



1. **Rather Than Be Eliminated, Proportionality and Consistency Should Be Overarching and Guiding Principles of the Disciplinary System**

As the Supreme Court and Task Force are aware, proportionality analysis has been a vital part of Arizona's lawyer discipline process for decades. A long line of Arizona Supreme Court cases recognizes that to have an effective system of sanctions for lawyer misconduct there must be internal consistency and fairness. Until now, the Court consistently and unequivocally has found it to be sound policy to examine the sanctions imposed in discipline cases that are factually similar.

Administrative Order No. 2009-73 specifically proposes that “[p]roportionality arguments will be eliminated” and “[s]anctions will be imposed pursuant to the American Bar Association guidelines.” In response, the Task Force drafted proposed Rule 58(k), which states in pertinent part: “Sanctions imposed shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* and, **if appropriate, a proportionality analysis.**”

Respectfully, the elimination of proportionality analysis or its relegation to an “if appropriate” type of issue is a bad idea and would be a mistake. If the lawyer disciplinary system is to be effective and perceived by the public and lawyers as fair, unbiased and impartial then it must incorporate and be characterized by objective and considered decision-making, predictability, consistency and fairness. Proportionality analysis is a vital aspect of attempting to attain consistency and fairness in the discipline process, recognizing that complete consistency is elusive because no two cases ever are precisely the same. Although proportionality may be difficult to measure and impossible to attain fully, proportionality analysis is a crucial part of establishing a lawyer discipline

process that will be viewed by the public and lawyers as unbiased, fair and consistent. Even if absolute proportionality or consistency is never fully attained, efforts nevertheless should be made to attain proportionality and consistency because these objectives are vital to the credibility and effectiveness of the discipline system.

Hopefully we all would agree with the fundamental proposition that lawyer discipline should depend solely upon objective factors and should *not* depend upon who you are, where you practice or who you know. Yet, absent a bright line requirement that lawyer discipline be consistent and proportional, excessive flexibility in the discipline rules and broad discretion to consider individual circumstances inevitably can result in different treatment and different sanctions for different lawyers who commit virtually the same offense(s). The reality is that the discipline system is administered and operated by human beings with inevitable individual biases and a tendency to identify with certain lawyers but not with others. Organizational biases or a “culture” also potentially might influence the application of disciplinary sanctions against some lawyers but not others for the same misconduct.

Although we all may agree in principle upon the need for consistency in the imposition of lawyer discipline, such conceptual agreement is meaningless unless the lawyer discipline rules actually are applied and enforced in a consistent, proportional manner. Inconsistent application of lawyer sanctions inevitably will cast doubt on the credibility, impartiality and fairness of any disciplinary system, including Arizona’s, and ultimately will severely undermine the effectiveness of the system. As observed by one Task Force Member (J. Scott Rhodes, Esq.) in 2008, “If you polled members of the State

Bar, many of them would tell you that their criticism of the process is that the State Bar doesn't end up prosecuting lawyers who are out there and are really bad." (Arizona Capitol Times, November 21, 2008). A lack of consistency and proportionality also unquestionably will confuse the message to be conveyed by lawyer sanctions—if different sanctions are imposed in different cases for the same misconduct then no clear, consistent message is sent regarding the consequences of that misconduct. The proposed amendments to the disciplinary rules therefore respectfully should incorporate and encourage proportionality as an overarching goal of the disciplinary process. Increased discretion and flexibility in handling disciplinary matters, and the desire to process disciplinary cases more timely, should not require that proportionality and consistency in the discipline process be jettisoned.

The proposed Rule amendments appear to mention "proportionality" only in Rule 58(k), which concerns the procedures in a "Formal Proceeding." Respectfully, it is suggested that proportionality and consistency not only should *not* be eliminated in general as part of lawyer discipline, but these principles should be embraced and incorporated into the rule amendments pertaining to the **entire** disciplinary process. That is, **proportionality and consistency should be guiding objectives throughout the process, including at the initiation of the process, the review process, the investigative stage, and the non-formal disposition (for example, diversion) of certain cases.** Simply put, if certain misconduct results in one lawyer receiving an early disposition of dismissal or diversion and another lawyer receiving a more serious sanction (such as censure or suspension) for the same misconduct, the sanctioning

process will not be perceived by the public or lawyers as credible, consistent, predictable or fair.

The proposed Rule amendments are drafted to permit increased flexibility in the sanctioning process, particularly during initial case review and disposition. Although such increased flexibility and discretion may enhance earlier disposition of cases, it also will subject State Bar counsel to extraordinary pressures to impose dismissal, diversion or other “non-formal” sanctions rather than initiating a formal proceeding against the offending lawyer. It is at the intake and “early disposition phase” of the process that the potential adverse effects of bias and/or pressure from a responding lawyer or his/her legal counsel may be most problematical. As currently proposed, Bar counsel’s dismissal or diversion (without an investigation) is not subject to review by the Attorney Regulation Committee in the normal course, and cases resulting in dismissals or referrals to diversion would not become public. Yet, requiring consistency and proportionality at that early stage is just as important (and perhaps even more so) than as at the formal proceedings stage. The objectives of consistency and proportionality should be incorporated into those rules relating to the initiation of proceedings, investigation, and dismissal or diversion in order to discourage inconsistent or disproportionate handling of disciplinary cases at that early stage.

2. **Resort to the ABA Standards Is Not a Panacea**

As anyone who has worked with the ABA Standards knows, the ABA Standards—although helpful in establishing an analytical framework for lawyer sanctions—do little to promote proportionality and consistency in lawyer sanctioning. As

observed by one legal commentator, “while the two-step framework of the Standards . . . is useful, the Standards are in other respects conceptually flawed, confusing and unworkably vague.”<sup>1</sup> This same commentator argues that “these voluntary standards provide virtually limitless flexibility, but they do not promote considered decision-making or provide the consistency” needed for a lawyer sanctioning process.

### **Conclusion**

The perception of lawyers and the public regarding the credibility, impartiality and overall fairness of the revised discipline procedures will, in substantial measure, determine whether the new discipline system is effective and accepted as better than the existing system. The Supreme Court in Administrative Order No. 2009-73 affirmatively states that one primary goal of the re-engineering of Arizona’s lawyer discipline system is “to maintain a fair and impartial discipline system.” Eliminating proportionality and consistency in decision-making and analysis for lawyer sanctions is antithetical to that goal.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of April, 2010.

ALCORN LAW OFFICES

/s/

Richard A. Alcorn  
28900 North Central Avenue, Suite 1400  
Phoenix, Arizona 85004

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<sup>1</sup> Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, available at [www.wcl.american.edu/journal/lawrev/48/pdf/levin.pdf](http://www.wcl.american.edu/journal/lawrev/48/pdf/levin.pdf)