

**FINAL REPORT TO THE NYSBA PROFESSIONAL
DISCIPLINE COMMITTEE: DISCOVERY, SUBPOENA
POWER AND EVIDENCE RULES IN DISCIPLINARY PROCEEDINGS**

**NYSBA Professional Discipline Subcommittee on
Discovery in Disciplinary Proceedings:**

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INTRODUCTION: ORGANIZATION OF REPORT

This is the final report of the Subcommittee on Discovery in Disciplinary Proceedings to the New York State Bar Association Committee on Professional Discipline.

This final report is organized as follows. Part I reviews the Committee charge to the Subcommittee and the Subcommittee's approach to the work. Part II summarizes the Subcommittee's findings concerning discovery, subpoena powers and evidence rules available in the states' attorney discipline systems. Part III discusses some thoughts concerning recommendations. Appendix A is a state-by-state description of each state. Appendix B is a chart depicting the availability of discovery procedures by state.

PART I.

COMMITTEE CHARGE TO THE SUBCOMMITTEE AND SUBCOMMITTEE APPROACH TO THE WORK

As was explained in the Subcommittee's preliminary report, Co-Chair Sarah McShea stated in her e-mail dated May 1, 2008, to the whole Committee on Professional Discipline, discovery in disciplinary proceedings is a current hot topic of interest around the country, and it was one of the topics on Paul Goldblum's proposed project list that was discussed at the Committee's meeting on April 17, 2008, and that led to the appointment of the Subcommittee. Co-Chair Sarah McShea's May 1st e-mail went on to ask that the Subcommittee research what disciplinary committees and courts are doing around the country and what different practices exist, and included in that requested research were compiling what other jurisdictions are doing presently and what New York is doing in the four Judicial Departments. Based on the research, the Subcommittee was further asked in Co-Chair Sarah McShea's May 1st e-mail to make recommendations to the whole Committee.

Shortly after the appointment of the Subcommittee, contacts were made with William Wernz, now a partner at Dorsey & Whitney LLP and the former Chief Disciplinary Counsel for Minnesota, and he was pleased to send materials to the Subcommittee, including materials generally on fairness in the disciplinary system. (William Wernz is a strong advocate of "fairness" in the disciplinary process.) Members of the Subcommittee also checked what was available at the American Bar Association; and while there was a February 1992 ABA report on the evaluation of disciplinary enforcement, that report was 16 years old and did not include a state-by-state analysis as to the availability of discovery procedures.

When the Subcommittee met, it was decided that we needed to put aside whatever

predispositions we might have about discovery in disciplinary proceedings and proceed in the appointed work of the Subcommittee in terms of three steps. First, we needed to do some original research into what the states were doing and prepare a report on our findings as to what is being done. Second, we needed to do research, as best we could, into how different procedures worked and prepare a report on those findings. Third, based on steps one and two (and only then), the Subcommittee could make recommendations, with the recognition that there might be respectful differences of opinion.

To perform the first step, the Subcommittee divided the states of the country into four groups. The first group consisted of the states in the Northeast and Middle Atlantic over to West Virginia and Ohio. The second group consisted of the states in the South and middle Mid-West (Indiana and Illinois). The third groups consisted of the states in the upper Midwest and the prairie states. The fourth group consisted of states in the Rocky Mountains and Far West. Each member of the Subcommittee then proceeded to research the disciplinary procedures in the states of his or her group and put together information.

We as a Subcommittee met several times and informally reported to each other; our first common and very basic response was that we were finding a great diversity of procedures among the states. Chief Judge Kaye has written on a number of occasions referencing Justice Louis Brandeis's statement about the states being the laboratory for American democracy, *e.g.*, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 251, 567 N.Ed.2d 1270, 1279, 566 N.Y.S.2d 906, 915, *cert. denied*, 500 U.S. 954 (1991) ("a State can act as a 'laboratory' in more ways than one, as Justice Brandeis recognized. . ."). The states can be viewed as acting as laboratories for democracy now concerning the subject of discovery in disciplinary proceedings.

We as a Subcommittee also put together written materials for each of our groups of states. Different approaches were taken and then discussed as a format for a final report to the whole Committee concerning what the states are doing with respect to discovery in disciplinary proceedings. For our Subcommittee's preliminary report on November 14, 2008, we as a Subcommittee presented to the whole Committee the different approaches of the Subcommittee members and a preliminary view of the procedures we were finding, along with the caveats that the rules in each state had to be read carefully, that cross-references to other state rules invariably had to be checked and that some corrections may be needed before presented to the whole Committee is the final report on what the states are doing with respect to discovery in disciplinary proceedings.

The Subcommittee has now proceeded to put together this final report to the whole Committee.

PART II.

OVERVIEW OF STATES' PROCEDURES

This Part of the report summarizes the states' disciplinary procedures in discovery, subpoena power, evidence rules and confidentiality provisions. Supporting this survey are Appendix A and Appendix B to this report. Appendix A is a state-by-state description of each state. Appendix B is a chart depicting the procedures by state.

A. Discovery.

What an examination of the different states' procedures with respect to discovery in disciplinary cases shows is that the states' procedures can reasonably, albeit not perfectly, be grouped into three categories: (i) eight states and three New York Appellate Division Judicial Departments appear to afford little or no discovery; (ii) six states and one New York Appellate Division Judicial Department appear to provide for limited discovery (certain kind of document production and witness information, but no express provision for depositions by respondent attorney); and (iii) thirty-five states and the District of Columbia appear to provide for a fair amount of discovery.

The eight states and three New York Judicial Departments that appear to afford little or no discovery are: Nevada (respondent attorney can defend at the hearing, but no provision for discovery); South Dakota (no provision for discovery); Kansas (generally no discovery, although upon request, the Disciplinary Administrator shall disclose all relevant evidence in his possession); Virginia (respondent right to receive copy of investigative report, no depositions unless witness unavailable for hearing); Delaware (no discovery); Connecticut (no provision for discovery); Massachusetts (no provision for discovery, subpoena power could be used by Bar Counsel for deposition during investigation); Rhode Island (no authorization in rules for respondents to take depositions, but respondent could request Disciplinary Board to use its authorization to take depositions); New York Appellate Division - First Department (no rule for depositions generally, depositions to preserve testimony if good cause to believe witness will be unavailable, practice but no rule for "Brady material" disclosure); New York Appellate Division - Third Department (deposition of respondent attorney but no other provision for depositions); and New York Appellate Division - Fourth Department (deposition of respondent attorney but no other provision for depositions).

The six states and one New York Judicial Department that appear to provide for limited discovery are: Colorado (rules preclude depositions, but require exchange of witness information, documents and use of experts); Hawaii (depositions may be permitted based on written requests to hearing officer and exchange of documents at pre-hearing conference);

Tennessee (no discovery prior to formal proceedings unless chair of Board of Professional Responsibility grants for good cause, some discovery after commencement of formal proceedings in basic disclosures at pre-hearing conference and in allowance by hearing panel for depositions and interrogatories); Michigan (generally no depositions unless witness unavailable, but either party may demand production of documents and witness information); Pennsylvania (general discovery rules not available, but at any stage of investigation both Disciplinary Counsel and respondent attorney have right to obtain subpoenas to compel witnesses before a hearing committee or special master and to produce documents, and before appointment of hearing committee or special master, Disciplinary Counsel has right to require production of documents and respondent attorney has right to receive copy of documents); New Jersey (once formal proceedings, discovery is available to “presenter” and available to respondent attorney if Answer filed, but discovery limited to relevant information in the hands of “presenter” but not include interrogatories, requests for admission and depositions); and New York Appellate Division - Second Department (no rule for discovery and depositions, but prior to and after commencement of formal proceedings, subpoena power extends to compel witness testimony and production of documents at request of respondent attorney as well as for investigation or prosecution).

The thirty-five and the District of Columbia states that appear to provide for a fair amount of discovery are: Wyoming (discovery of any relevant matter through depositions, interrogatories, document production, physical or mental examinations and requests for admission); Texas (witness information and statements, expert summaries, six hours of depositions, 25 interrogatories, production of documents, request for admission); New Mexico (for good cause chair of hearing committee hearing may prior to formal hearing authorize discovery that is then subject to New Mexico Rules of Civil Procedure, exchange of witness information is required); Idaho (discovery permitted in the manner provided by the Idaho Rules of Civil Procedure); Montana (parties entitled to discovery subject to the control of the hearing chair); Wisconsin (in formal proceedings, at pre-hearing conference, depositions authorized at request of either party); Oregon (permitted discovery includes depositions, production of documents and request for admission); West Virginia (mandatory pre-hearing disclosure by Disciplinary Counsel of witnesses, expert information, results of physical or mental examinations, hearing exhibits and exculpatory evidence, deposition of respondent attorney, good cause required for other discovery); Washington (discovery allowed under rules similar to Superior Court Civil Rules, including entitlement to depositions); Alaska (Alaska Rules of Civil Procedure govern discovery in disciplinary cases, depositions and requests for admissions may be done for 60 days following respondent’s Answer); Maine (Bar Counsel required to produce all exhibits to be presented to Grievance Commission, depositions and other discovery under Rules 26 through 37 of the Maine Rules of Civil Procedure may be had upon showing of good cause); Utah (disciplinary cases are court actions in which the Utah Rules of Civil Procedure and the Utah Rules of Evidence apply and thus authorize the taking

