "conditions its bar to a request for investigation upon the knowledge or negligence of a 'complaining witness.'" "Complaining witness" is a term of art used throughout the Rules Governing Discipline and Disability to refer to the person who initiates a request for investigation. As such, the term itself is not unclear or ambiguous. On the other hand, the statute of limitations may be difficult to apply if there is more than one complaining witness. For example, if the OARC lost or anticipated losing a case or claim on this basis, nothing seems to prevent the OARC from finding another complaining witness who could not possibly have discovered the misconduct sooner—perhaps the OARC itself.

109. C.R.C.P. 251.32(i).

110. *Attorney D.*, *supra* note 107 at 402.

111. *Id.*

112. C.R.C.P. 251.18(d).

113. C.R.C.P. 251.18(f)(4)(D).

114. *Compare* C.R.C.P. 26(b)(2) *with* C.R.C.P. 251.18(f)(4)(E).

115. *Attorney D.*, *supra* note 107 at 399.

116. *See North Carolina State Bar v. Harris*, 535 S.E.2d 74, 76 (N.C.App. 2000) (affirming prior decision holding that witness interview notes of state Bar investigator were protected by work product doctrine but holding that state Bar had waived such protection by calling investigator as a witness at trial); *In re PCB File No. 92.27*, 708 A.2d 568 (Vt. 1998) (witness statements taken by Bar counsel or investigator on his behalf protected under work product doctrine). *See also* C.R.C.P. 251.31(a) (excepting the OARC's "work product" from rule stating that records of the OARC and other members of disciplinary system are public upon the filing of a complaint).

117. *Attorney D.*, *supra* note 107 at 398-99.

118. C.R.C.P. 251.18(e).

119. *Grogan v. Taylor*, 877 P.2d 1374, 1384 (Colo.App. 1993), *rev'd on other grounds* 900 P.2d 60 (Colo. 1995). *Accord Wollan v. U.S. Dep't of Interior*, 997 F.Supp. 1397, 1403 (D.Colo. 1998) (expert opinions on questions of law, even by lawyers, are inadmissible). *See generally* Gonzalez, "Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702 and 704," 31 *The Colorado Lawyer* 53 (March 2002).

120. C.R.C.P. 251.32(g).

121. *Id.* *See In re Segal*, 719 N.E.2d 480 (Mass. 1999) (two-year suspension for conduct related to criminal case in which respondent lawyer was acquitted).

122. *People v. Kolenc*, 887 P.2d 1024, 1026 (Colo. 1994); *People v. Tucker*, 837 P.2d 1225, 1227 (Colo. 1992). *See also Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47 (Pa. 2005) (affirming disbarment order based in part on binding effect of jury's finding of fraud against lawyer in civil case, which required same standard of proof by clear and convincing evidence as applies in disciplinary case).

123. *In re Whitney*, 120 P.3d 550, 556 (Wash. 2005).

124. *In re Egbune*, 971 P.2d 1065, 1067 (Colo. 1999). *Accord Iowa Supreme Court Board of Professional Ethics v. Remer*, 617 N.W.2d 269 (Iowa 2000); *Attorney Grievance Commission of Maryland v. Bear*, 763 A.2d 175 (Md. 2000).

125. C.R.C.P. 251.18(b)(2).

126. C.R.C.P. 251.16(d). *See* C.R.C.P. 97; Canon 3(C), Code of Judicial Conduct. In the event of the PDJ's abstention, a presiding officer is chosen at random from the list of hearing board members. C.R.C.P. 251.18(b)(2). This rule does not require the presiding officer to be a lawyer.

127. C.R.C.P. 251.18(b)(1).
128. C.R.C.P. 251.18(d).
129. C.R.C.P. 251.18(a).
130. C.R.C.P. 251.18(f)(4)(D)(iv).
131. *Attorney D.*, *supra* note 107 at 399.
132. C.R.C.P. 251.19(a).
133. C.R.C.P. 251.19(b)(4), (6).
134. *In re Roose*, 69 P.3d 43, 47-48 (Colo. 2003).
135. C.R.C.P. 251.19(b)(4).
136. See C.R.C.P. 251.32(a) (majority of hearing board is a quorum).
137. C.R.C.P. 251.19(b).
138. C.R.C.P. 251.6(d). Where a hearing board orders private admonition, the "fact that private admonition is imposed shall be public information, but the private admonition itself shall not be disclosed." C.R.C.P. 251.31(i).
139. C.R.C.P. 251.6(c).
140. C.R.C.P. 251.6(b).
141. C.R.C.P. 251.6(a).
142. C.R.C.P. 251.28(f). See also C.R.C.P. 251.28(e) (Clerk of Court or PDJ "shall release for publication orders of disbarment, suspension, or transfer to disability inactive status").
143. C.R.C.P. 251.19(b).
144. *People v. Mascarenas*, 103 P.3d 339, 351 (Colo. PDJ 2003) (Keithley, dissenting). See generally Bender, "Deterrence, Integrity, and the Public Good: The Disgorgement and Restitution of Third Party Fees as a Condition of Reinstatement in *In re Hager*," 18 *Georgetown J. of Legal Ethics* 611 (Summer 2005) (courts historically have ordered restitution in disciplinary cases to return attorney fees paid by or on behalf of clients, return misappropriated client funds, and occasionally to compensate third parties for financial harm caused by the attorney), citing *People v. Rivers*, 933 P.2d 6 (Colo. 1997) (ordering restitution of fees paid by girlfriend to represent boyfriend in domestic violence cases). See also *Lawyer Disciplinary Board v. Ball*, 633 S.E.2d 241 (W.Va. 2006) (ordering respondent lawyer to make restitution of several million dollars that he received in funds and property from various estates, ostensibly for his services as an attorney and executor).
145. C.R.C.P. 251.7(a)(3).
146. *Id.*
147. C.R.C.P. 251.7(a).
148. C.R.C.P. 251.7(b) and (e).
149. C.R.C.P. 251.7(b).
150. C.R.C.P. 251.7(f).
151. C.R.C.P. 251.27(a). On September 1, 2000, the court discontinued, for lack of need, an intermediate appellate tribunal known as the Appellate Discipline Commission. See http://www.courts.state.co.us/supct/rules/2000/2000_20.pdf.

152. *Attorney E.*, *supra* note 79; *Attorney D.*, *supra* note 107; *People v. Trupp*, 51 P.3d 985 (Colo. 2002).

153. C.R.C.P. 251.27(g) omits C.A.R. 4(a)'s reference to an order granting or denying a judgment notwithstanding the verdict, which is inapplicable to disciplinary proceedings.

154. C.R.C.P. 251.27(h).

155. C.R.C.P. 251.27(b).

156. *People v. Haines*, No. 04PDJ112, Order Re: Stay Pending Appeal and Amendment of Judgment Pursuant to C.R.C.P. 59(a)(4), dated May 19, 2006 (on file with author).

157. C.R.C.P. 251.27(o).