of depositions); California (Civil Discovery Act applies to disciplinary cases); Arizona (respondent attorneys have full rights to discovery under the Arizona State Civil Procedure Code, including depositions); North Dakota (for sixty days following service of a petition in formal proceedings, disciplinary counsel and the respondent attorney are entitled to reciprocal discovery pursuant to North Dakota Rules of Civil Procedure of all non-privileged matters); Oklahoma (by rule, depositions may be taken and documents and things required to be produced in the same manner as in civil cases, and respondent attorney is entitled, upon written request made 15 days before trial, to names and addresses of prosecution witnesses); Nebraska (in court based process, discovery rules apply as in the state district courts of Nebraska, including depositions); Missouri (discovery by depositions, production of documents and request for admission); Arkansas (disclosure of witness information, and disciplinary counsel and respondent attorney: (1) may take depositions in accordance with Rule 30 of the Arkansas Rules of Civil Procedure; and (2) shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or attorney and (ii) other material upon good cause shown to the chair of the panel before which the matter pending); Iowa (depositions and other discovery under Iowa Court Rules); Louisiana (disclosure of witness information, and disciplinary counsel and respondent attorney: (1) may take depositions in accordance with Rule 30 of the Arkansas Rules of Civil Procedure; and (2) shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or attorney and (ii) other material upon good cause shown to the chair of the panel before which the matter pending); Iowa (depositions and other discovery under Iowa Court Rules); Minnesota (by rule, before a probable cause hearing and before the pre-hearing meeting or within 10 days thereafter, either party may take a deposition as provided by the Minnesota Rules of Civil Procedure and serve upon the other a request for admission); North Carolina (depositions and other discovery available to both parties under the North Carolina Rules of Civil Procedure); South Carolina (depositions and other discovery available to both parties under the South Carolina Rules of Civil Procedure); Mississippi (depositions and other discovery available because in practice, Mississippi Rules of Civil Procedure applicable to disciplinary cases); Florida (depositions and other discovery available because Florida Rules of Civil Procedure applicable to disciplinary cases); Indiana (depositions and other discovery available because Indiana Rules of Civil Procedure applicable to disciplinary cases); Illinois (depositions and other discovery available because Illinois Rules of Civil Procedure applicable to disciplinary cases); Kentucky (depositions and other discovery available because Kentucky Rules of Civil Procedure applicable to disciplinary cases); Georgia (depositions and other discovery available because Georgia Civil Practice Act applicable to disciplinary cases); District of Columbia (during investigation, respondent can access disciplinary counsel's file relating to charges, and subject to showing of need and no undue burden, respondent can have depositions and document production of non-parties); Alabama (mandatory initial disclosures, interrogatories and requests for document production permitted, and subject to approval of Disciplinary Committee, both sides may take

depositions); Ohio (depositions and other discovery in accordance with provisions of the Ohio Rules of Civil Procedure, which are applicable to Ohio disciplinary cases); New Hampshire (by rule, discovery by a disciplinary counsel and a respondent once an Answer to Charges is filed, depositions to be requested by counsel at a pre-trial conference); Maryland (following peer review and upon the filing of a petition for disciplinary action, the Maryland Court of Appeals appoints a judge of a Maryland circuit court to hear the case, and the order of designation shall require the appointed judge, after consulting with Bar Counsel and the respondent attorney, to enter a scheduling order defining the discovery and setting dates for the completion of discovery); Vermont (Vermont Rules of Civil Procedure apply in attorney disciplinary cases, 20 days of the filing of the Answer, disciplinary counsel and respondent are to exchange witness information, 60 days of the filing of an Answer, disciplinary counsel and respondent may conduct depositions and comply with requests for the production of relevant and non-privileged documents).

This survey thus shows that a clear majority of states allow for discovery in the disciplinary process: slightly over 70% of the 51 jurisdictions surveyed (counting New York as one) include a provision for a fair amount of discovery in disciplinary proceedings and, specifically, a provision for depositions at some point in the process.

This discovery takes place usually in the context of an administrative disciplinary system; however, a few states have the courts more involved in the disciplinary process and the discovery is had when the case is before the court. In Maryland, for example, disciplinary cases involving formal charges that do not include the option of "peer review," are court proceedings handled by an assigned judge who, as noted above, enters a scheduling order that includes pre-hearing discovery under Maryland's civil discovery rules.

Also, this allowance for discovery stands in distinct contrast to the rules of the New York Appellate Division Judicial Departments, which place them with the minority of states having limited, little or no discovery in the attorney disciplinary process.

B. Subpoena Power.

All the states provide for the issuance of subpoenas that compel the appearance of witnesses and production of documents at the hearing, and most states expressly provide for subpoenas to be issued at the request of the responsible disciplinary authority in aid of an investigation. In a few jurisdictions, such as Connecticut and the New York Appellate Division - Fourth Department, the subpoena power is written to be available only to Disciplinary Counsel and a Disciplinary Committee. In some states, such as Virginia, a respondent attorney must request the Disciplinary Counsel to issue a subpoena. In many states, however, the Disciplinary Committee or the hearing panel chair is authorized to issue

subpoenas to either the respondent or the Disciplinary Counsel. In a few states, such as Minnesota and Nebraska, a court or a court appointed referee is authorized to issue subpoenas to either the respondent or the Disciplinary Counsel. In those states which allow for discovery pursuant to state rules of civil procedure, the subpoena power is available in aid of rule authorized discovery. In some jurisdictions, such as Massachusetts, the subpoena power may effectively allow for discovery that is not otherwise expressly stated in the rules of procedure.

C. Rules of Evidence.

Fifteen jurisdictions and the four New York Appellate Division Judicial Departments do not either expressly make applicable the state Rules of Evidence or make a more general reference as applicable the evidence rules that govern in the trial of civil cases. The fifteen jurisdictions are: Hawaii, New Jersey, Alaska, Massachusetts, New Hampshire, Ohio, Pennsylvania, Connecticut, Washington, Kansas, California, Oregon, South Dakota, the District of Columbia and Mississippi. Mississippi is included in the list because it does not have a provision in its rules applying the Mississippi rules of evidence to disciplinary cases; however, in practice, the Mississippi rules of evidence are applied in disciplinary cases. Ohio and Kansas do not make reference to their respective evidence codes or to evidence rules that govern in civil trials; however, both Ohio and Kansas refer to their respective Rules of Civil Procedure as governing disciplinary hearings.

Twenty-six states that expressly make applicable the state Rules of Evidence to disciplinary proceedings are: Virginia, Tennessee, South Carolina, North Carolina, Michigan, Kentucky, Georgia, Illinois, Indiana, Florida, Alabama, Virginia, West Virginia, Colorado, Rhode Island, Delaware, Vermont, Maine, Arkansas, Iowa, Louisiana, Utah, Minnesota, Montana, North Dakota and Texas. Nine states that make a more general reference as applicable the evidence rules that govern in the trial of civil cases are: Maryland, Missouri, Idaho, Nebraska, Arizona, New Mexico, Nevada, Wisconsin and Oklahoma.

This survey thus shows that a clear majority of states either expressly make applicable the state Rules of Evidence or make a more general reference as applicable the evidence rules that govern in the trial of civil cases: almost 70% of the 51 jurisdictions surveyed (counting New York as one) either expressly make applicable the state Rules of Evidence or make a more general reference as applicable the evidence rules that govern in the trial of civil cases.

Also, this reference to the application of evidence rules in the clear majority of the states' disciplinary rules stands in distinct contrast to the rules of the New York Appellate Division Judicial Departments, which place them with the minority of states not referencing evidence rules in disciplinary hearings.

D. Public or Confidential.

The states provide, apparently without exception, for confidentiality of attorney discipline investigations. Many states, however, also provide for public proceedings once a disciplinary case reaches the point of formal proceedings. This combination of confidential investigations with public formal proceedings is found in a majority of jurisdictions, among them: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Michigan, Wisconsin, Colorado, New Jersey, Maryland, West Virginia, Kansas, Louisiana, Tennessee, Minnesota, Illinois, Nebraska, Missouri, New Mexico, Nevada, North Dakota, North Carolina, South Carolina, Oklahoma, Texas and Utah. Many states also expressly provide for waiver of confidentiality by a respondent attorney.

The prevalence of public formal disciplinary proceedings stands in contrast to New York. Although there was once discussion of open disciplinary proceedings in New York, *see* Spencer, "Open Disciplinary Hearings Urged; OCA Revamps Details of Proposed Bill," *New York Law Journal*, p. (Mar. 17, 1997), New York has continued to have a strong confidentiality statute at Judiciary Law § 90(10).

PART III.

THOUGHTS ON RECOMMENDATIONS

Two observations can be made as a preface to considering recommendations.

First, it is worthwhile to remind ourselves that procedures matter to the fairness of a legal system. At a fundamental level, it is basic constitutional law that due process of law preserves the appearance and reality of fairness, generating the feeling, important to popular government, of justice being done, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951)(Frankfurter, J., concurring), and further guarantees that "life, liberty, or property will not be taken on the basis of erroneous or distorted conception of the facts and the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Second, in the field of disciplinary enforcement, there appears to be an evolution of procedure toward more discovery and more governance by rules such as evidence codes that reflect a public model of justice and seem to be a corollary to the historical evolution of professional discipline from aspirational norms for professionals to rules of conduct for attorneys in various business or legal relationships. Hazard, "The Future of Legal Ethics," 100 Yale L.J. 1239 (1991).

With these observations in mind, a series of possible recommendations could suggest

themselves.

If the provision for discovery in disciplinary proceedings by slightly over 70% of the 51 jurisdictions surveyed (counting New York as one) reflects the experience of the states and the outcome of debates at the state level concerning the inclusion of discovery in the disciplinary process so that fair outcomes are obtained, then the vote would be in favor of including discovery in the disciplinary process and, specifically, allowing for depositions at some point in the disciplinary process, with corresponding adjustment of the stated subpoena power to support deposition taking. New York rules would need to be changed.

Similarly, if the provision for the application of evidence rules in disciplinary hearings by almost 70% of the 51 jurisdictions surveyed (counting New York as one) reflects the experience of the states and the outcome of debates at the state level concerning the application of evidence rules in the disciplinary process so that fair outcomes are obtained, then the vote would be in favor of the application of evidence rules in the disciplinary process. Again, New York rules would need to be changed.

The same can be said as to making public formal disciplinary proceedings. If the provision for public formal disciplinary proceedings by the majority of jurisdictions reflects the experience of the states and the outcome of debates at the state level concerning making formal disciplinary proceedings public, then the vote would be in favor of making public formal disciplinary proceedings. Yet again, New York rules would need to be changed.

The fact, however, that the procedures for disciplinary enforcement in other states are now different from those in New York with respect to discovery, subpoena power, evidence rules and confidentiality does not necessarily mean that current New York procedures should be changed, just that if changes are considered to New York procedures to having discovery, stating that evidentiary rulings in disciplinary hearings shall be made in accordance with the state's evidence code and making formal proceedings public, it would be with the knowledge and support that New York would be changing its procedures to be along the lines of what other states mostly do concerning those subjects.

The Subcommittee members have somewhat different views concerning the desirability of depositions that respondent attorneys can take and when depositions ought to be available to a respondent attorney.

The prosecution side would have to contend with the respondent attorney having an important procedural mechanism for developing a defense; there are disciplinary cases that are relatively simple and taking depositions will not shed light in the case; and the prosecution would need to be concerned that some complainants may need protection if subjected to

deposition. On the other hand, disciplinary cases can be fact-sensitive, there are disciplinary cases that do involve some level of complication and clash of recollection, deposition testimony will shed light in the case and the complainant is quite capable of handling a deposition. In the view of some members of the Subcommittee, the ability of the respondent attorney to take depositions is important to have in a fair disciplinary process.

As to when depositions may be taken, one view on the Subcommittee is strongly that it should be only after formal proceedings have been commenced, and that view can quite fairly cite how most all states have structured the right of a respondent attorney to take depositions. Another view of the Subcommittee is that while the general rule for depositions should be structured to make depositions available as of right after formal charges are brought, there may be situations in which, before formal charges, a respondent attorney should be able to seek leave upon a showing of good cause to the Chair of the Disciplinary Committee or the Appellate Division to take a specified deposition. If, for example, a disciplinary case appears to involve a clash of recollection between the respondent attorney and the complainant based on the complainant's unsworn complaint and the sworn testimony and documentation submitted in opposition by the respondent attorney, a deposition taken by the respondent attorney may be able to narrow the differences in the facts and, among other things, help avoid the situation of a respondent attorney being over-charged and avoid tasking a Disciplinary Counsel with seeking to sustain charges that a more complete view of the facts would have counseled not bringing in the first place.

As for the application of formal rules of evidence, with a stated burden of proof, to disciplinary hearings and making public disciplinary hearings on formal charges, it is the view of some members of the Subcommittee that such change should be made in New York. The consequences of major disciplinary sanctions are such that a person's means of earning a livelihood and enjoying a meaningful professional livelihood are at stake and to impose a deprivation of that consequence should be a matter of public airing. A behind-closed-doors trial in such circumstances runs counter to basic notions of due process. To quote Felix Frankfurter, "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy, a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951)(Frankfurter, J., concurring). For the respondent attorney, public hearings provide protection from behind-closed-doors injustices.

APPENDIX A: STATE SUMMARIES

ALABAMA

Discovery.

The parties' right to discovery in disciplinary proceedings in Alabama are as follows:

Under Rule 17, Subpoena Power, Witnesses and Pre-Trial Proceedings, both General Counsel and the respondent attorney may request that the Disciplinary Commission order a conference to obtain admissions and narrow the issues presented in the pleadings. All discovery proceedings are conducted in accordance with the Alabama Rules of Civil Procedure.

Upon receiving approval of the Disciplinary Hearing Officer or the Disciplinary Commission, both General Counsel and the respondent may take depositions.

Initial Disclosures are required under Alabama Rule of Civil Procedure 26, and the use of interrogatories and requests for document production in disciplinary proceedings are allowed and are governed by Alabama Rules of Civil Procedure 33 and 34 respectively.

Subpoenas.

Both parties may have subpoenas and subpoenas *duces tecum* issued in disciplinary proceedings.

Evidence.

The Alabama Rules of Evidence govern the admissibility of evidence in disciplinary proceedings in Alabama; however, the Alabama Disciplinary Commission may relax these rules if a strict application would otherwise preclude the admission of highly probative and non-cumulative documentary or demonstrative evidence.

ALASKA

Alaska has an administrative system of enforcing attorney discipline contained in the Rules of Disciplinary Enforcement in the Alaska Bar Rules. Rule 10 of the Rules of Disciplinary Enforcement establishes the Disciplinary Board that, among other things, employs Bar Counsel established in Rule 11 and hears appeals from Hearing Committees that are established under Rule 12.

Discovery.

Rule 24(d) of the Rules of Disciplinary Enforcement provides for discovery by document production, requests for admission and depositions for 60 days following the filing of the respondent attorney's Answer. Bar Counsel and the respondent attorney are to receive reciprocal discovery of all matters not privileged. The Alaska Rules of Civil Procedure applies to the discovery.

Subpoena Power.

Rule 24(a) of the Rules of Disciplinary Enforcement provides that at any stage of the investigation, Bar Counsel will have the right to obtain subpoenas to compel testimony and produce documents; the subpoenas are issued by the Area Discipline Division Committee. During Formal Proceedings, both Bar Counsel and the respondent attorney have the right to obtain subpoenas to compel testimony and produce documents at the hearing; the subpoenas are issued by a member of the Hearing Committee.

Evidence Rules.

Rule 22 of the Rules of Disciplinary Enforcement provides that the rules of evidence applicable to administrative hearings will apply in all hearings before Hearing Committees.

Public or Confidential.

Rule 21 of the Rules of Disciplinary Enforcement provides that after the filing of a petition for formal hearings are public whether before a Hearing Committee or Disciplinary Board, but that Bar Counsel files are confidential.

ARIZONA

Arizona's disciplinary process has the State Bar, under Rule 54 of the Rules of the Supreme Court of Arizona, as the recipient of ethics complaints against attorneys and as the agency that conducts investigations. Arizona has, under Rule 55 of the Rules of the Supreme Court of Arizona, a diversion program as an alternative to discipline, but of a decision is made that formal proceedings be commenced, then under Rule 57, the State Bar files a complaint with the disciplinary clerk.

Discovery.

Rule 57(e) provides for initial disclosures similar to federal court initial disclosures: witnesses who will be called to testify, person with knowledge of the facts, experts, identity and location of documents a party plans to use at trial, a list of documents or categories of documents. Rule 57(f) provides for discovery within time limits and subject to Rules 26(a) through (f) and Rules 29 through 36 of the Arizona Rules of Civil Procedure, which (like their counterparts in the Federal Rules of Civil Procedure) encompass expert discovery, depositions, interrogatories, requests for production of documents, requests for physical and mental examination and requests for admission.

Subpoena Power.

Rule 47(h) provides: that all hearing officers have subpoena power; that for an investigation and until a formal complaint is filed, the State Bar may obtain a subpoena for investigations from a probable cause panelist; and that after a formal complaint is filed by the State Bar, the State Bar, respondent or respondent's counsel may obtain a subpoena from a hearing officer.

Evidence Rules.

Rule 57(j) governs hearings before a hearing officer. Rule 57(j)(4) requires the State Bar to prove its case by clear and convincing evidence and authorizes respondent to present evidence as permitted by the rules of evidence.

Public or Confidential.

Rule 70 provides for public access to records and public proceedings upon, among other things, waiver of confidentiality by the respondent or a finding of probable cause.

ARKANSAS

Arkansas has an administrative system of enforcing attorney discipline contained in Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys At Law ("the Procedures"). Under Section 3 of the Procedures, the Arkansas Supreme Court appoints a Committee on Professional Conduct for enforcement subject to the court; and under Section 5 of the Procedures, an Office of Professional Conduct led by an Executive Director is provided for.

Discovery

Section 6B(1) provides that except as stated in the Procedures, the Arkansas Rules of Civil Procedure regarding discovery do not apply.

Section 8 of the Procedures govern discovery. Rule 8A of the Procedures provides that within 10 days following the filing with the Office of Professional Conduct a request for a hearing by a respondent attorney after a Section 10 ballot vote, the Executive Director and a respondent attorney shall exchange the names and addresses of all persons having knowledge of relevant facts. Rule 8A of the Procedures also provides that within 60 days following the filing with the Office of Professional Conduct a request for a hearing by a respondent attorney after a Section 10 ballot vote, the Executive Director and a respondent attorney: (1) may take depositions in accordance with Rule 30 of the Arkansas Rules of Civil Procedure; and (2) shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or attorney and (ii) other material upon good cause shown to the chair of the panel before which the matter pending.

Subpoena

Rule 8C provides that proceedings under the Procedures are not subject to the Arkansas Rules of Civil Procedure except those Arkansas Rules of Civil Procedures relating to depositions and to subpoenas. Accordingly, Rule 45 of the Arkansas Rules of Civil Procedure applies to allow the issuance of subpoenas.

Evidence Rules

Section 7 of the Procedures govern matters of evidence. Section 7B states that formal charges of misconduct shall be established by a preponderance of the evidence. Section 7C of the Procedures places the burden of proof in seeking discipline on the Executive Director. Section 7E of the Procedures provides that the Arkansas Rules of Evidence and Arkansas Rules of Civil Procedure shall not generally apply to disciplinary proceedings.

Public or Confidential

Section 6 of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys At Law governs confidentiality and records. Section 6A imposes a general rule of confidentiality as to all communications, complaints, testimony, evidence, actions and activities. Section 6B states exceptions to the general rules. Section 6B(2) provides that the records of hearings conducted by the Committee on Professional Conduct pursuant to Section 11 of the Procedures governing public hearings for cases in which a public sanction may be imposed. Such a public hearing under Section 11 is held if a vote by the Committee under Section 10 of the Procedures

CALIFORNIA

The State Bar of California investigates complaints of attorney misconduct. If the State Bar determines that the attorney's actions involve probable misconduct, formal Charges are filed with the independent State Bar Court. Disciplinary complaints in formal proceedings in California are heard by State Bar Court Hearing Judges who, per Rule 9.13 of the California Rules of Court, has the power recommend to the California Supreme Court disbarment or suspension. For lesser sanctions, the State Bar Court may impose them on the respondent attorney. California touts that it is the only state in the nation with independent professional judges dedicated to ruling on attorney discipline cases. The Rules of Procedure of the State Bar Court contain the provisions covering discovery, subpoena power, evidence rules and confidentiality.

Discovery & Subpoena Power.

Rules 150 through 189 of the Rules of Procedure of the State Bar Court govern subpoenas and discovery. Under Rules 152, 153 and 155, discovery and trial subpoenas are available to any party. Rule 180 provides that the California Civil Discovery Act applies to State Bar Court proceedings and thus the discovery that is available in a California civil action may be had in a State Bar Court case, except for physical and mental examinations per Rule 184.

Evidence Rules.

Rule 213 of the Rules of Procedure of the State Bar Court places on the State the burden of proof of culpability by clear and convincing evidence. Rule 214 provides that the California Evidence Code applicable to civil cases applies as well in State Bar Court cases.

Public or Confidential.

Rule 20 of the Rules of Procedure of the State Bar Court provides that all State Bar Court proceedings shall be public except settlement conferences or otherwise provided.

COLORADO

The Colorado Supreme Court, pursuant to Rule 251.3 of the Colorado Rules Regarding Attorney Discipline and Disability Proceedings, appoints Regulation Counsel to, among other things, conduct investigations and prosecute disciplinary cases, and, pursuant to Rule 251.2, appoints an Attorney Regulation Committee that, among other things, decides whether to direct Regulation Counsel to proceed to the filing of a formal disciplinary complaint. The Colorado Supreme Court, pursuant to Rule 251.17, appoints members of the Colorado Bar to serve on Hearing Boards. Once a disciplinary case proceeds to a formal complaint brought by Regulation Counsel, a Hearing Board to hear the case is designated pursuant to Rule 251.18.

Discovery.

Rule 251.18(d) states that once a formal case is commenced with the filing of a complaint by Regulation Counsel pursuant to Rule 251.14, the case is governed by the Colorado Rules of Civil Procedure and the practice in aid of civil cases in Colorado; however, Rule 251.18(f)(4) further provides that Rule 26 of the Colorado Rules of Civil Procedure does not apply but that the Rule governs discovery, which then limits discovery to witness information, document production and expert information.

Subpoena Power.

Rule 251.18(f) provides for the Clerk of the Presiding Disciplinary Judge's office to issue subpoenas to compel testimony and produce documents for hearings.

Evidence.

Rule 251.18(d) states that once a formal case is commenced with the filing of a complaint by Regulation Counsel, the case is governed by the Colorado Rules of Evidence and the practice in aid of civil cases in Colorado, provided however that the proof shall be by clear and convincing evidence.

Confidentiality.

Rule 251.31 states that before a formal complaint is filed as provided in Rule 251.14, the proceedings are confidential unless the respondent has waived confidentiality, but that once a formal complaint is filed, the proceedings are public.

CONNECTICUT

The Connecticut disciplinary system is contained in the “Official 2008 Connecticut Practice Book” (the “Practice Book”). The Connecticut Rules of Professional Conduct are in that Practice Book. Chapter 2 of the Practice Book covers the Connecticut Superior Courts contains statutes governing attorneys, including statutes establishing the Connecticut attorney disciplinary bodies and procedures.

Discovery.

Sections 2-29 and 2-30 of the Practice Book establish, respectively, Grievance Panels and Grievance Counsel to be appointed by the judges of the Superior Court. Under section 2-32, a grievance panel with the assistance of Grievance Counsel reviews a disciplinary Complaint to determine whether there is probable cause. Sections 2-33 and 2-34A establish, respectively, a Statewide Grievance Committee and Disciplinary Counsel to be appointed by the judges of the Superior Court. Under section 2-35, if a Grievance Panel has determined that probable cause exists the respondent attorney is guilty of misconduct, the Statewide Grievance Committee or the reviewing committee shall hold a hearing to determine whether probable cause exists. If it does, then a public hearing is held at which the respondent has a right to be present, to be heard in his defense, to call witnesses, to cross-examine witnesses and to make a statement at the conclusion of the evidentiary hearing. There is not in this process at any point any provision for discovery by respondent.

Subpoena Power.

Section 2-29(e) grants power to a Grievance Panel to compel any person by subpoena to appear to give testimony and to produce documents. Section 2-34A grants subpoena power to Disciplinary Counsel to compel witnesses for a hearing before a grievance panel, a reviewing committee or a statewide grievance committee. Section 2-35(b) also grants subpoena power to the Statewide Grievance Committee for testimony and for the production of documents in proceedings before the Statewide Grievance Committee or a reviewing committee appointed by the Statewide Grievance Committee.

Evidence Rules.

There is no provision in section 2-35 or any other section in the Practice Book for the applicability of any rules of evidence. Section 2-35(d) expressly states the respondent’s right to be heard and cross-examine, but not any rule or rules for the receipt of evidence.

Public or Confidential.

Section 2-35(c) provides that a hearing before the Statewide Grievance Committee or a reviewing committee appointed by the Statewide Grievance Committee shall be confidential unless that respondent attorney requests that such hearing be in public.

DELAWARE

Delaware's disciplinary procedures are contained in the "Delaware Lawyers' Rules of Disciplinary Procedure" promulgated by the Delaware Supreme Court. Rule 2 of the "Delaware Lawyers' Rules of Disciplinary Procedure" establishes a Board on Professional Responsibility whose members are appointed by the Delaware Supreme Court. Board members who participate in any proceeding are required to comply with Judicial Canon 3(C) of the Delaware Judges' Code of Judicial Conduct, which among other things requires disqualification where a judge's impartiality may be reasonably questioned or a judge has a personal bias.

Discovery & Subpoena Power.

Delaware's general disciplinary procedures are set forth in Rule 9 of the "Delaware Lawyers' Rules of Disciplinary Procedure." The stages are: (a) screening and evaluation, by the Office of Disciplinary Counsel, of information of misconduct; (b) formal investigation by the Office of Disciplinary Counsel and consideration by the Preliminary Review Committee ("PRC") of the Board -- before the PRC, a respondent attorney may present further written information and the Office of Disciplinary Counsel presents a recommendation; (c) if appropriate, disposition by private probation or admonition before formal charges; (d) formal proceedings instituted by the Office of Disciplinary Counsel by the service of a petition and hearings before panels of Board members; and (e) review by the Court of Board action. At the hearing, the respondent attorney is entitled to be represented, to cross-examine witnesses and to present evidence. Rule 9 itself does not include any reference to permissible discovery.

Rule 12 of the "Delaware Lawyers' Rules of Disciplinary Procedure," however, does govern "Subpoena power and discovery." Rule 12(a)(1) provides that *before* a petition for discipline, the Office of Disciplinary Counsel may compel by subpoena the testimony of witnesses (including the respondent attorney) and production of documents. Rule 12(a)(2) provides that *after* the filing of a petition for discipline, the Office of Disciplinary Counsel or the respondent attorney may compel by subpoena the testimony of witnesses and production of documents and further that the Clerk of the Supreme Court shall issue such subpoenas as are requested in writing by the respondent attorney and such commissions at the written request of either the Office of Disciplinary Counsel or a respondent attorney for the issuance of a subpoena where the evidence is beyond the jurisdictional limits. Rule 12(e) provides that the Office of Disciplinary Counsel and the respondent attorney may take the deposition of a witness (including the respondent attorney) by subpoena as set forth in Rule 12(a). Rule 12(g) provides that discovery disputes are determined by the chair or vice-chair of the Board. Rule 12(h) provides that

the Office of Disciplinary Counsel and respondent attorney shall exchange names of witnesses and copies of documents to be used by each side in its case in chief 10 days prior to any hearing and may supplement those lists thereafter with the approval of the opposing party or the chair of the Hearing Panel on the case. Rule 12(h) adds that the Hearing Panel may exclude any evidence offered by a party who does not comply with Rule 12(h). Rule 12(i) states that nothing in the Rules shall be deemed to limit the respondent attorney's obligation to respond at any point to a lawful demand for information by the Office of Disciplinary Counsel.

Rule 15(b) of the "Delaware Lawyers' Rules of Disciplinary Procedure" does not expand available discovery because even though Rule 15(b) provides that the Delaware Rules of Civil Procedure "shall apply to the extent practicable in disciplinary and disability matters," Rule 15(b) continues with the express limitation "provided that discovery procedures shall not be expanded beyond those provided in Rule 12 hereof [the 'Delaware Lawyers' Rules of Disciplinary Procedure']."

Evidence.

Rule 9(f)(2) states that at hearings, the Delaware Rules of Evidence (modeled on the Federal Rules of Evidence) "shall be followed as far as practicable, provided that evidence may be admitted and considered which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs, or as otherwise provided in these Rules." Rule 9(f)(3) provides for admissibility of transcripts, exhibits, findings of fact and conclusions of law from other proceedings in which the respondent attorney has been a party or participant. Rule 15(d) places the burden of proof in seeking discipline on the Office of Disciplinary Counsel.

Public or Confidential.

Rule 13 governs access to disciplinary information. Prior to the Hearing Panel's submission to the Court of its final report, disciplinary proceedings and records are confidential. Protective orders may be issued upon a showing of good cause or *sua sponte* by the Chair and Vice Chair of the Board, the Chair of a Hearing Panel or the Court with respect to proceedings, reports, documents or other information which may otherwise be made public. The pendency, subject matter or status of a disciplinary matter may be disclosed if, among other situations, the respondent attorney waives confidentiality in writing, the proceeding is based upon allegations which include the conviction of a crime, the proceedings are based upon allegations which have otherwise been made public and with the approval of the Court to correct false or misleading public statements.

DISTRICT OF COLUMBIA

Discovery and Subpoenas.

Section 8(g) of Rule XI of the Rules governing the D.C. Bar states that “[t]he attorney shall have the right to reasonable discovery in accordance with rules promulgated by the Board [on Professional Responsibility].” Rulings with respect to discovery issues are made by the Chairperson of the Hearing Committee to which the matter has been assigned or by the Chairperson of the Board. Objections to discovery rulings are preserved and may be raised upon appeal to the Board from the final action of the Hearing Committee. Interlocutory appeals are not allowed.

Specifically, the Board on Professional Responsibility has enumerated the following discovery rules:

During the course of an investigation of a disciplinary complaint and following the filing of a petition instituting formal disciplinary proceedings, the respondent is entitled, upon two days oral request, to access any material of Bar Counsel that pertains to the pending charges and is not otherwise privileged or work product.

Upon authorization from the Chair of the Hearing Committee or the Chair of the Board, the respondent is entitled to depose and request document production from non-parties. Such authorization, however, will not be granted unless the respondent can demonstrate that he or she has a compelling need for the additional discovery in the preparation of his or her defense and that such discovery will not be unduly burdensome on the complainant or other persons. If such authorization is granted, Bar Counsel is required to issue subpoenas to respondent to compel attendance of such witnesses or production of such documents.

Upon request from either party, requests for admissions and narrowing of the issues may be ordered by the Chair of the Hearing Committee at his or her discretion.

Evidence.

During a formal disciplinary evidentiary hearing before a Hearing Committee, Bar Counsel and respondent are allowed to introduce evidence so long as such evidence is relevant, not privileged, and not merely cumulative. All documentary evidence must be served upon the opposing party at least 10 days in advance of the date of the hearing. The Hearing Committee is not otherwise bound by any other rules of evidence and may afford presented evidence as much weight and significance as it wishes. Either parties’ failure to present evidence at the evidentiary hearing operates as a waiver of that party’s right to present such evidence in the future.

Confidentiality.

All proceedings involving misconduct allegations are confidential until either a petition is filed or an informal admonition is issued. All Hearing Committee proceedings and the Board are open to the public. Section 17(d) of Rule XI provides that a protective order may be issued to protect the interests of the complainant or of any other person, for good cause shown, and upon notice and an opportunity to be heard. Such a protective order would prohibit the disclosure of confidential or privileged information or of any documents listed in the order and the order can direct that proceedings be held in such a way that the order is implemented.

FLORIDA

Rule 3 of the Rules Regulating the Florida Bar addresses the Rules of Discipline.

Discovery.

Both parties to a disciplinary proceeding in Florida may utilize all discovery tools available under the Florida Rules of Civil Procedure, including: initial disclosures (Rule 1.280); depositions (Rule 1.310); interrogatories (Rule 1.340); requests for document production (Rule 1.350); and requests for admission (Rule 1.370). Florida has a number of different levels of discipline, including procedures before Referees, Committees, the Board of Governors, the Supreme Court of Florida, and the Circuit Court. Each of these levels provide for some discovery. General Rules of Procedure are set forth in Rule 3-7.11.

Discovery, however, is very limited in duration because the disciplinary rules in Florida require that the formal trial be held as soon as possible following the expiration of 10 days from the date the respondent files his or her answer.

Subpoenas.

Both parties may have subpoenas and subpoenas duces tecum issued during discovery by the referee presiding over the disciplinary proceedings.

Evidence.

During formal proceedings, the introduction of evidence will be governed by the Florida Rules of Evidence.

Confidentiality.

All matters including files, investigation reports and records are the property of the Florida Bar, except those disciplinary matters conducted in circuit courts. All of those matters are confidential, except as set forth in Rule 3-7.1. When disclosure is permitted, it is limited to information concerning the status of the proceedings and information that is in the public record.

GEORGIA

Discovery.

Both parties in a disciplinary proceeding in Georgia may conduct discovery in accordance with the State's Civil Practice Act, including: initial disclosures (§ 9-11-26); depositions (§ 9-11-30); interrogatories (§ 9-11-33); requests for production (§ 9-11-34); and requests for admission (§ 9-11-36).

Subpoenas.

Both the State Bar and the respondent attorney have the right to have subpoenas and subpoenas duces tecum issued by either the State Disciplinary Board or the special master residing over the disciplinary proceedings.

Evidence.

The Georgia Rules of Evidence control the admission of all evidence in disciplinary proceedings.

HAWAII

Hawaii's disciplinary process is an administrative system contained in Rule 2 of the Rules of the Supreme Court of Hawaii. Rule 2.4 sets up a Disciplinary Board. Rule 2.5 sets up Hearing Committees. Rule 2.6 establishes Disciplinary Counsel.

Discovery.

Rule 2.12 provides that there shall be no discovery except upon good cause shown to the Disciplinary Board Chairperson. The Disciplinary Board, however, has supplementary Rules that include the requirement of a pre-hearing conference at which among other things the exchange of documents is to be discussed and provide that there be no discovery requests until after the pre-hearing conference. After that conference, requests made be made in writing with a copy to the Hearing Committee or Officer. Pursuant to that procedure, depositions may occur, albeit with the good cause required by Rule 2.12.

Subpoena Power.

Rule 2.12 provides for subpoena power. A member of a Hearing Committee or Disciplinary Counsel may issue subpoenas in the matters before them. After formal proceedings are instituted, a respondent may obtain a subpoena.

Evidence Rules.

Rule 2.7(c) provides that the findings and conclusions of the Hearing Committee or Officer shall be supported by clear and convincing evidence, that the respondent shall have a full opportunity to cross-examine and present evidence and that the Hearing Committee or Officer shall not be bound by the formal rules of evidence.

Public or Confidential.

Rule 2.22 provides that records and proceedings of the Disciplinary Board, Hearing Committees and Disciplinary Counsel are confidential unless waived by the respondent attorney, the misconduct is predicated upon commission of a crime by respondent or otherwise as provided under the Rules. Records filed in and proceedings before the Supreme Court are public.

IDAHO

Idaho's disciplinary process is contained in Section V of the Idaho Bar Commission Rules. Rule 502 of the Idaho Bar Commission Rules establishes a Professional Conduct Board that among other things appoints Hearing Committees established by Rule 503. Bar Counsel is established by Rule 504 to investigate and prosecute disciplinary cases. Per Rule 509 Bar Counsel investigate grievances. Rule 511 establishes the procedures for formal proceedings that begin with the filing of formal Charges by Bar Counsel, with the concurrence of the Board of Commissioners of the Idaho State Bar, with the Clerk of the Idaho Supreme Court.

Discovery & Subpoena Power.

After the filing of formal Charges, a Hearing Committee is appointed pursuant to Rule 511(c) to hear the case and holds pursuant to Rule 511(f) a scheduling conference for the completion of the case, including timetables for completion of discovery. Rule 525(k) provides that the discovery shall be permitted and is governed by the Idaho Rules of Civil Procedure. Consequently, depositions, document production, interrogatories, and requests for admissions are available. Rule 524 for subpoena power. Rule 524(a) covers investigative subpoenas, and after the filing of formal Charges, Rule 524(b) provides that Bar Counsel and a respondent attorney may request the issuance of subpoenas per Rule 45 of the Idaho Rules of Civil Procedure for deposition or hearing issued by the Professional Conduct Board for testimony and documents.

Evidence Rules.

Rule 525(c) provides that the rules of evidence applicable in Idaho district courts are applicable to disciplinary proceedings. Rule 525(d) states that Bar Counsel shall have the burden of proof in seeking to impose discipline. Rule 525(e) states that any issue of fact must be proven by clear and convincing evidence.

Public or Confidential.

Rule 521(a) provides that disciplinary proceedings after the filing of formal Charges are public. Rule 521(b) provides that disciplinary proceedings before the filing of formal Charges are confidential unless the respondent attorney has waived confidentiality. Rule 521(c) provides for public hearings of Hearing Committee, Professional Conduct Board or Court.

ILLINOIS

Discovery.

All discovery in disciplinary proceedings before the Disciplinary Hearing Board is governed by the Illinois Rules on Civil Proceedings in the Trial Court, including: initial disclosures (Rule 201); depositions (Rules 202-206); interrogatories (Rule 213); requests for document production (Rule 214); and requests for admission (Rule 216).

Subpoenas.

Under the Rules Governing the Legal Profession and Judiciary in Illinois, both the petitioner and respondent may request the issuance of subpoenas and subpoenas *duces tecum*.

Evidence.

The Illinois Rules of Evidence control the admissibility of evidence at disciplinary proceedings.

INDIANA

Discovery.

Both parties to a disciplinary proceeding in Indiana have access to all discovery tools provided for under the Indiana Rules of Civil Procedure (following same nomenclature as the Federal Rules of Civil Procedure).

Discovery is limited to a period of 60 days after a hearing officer has been appointed by the Indiana Supreme Court to preside over the disciplinary hearing. Additionally, upon the request of either party, the hearing officer may, in his or her discretion, order a pre-hearing conference for purposes of obtaining party admissions, making initial disclosures, and narrowing the issues. Although not explicitly stated, the pre-hearing rule appears to contemplate the possibility of additional discovery methods if it could aid in the disposition of the matter.

Subpoenas.

Either party may request the issuance of a subpoena or subpoena *duces tecum* from the hearing officer. Subpoenas for the attendance of witnesses and for the production of documentary evidence must conform to Indiana Trial Rule 45. Hearing officers have the authority to enforce, quash or modify subpoenas upon proper application by an interested party or witness.

Evidence.

Indiana rules of pleading and practice in civil cases do not apply to disciplinary proceedings. With regard to the application of the rules of evidence to the proceedings before the hearing officer, the Indiana Disciplinary Commission stated that, in practice at least, the admissibility of evidence is based loosely on the Indiana Rules of Evidence. However, the Indiana Supreme Court has never ruled on the issue of (1) whether hearing officers are bound by the Indiana Rules or (2) whether the Court would overturn a hearing officer's decision when such decision was based solely on evidence that would be inadmissible under the Indiana Rules.

IOWA

Iowa has an administrative system of enforcing attorney discipline contained in chapters 34, 35 and 36 of the Iowa Court Rules, which establish the Attorney Disciplinary Board and the Grievance Commission.

Discovery

Rule 35.6 of the Iowa Court Rules governs discovery in a disciplinary proceeding in Iowa. If either party to utilize discovery, that discovery is to commence within 30 days of service of the complaint. The discovery is to proceed according to the Iowa Rules of Civil Procedure, 1.501 to 1.517, 1.701, 1.702 and 1.714 to 1.717. Also, the respondent attorney need not answer interrogatory, request for admission, question upon oral examination, if answer would be self-incriminatory, and there is provision for applying for order enforcing discovery and perpetuation of evidence.

Subpoena Power

Rule 35.8 of the Iowa Court Rules provides that a district court may issue a subpoena upon application of the Grievance Commission, complainant or respondent attorney. Rule 36.10 of the Iowa Court Rules provides that subpoenas may be issued at the behest of either the Grievance Commission or the respondent attorney.

Evidence Rules

After the Attorney Disciplinary Board brings a complaint against the respondent attorney, hearings on whether to impose disciplinary sanctions are held before the Grievance Commission. Rules 35.7, 36.8 and 36.14 of the Iowa Court Rules govern hearings before the Grievance Committee, but those Rules do not themselves specify the standard of proof or who has the burden of proof. Rule 36.14 does, however, provide that the respondent attorney may at a hearing before the Grievance Committee defend, participate, cross-examine and present evidence in accordance with the Iowa Rules of Civil Procedure and Iowa Rules of Evidence.

Public or Confidential

Rules 35.17 and 36.14 of the Iowa Court Rules provide that the hearings before the Grievance Commission shall not be open to the public. Rule 36.18 of the Iowa Court Rules provides that generally proceedings, hearings and papers filed before the Grievance Commission are confidential until the recommendation of a public sanction, and witnesses are to swear to keep the matter confidential until made public.

KANSAS

Kansas has an administrative system of enforcing attorney discipline contained in Rules 201 through 227 of the Kansas Supreme Court Rules, which establish an Office of the Disciplinary Administrator and Kansas Board for Discipline of Attorneys.

Discovery

Rule 216 governs subpoena power, witnesses and pretrial proceedings. Under Rule 216(d), upon request, the Disciplinary Administrator shall disclose to the respondent all evidence in his possession relevant to the proceeding and that no other discovery shall be permitted. Under Rule 216(d), a deposition may be taken upon approval by a hearing panel if testimony is needed to be preserved or a witness is unable to attend a hearing.

Subpoena Power

Under Rule 216(b), a district court is authorized to issue subpoenas upon proper application. The respondent attorney has right to compel, by subpoena, attendance of witnesses and the production of pertinent books, papers, and documents before a hearing panel. Also, under Rule 216(c), a Disciplinary Administrator in making investigations may issue subpoenas and administer oaths.

Evidence Rules

Rule 211 governs the conduct of formal hearings. Rule 211(a) provides that formal hearings are before three member panels. Rule 211(d) provides that the hearing shall be governed by the Kansas Rules of Civil Procedure as set forth in the Kansas Code of Civil Procedure. Rule 211(f) and supporting Kansas case law requires that a finding of misconduct be established by clear and convincing evidence.

Public or Confidential

Rule 222(a) of the Kansas Court Rules states that all proceedings, reports and records of disciplinary investigations and hearings shall be private and shall not be disclosed to the public except as provided in that Rule. Rule 222(d) states that after a determination of probable cause as provided for in Rule 210(c), all subsequent proceedings are open to the public and press in the same way as a district court proceeding. Rule 216(g) provides that the subpoena and deposition procedures are subject to the confidentiality requirements of Rule 222.

KENTUCKY

Discovery.

The Kentucky Rules of Civil Procedure govern all aspects of discovery in disciplinary procedures in the State (following same nomenclature as the Federal Rules of Civil Procedure).

Subpoenas.

Both Bar Counsel and the respondent have the right to seek subpoenas in disciplinary proceedings; however, the scope and process of such right is somewhat different for each. For respondents, the Rules simply state they shall have the right to subpoenas and subpoenas duces tecum. For Bar Counsel, they must request the Inquiry Commission to issue subpoenas against the respondent or any other person. Upon such a request, the Inquiry Commission will hold a hearing to determine if such subpoena should be issued. The respondent must be given at least five days notice of this hearing. At the hearing Bar Counsel must show good cause for why the subpoena should be issued. If a subpoena duces tecum is issued, Bar Counsel must furnish the respondent with copies of documentary evidence obtained from such subpoena.

Evidence.

The Kentucky Rules of Evidence govern the admissibility of all evidence at disciplinary proceedings.

LOUISIANA

Louisiana has an administrative system of enforcing attorney discipline contained in Rule XIX of the Rules of the Louisiana Supreme Court, which establish an Attorney Discipline Board and an office of Disciplinary Counsel headed by a Chief Disciplinary Counsel.

Discovery

Section 15 of Rule XIX governs discovery. Section 15A provides that within 20 days following the filing an Answer, Disciplinary Counsel and a respondent attorney shall exchange the names and addresses of all persons having knowledge of relevant facts. Section 15A further provides that within 60 days following the filing an Answer, Disciplinary Counsel and a respondent attorney: (1) may take depositions in accordance with the Louisiana Code of Civil Procedure; and (2) shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or attorney and (ii) other material upon good cause shown to the chair of the panel before which the matter pending within 20 days of the request. Disputes to be determined by chair of hearing committee. Discovery orders are interlocutory and may not be appealed prior to entry of final order. Except with regard to depositions and subpoenas and as provided by rules, proceedings are not subject to Louisiana Code of Civil Procedure.

Subpoena Power

Section 14 of Rule XIX governs the subpoena power. Section 14B provides for investigatory subpoenas issued by Disciplinary Counsel. Section 14C provides that after formal charges, disciplinary counsel and a respondent attorney may, in accordance with the Louisiana code of Civil Procedure, compel production of witnesses and documents at depositions and hearings.

Evidence Rules

Section 18 of Rule XIX states that except as otherwise provided in Rule XIX, the Louisiana Code of Civil Procedure and the Louisiana Code of Evidence apply in attorney disciplinary cases. Hearings are conducted by Hearing Committee formed under section 3 of Rule XIX. Section 18C provides that the standard to prove attorney misconduct is clear and convincing evidence.

Public or Confidential

Section 16 of Rule XIX governs confidentiality. Section 16A provides that prior to the filing and service of formal charges, proceedings are confidential unless the

respondent has waived confidentiality. Section 15B provides that after the filing and service of formal charges, the proceedings are public, except for deliberations or for information for which a protective order has been issued.

MAINE

The rules governing disciplinary proceedings in Maine are found at Rule 7 of the Maine Bar Rules.

Discovery.

Rule 7.1 covers disciplinary proceedings before the Grievance Commission and the Board of Overseers of the Bar; Rule 7.2 governs disciplinary proceedings before the Court; and Rule 7.3 covers other provisions, such as for when an attorney is convicted of a crime, resignations and reciprocal discipline.

Rule 7.1 sets forth an administrative procedure triggered by the filing of a disciplinary complaint, review by a panel of the Grievance Commission that either dismisses the complaint or finds probable cause, the filing of a public Petition by Grievance Bar Counsel and Answer, a hearing before a disciplinary panel, a Grievance Commission panel determination that may conclude in a dismissal, a dismissal with a warning, a public reprimand or, if the conduct warrants a suspension or disbarment, a direction to Bar Counsel to file an information, a report by the Grievance Commission panel, objections to the report by the respondent attorney and Bar Counsel and oral argument before an appellate panel of the Grievance Commission. There is no provision for discovery in this administrative procedure.

Rule 7.2 sets forth a formal court procedure is triggered by either an attorney filing a petition for review of a public reprimand or an information filed by Bar Counsel seeking suspension or disbarment. A petition for review of a reprimand may result in a trial if the reviewing court so determines; if ever the court determines there is probable cause for suspension or disbarment, then the court directs Bar Counsel to file an information. Per Rule 7.2(b), in a proceeding commenced by an information, which is called an "attorney discipline action," the Maine Rules of Evidence and the Maine Rules of Civil Procedure (with certain stated exceptions) apply. There is not an automatic right to discovery in an attorney discipline action because under Rule 7.2(b)(2), Rules 26 through 37 of the Maine Rules of Civil Procedure do not apply; however, under that same Rule: (i) Bar Counsel is to provide to the respondent attorney copies of all exhibits presented to the Grievance Commission disciplinary panel or the Board of Overseers in proceedings leading to the information; (ii) discovery under Rules 26 through 37 of the Maine Rules of Civil Procedure may be had upon a showing of good cause to the court and an order of the court; and (iii) the court may in its discretion hold a pretrial conference to consider such issues as may aid in the disposition of the case. As noted below, per Rule 7.2(b)(2), a court disciplinary trial is heard by a justice of the Maine Supreme Judicial Court.

Subpoena Power.

Included in Rule 7.3 is the subpoena power: at any stage of an investigation or formal proceeding, a witness or respondent attorney may be summoned by subpoena to appear before Bar Counsel, the Grievance Commission or Grievance Commission panel, the Board of Overseers or Board panel or the Court. Any member of the Board of Overseers, any member of the Grievance Commission, a notary public or the Clerk of any county Superior Court can issue a subpoena for witnesses or documents. The Rule is not limited as to who may be able to obtain a subpoena, which would mean that a respondent attorney can have a subpoena issued.

Evidence Rules.

In a hearing before a Grievance Commission panel, Rule 7.1 provides that the respondent attorney may cross-examine witnesses and that “[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.” With respect to a hearing on review of a public reprimand, there is not an express statement in the Rule as to evidence rules. In an attorney discipline action, per Rule 7.2(b)(2), a single judge of Supreme Judicial Court of Maine hears the action, and the Maine Rules of Evidence govern trials; and per Rule 7.2(b)(3)&(4), the proceedings are *de novo* and the Grievance Board has the burden of proof by a preponderance of the evidence.

Public or Confidential.

Rule 7.1(d)(2) provides that the initial review by the Grievance Commission of a disciplinary complaint “shall not be open to the public and shall be confidential”; however, Rule 7.1(e)(2)(B) provides that disciplinary proceeding hearing before a Grievance Commission panel is “open to the public,” although possibly subject to protective order, to be issued upon a good cause showing, prohibiting certain disclosures and requiring the hearing to be conducted in such a way so as to implement the protective order. A court disciplinary trial is public like any other court trial.

MARYLAND

Maryland's disciplinary procedures are set forth in the Maryland Court Rules starting at Rule 16-711. Rule 16-711 establishes the Attorney Grievance Commission that oversees the administration of the Maryland disciplinary system, and Rule 16-712 establishes Bar Counsel that performs investigative, prosecutorial, enforcement and administrative duties in the Maryland disciplinary system. The Attorney Grievance Commission has Administrative and Procedural Guidelines that are implementing regulations.

Discovery & Subpoena Power.

After the filing, with Bar Counsel, of a complaint alleging misconduct against an attorney, the Bar Counsel investigates the complaint. Rule 16-732 provides for investigative subpoenas that authorizes the chair of Attorney Grievance Commission to authorize Bar Counsel to issue subpoenas for the compelling the attendance of witnesses for testimony and the production of documents. Rule 16-733 provides that before a petition for disciplinary action is filed, Bar Counsel or an attorney who is or may be the subject of Bar Counsel investigation may perpetuate testimony for the case pursuant to Rule 2-404 which governs perpetuation of evidence in a civil case. Upon completion of the investigation, Rule 16-734 provides that Bar Counsel is to recommend to the Attorney Grievance Commission action that fall in the following range: (a) dismissal of the complaint; (b) a conditional diversion agreement; (c) a reprimand; (d) charges with an election to peer review; and (e) the immediate filing with the Maryland Court of Appeals of a petition for disciplinary action.

The action of filing charges with the election to peer review reflects that Maryland has a peer review system set forth in Rules 16-713 and 16-743. A Peer Review Panel appointed by the Attorney Grievance Commission meets in non-recorded sessions with the respondent attorney, the complainant and Bar Counsel, considers the charges with those participants only and recommends action that is subject to disagreement by Bar Counsel and the respondent.

Rule 16-751 governs the filing of petitions for disciplinary action with the Maryland Court of Appeals. Rule 16-752 provides that upon the filing of a petition for disciplinary action, the Maryland Court of Appeals appoints a judge of a Maryland circuit court to hear the case, and the order of designation shall require the appointed judge, after consulting with Bar Counsel and the respondent attorney, to enter a scheduling order defining the extent of discovery and setting dates for the completion of discovery and the filing of motions and hearing. Rule 16-756 provides that discovery is governed by the

regular rules governing discovery found in Title 2 of the Maryland Court Rules, Rule 2-401 *et seq.* Thus, when it comes to the adjudication of a formal disciplinary case, Maryland has what is a court action with the allowance or discovery, including depositions, in a civil action.

Evidence.

Rule 16-757(a) provides that the hearing of a disciplinary action “is governed by the rules of evidence and procedure applicable to a court trial in a civil action tried in a circuit court.” Rule 16-757(b) provides that burden of proof is on Bar Counsel to prove the averments of the petition by clear and convincing evidence. A respondent has the burden of proof as to an affirmative defense or mitigation by the preponderance of the evidence.

Public or Confidential.

Rule 16-723 provides that peer review meetings, investigation records, peer review panel records and proceedings, information subject to a confidential order, contents of a warning issued by Bar Counsel pursuant to Rule 16-735 and a pre-2001 private reprimand, the contents of a Conditional Diversion Agreement are to be kept confidential. Rule 16-723 also provides that certain records and proceedings are to be public: a petition for disciplinary or remedial action, all proceedings and evidence admitted in evidence at any hearing on a petition for disciplinary or remedial action, an affidavit that consents to discipline, a reprimand issued by the Attorney Grievance Commission and disciplinary proceedings in the Court of Appeals.

MASSACHUSETTS

The Massachusetts disciplinary system is contained in Rule 4.01, “Bar Discipline,” of the Massachusetts Supreme Judicial Court.

Discovery.

Sections 5, 6 and 7 of Rule 4.01 of the Rules of the Massachusetts Supreme Judicial Court establish, respectively, a Board of Bar Overseers, Hearing Committees, and Bar Counsel to handle attorney disciplinary cases. An attorney grievance is first subjected to an investigation by Bar Counsel who may recommend closing the grievance, imposing an admonition, instituting formal proceedings or imposing formal discipline by agreement. A formal proceeding is instituted by Bar Counsel filing a Petition with the Board of Bar Overseers, the respondent attorney is then to file an Answer, after which a hearing is held at which the respondent may be represented by counsel, present evidence and cross-examine witnesses. The provision for discovery that effectively exists is in section 22 granting subpoena power.

Subpoena Power.

Section 22 of Rule 4.01 states that upon request by Bar Counsel or a respondent-lawyer for testimony or production of evidence at a hearing, witnesses may be summoned by subpoena issued at the direction of a Board member, hearing committee chair or special hearing officer. Section of Rule 4.01 also states that upon request of Bar Counsel, at any stage of an investigation, witnesses may be summoned by subpoena issued by a Board member, hearing committee chair or special hearing officer. Also, section 22 provides that testimony may be taken outside Massachusetts by a hearing committee, special hearing officer or hearing panel and that where appropriate, testimony may be taken within or outside Massachusetts by deposition or by Commission.

Evidence Rules.

There is no provision in section 8 or any other section of Rule 4.01 for the applicability of any rules of evidence in hearings held in formal proceedings.

Public or Confidential.

Section 20 of Rule 4.01 governs confidentiality and public proceedings. Section 20(1) requires that except for a Court order providing differently and for required disclosures to the Court, the Board and Bar Counsel keep confidential all information involving allegations of misconduct by a lawyer until the earliest of the submission of a resignation, the submission of a recommendation formal discipline be imposed or

submission upon a respondent attorney of a petition for discipline instituting formal charges. Section 20(2) provides that notwithstanding subsection (1), the Board or Bar Counsel may disclose the pendency, subject matter and status of an investigation if the respondent attorney has formally waived confidentiality or made the matter public, the investigation is predicated upon the conviction of the respondent attorney for a serious crime, the investigation is based on allegations that have become generally known or there is a need to notify another person or organization in order to protect the public, the administration of justice or the legal profession. Upon the submission of a resignation, the submission of a recommendation formal discipline be imposed or submission upon a respondent attorney of a petition for discipline instituting formal charges, the proceedings are open to the public except for deliberations of the hearing committee, information subject to a protective order or further proceedings following the recommendation of the hearing committee, special hearings officer, a hearing panel, an appeal panel or an order of the Board or a court that an admonition be imposed or that the petition for discipline be dismissed.

MICHIGAN

Michigan disciplinary proceedings are governed by Chapter 9 of the Michigan Court Rules of 1985. The rules governing practice in a non-jury civil action apply to proceedings before hearing panels.

Discovery.

Discovery in disciplinary proceedings in Michigan is not allowed except for the following:

First, within 21 days of the service of a formal complaint on the respondent attorney, either party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection and copying. Such documents must be made available within 14 days after such demand. Subsequently discovered documentary evidence that is to be introduced at the hearing by either party must be supplied to the other party no later than 14 days prior to the hearing. Documents not so supplied will not be admissible at the hearing unless the offering party can show good cause.

Second, within 21 days of the service of a formal complaint on the respondent attorney, either party may demand in writing that the opposing party make initial disclosures of all witnesses to be called at the hearing. The other party must make such disclosures within 14 days after such a request is made, and the other party must provide all statements given by such witnesses except for those statements that are privileged or protected as work product. Subsequent notifications must be made by both parties within seven days after supplemental witnesses are identified. If such identification of subsequent witnesses occurs within the 14 days before a scheduled hearing, then the identifying party must immediately disclose and must immediately provide any statements given by such witnesses to the opposing party.

Depositions may only be taken of witnesses who live outside of Michigan or who are physically unable to attend the hearing. Good cause must be shown before any other person may be deposed by either party.

Upon request by either party, the hearing panel can order a pre-hearing conference to obtain party admissions and narrow the issues to be presented at the hearing.

Subpoenas.

Both parties may request the issuance of subpoenas and subpoenas *duces tecum* from the Attorney Grievance Commission. Subpoenas for the appearance of witnesses or

the production of documents are available to the commission after a request for investigation has been served upon the respondent.

Evidence.

The admissibility of evidence at a disciplinary hearing is controlled by the Michigan Rules of Evidence for civil actions in the circuit courts of the State.

MINNESOTA

Minnesota has a partly administrative and partly court attorney disciplinary system that is found in the Minnesota Rules on Lawyers Professional Responsibility (the “Rules”). The Rules set up a District Ethics Committee for the investigation of ethics complaints and a Lawyers Professional Responsibility Board (i) that has general supervisory responsibility authority over the Office of Lawyers Professional Responsibility and (ii) that is divided into panels to hear whether there is probable cause for the Director of the Office of Lawyers Professional Responsibility to file, under Rule 12, a formal Petition for Disciplinary Action with the Minnesota Supreme Court.

Discovery

Under Rule 9(c), before a probable cause hearing and before the pre-hearing meeting or within 10 days thereafter, either party may serve upon the other a request for admission. The Minnesota Rules of Civil Procedure for Minnesota District Courts govern as to requests for admission, except 10 days is the time for answers or objections, with Panel Chair or Vice-Chair to rule upon objections.

Under Rule 9(d), before a probable cause hearing and before the pre-hearing meeting or within 10 days thereafter, either party may take a deposition as provided by the Minnesota Rules of Civil Procedure, with the District Court of Ramsey County having jurisdiction over issuing of subpoenas and over motions arising from the deposition.

Under Rule 9(e), at the pre-hearing meeting for the probable cause hearing, the parties are to endeavor to formulate stipulations of fact, each party is to mark and provide the other side a copy of each affidavit or exhibit to be introduced at the panel hearing (no additional exhibit may be received without the opposing party’s consent) and the parties are to prepare a pre-hearing statement.

Subpoena Power

Rule 9 (h) provides, at the stage leading up to a probable cause hearing, that the District Court of Ramsey County shall have jurisdiction over issuance of subpoenas. Rule 14(c) provides, at the stage leading up to the hearing on a Formal Petition for Disciplinary Action, for the availability of subpoenas to both parties, with jurisdiction over subpoenas vested in District Court of Ramsey County.

Evidence Rules

Rule 9 sets forth a initial administrative probable cause hearing held before a hearing panel, except where, as provided in Rule 9(g), the Panel Chair and the Lawyers Professional Responsibility certify to the Court that extraordinary circumstances indicate that the matter is not suitable for submission to a panel. Then, because of exceptional complexity or other reasons, the Court may appoint a referee to conduct a probable cause hearing with the powers of a district court judge or the Court may direct the Director of the Office of Lawyers Professional Responsibility to file, under Rule 12, a formal Petition for Disciplinary Action with the Court. Under Rule 9(h), the probable cause hearing takes evidence only in the form of affidavits, depositions and testimony by the lawyer, a complainant and a witness whose testimony is authorized for good cause provides for submission of matter to a hearing panel. Testimony is subject to cross-examination and the Minnesota Rules of Evidence.

After the filing with the Minnesota Supreme Court of a formal Petition for Disciplinary Action under Rule 12 and an Answer under Rule 13, a hearing is held. Under Rule 14, the Court may appoint a referee to hear and report; and unless the Court directs otherwise, hearings are conducted in accordance with the Minnesota Rules of Civil Procedure.

Public or Confidential

Rule 20 governs confidentiality. The general rule in Rule 20(a) is that the files, records and proceedings of the District Committees, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility relating to a complaint of attorney misconduct shall be confidential until a probable cause determination has been made under Rule 9 or court proceedings have been instituted. Rule 20(d) provides that proceedings before referee or the Court are not confidential, unless otherwise ordered.

MISSISSIPPI

Discovery.

The Rules of Discipline for the Mississippi State Bar are mostly silent as to what discovery tools are available to respondent attorneys. The Office of the General Counsel for the Mississippi Bar Association stated that, in practice, the Mississippi Rules of Civil Procedure are applicable in disciplinary proceedings and respondent attorneys have access to all traditional discovery tools (Mississippi's Rules of Civil Procedure follow the same nomenclature as the Federal Rules of Civil Procedure). However, the Rules limit the duration of discovery in that all discovery, motions practice, and trials must be completed within 180 days of the complaint tribunal being assigned.

Subpoenas.

Before a subpoena can be issued to either party in a disciplinary proceeding in Mississippi, approval is required from the Chair of the Committee on Professional Responsibility or from a majority of the members of the Committee.

Evidence.

The Mississippi Rules are also silent as to whether the State's Rules of Evidence apply to disciplinary proceedings; however, the Office of General Counsel confirmed that the Rules of Evidence are adhered to.

MISSOURI

The Missouri disciplinary process is an administrative system set forth in Rule 5 of the Missouri Supreme Court. Rules 5.01 through 5.06 set up an Advisory Committee, Regional Disciplinary Committees, Disciplinary Hearing Panels and Chief Disciplinary Counsel to handle attorney misconduct complaints.

Discovery

Rule 5.15 provides that discovery is limited to requests for production of documents, requests for admissions, and depositions and shall be completed within the time limits set for the commencement of the hearing after the filing of the information. Rule 5.15 further provides that discovery disputes are to be resolved by the presiding officer of the hearing panel.

Subpoena Power

Rule 5.09 provides that for investigations, chief disciplinary counsel, disciplinary hearing panel or a Committee or division conducting an investigation may issue subpoenas for documents and for witnesses to testify before the disciplinary counsel, panel, division or committee.

Evidence Rules

Rule 5.15 governs the conduct of the hearing. Rule 5.15(c) provides that hearings are to be conducted according to rules of the Missouri Supreme Court, that rules of evidence for trials in the circuit courts shall apply and that the burden of proof is on the proponent of the information to establish attorney misconduct by a preponderance of the evidence.

Rule 5.22 provides for trial and disposition of an information filed directly with the Missouri Supreme Court without a hearing before a disciplinary hearing panel. If the case is tried by the Court, it is tried without a jury and shall be governed by the law of evidence applicable to civil proceedings. If the case is tried by a master, it shall be tried in accordance with the rules of the Missouri Supreme Court for non-jury cases.

Public or Confidential

Rule 5.31(a) provides that an information filed with the Missouri Supreme Court and all materials related to it are public unless otherwise ordered by the Supreme Court. The records of proceedings prior to the issuance of an admonition or the filing of a

decision of a disciplinary hearing panel are not to be made public unless the Court so orders otherwise.

MONTANA

Montana's disciplinary process is contained in Rules for Lawyer Disciplinary Enforcement, which set up an administrative system of disciplinary enforcement with a Commission on Practice ("COP") and Office of Disciplinary Counsel ("ODC") under the direct supervision of the Montana Supreme Court. Rule 2 of the Rules for Lawyer Disciplinary Enforcement imposes on the OPC the responsibility of establishing review panels and adjudicatory panels. Rule 5 makes the ODC responsible for among other things investigation and prosecution of cases.

Discovery & Subpoena Power.

Rule 22(A) provides that the Montana Rules of Civil Procedure apply to formal disciplinary proceedings. Rule 19(D) provides that the Disciplinary Counsel and the respondent attorney are entitled to reciprocal discipline. Rule 1(C) provides that subpoenas may be issued by the COP at the request of Disciplinary Counsel or the respondent attorney to compel testimony and produce documents.

Evidence Rules.

Rule 12(C)(2) provides that the Montana Rules of Evidence apply to formal disciplinary proceedings. Rule 22(B) and (C) provides that the ODC has the burden of proving misconduct clear and convincing evidence.

Confidentiality.

Rule 20(A) provides that prior to the filing of a formal complaint, disciplinary proceedings are confidential unless the respondent attorney has waived confidentiality. Rule 20(B) provides that after the filing of a formal complaint, disciplinary proceedings are public.

NEBRASKA

Sections 3-301 through 328 of the Nebraska Supreme Court Rules contain the attorney disciplinary procedures. Nebraska has a court system in which formal proceedings are instituted under section 3-310(C) by Counsel for Discipline by filing a Formal Charge with the Nebraska Supreme Court as an original proceeding. Upon the filing of an Answer raising an issue of fact, the Court under section 3310(J) refers the case to a referee.

Discovery

Under section 3-310(J), the referee has the same power as a referee in a civil action in Nebraska and shall observe the rules of evidence, discovery rules and motion practice as applicable in the state district courts of Nebraska.

Subpoena Power

Section 3-317(A) provides that Counsel for Discipline are authorized to issue subpoenas for witness testimony and production of documents. Section 3-317(C) provides that the respondent attorney has the right to request a referee for issuance of subpoena prior to ten days of any hearing.

Evidence Rules

Section 3-310(J) provides that the referee shall observe the same rules as are applicable in a civil action in the state district courts of Nebraska and that the standard of proof is clear and convincing evidence.

Public or Confidential

Section 3-318 governs publicity of proceedings. Hearings, records or proceedings of the Counsel for Discipline, the Committee on Inquiry and the Disciplinary Review board are confidential except under certain specific conditions. A respondent attorney may waive confidentiality. Specific conditions apply with regard to various disciplinary pleadings filed in the Supreme Court -- Formal Charges are a matter of public record.

NEVADA

Nevada's disciplinary process is contained in the Rules of the Supreme Court of Nevada. Rule 103 provides that the Board of Governors of the State Bar of Nevada shall appoint disciplinary boards and hearing panels. Rule 104 establishes Bar Counsel who among other things investigate grievances and prosecute formal complaints. Rule 105 sets forth the procedures for handling of cases. Rule 105(2) states the procedures for formal proceedings that are commenced by the Bar Counsel filing a written complaint in the name of the State Bar, and a hearing panel is appointed to hear the case (with a procedure for challenging appointments to the panel).

Discovery & Subpoena Power.

Rule 105(2)(c) states that hearing shall be held within 45 days after assignment of the hearing panel and 30 days after bar Counsel gives notice of the hearing date that is to be accompanied by a summary of the evidence against the respondent attorney and a list of witnesses that Bar Counsel intends to call at the hearing. Rule 110 provides for subpoena powers: Bar Counsel and hearing panel members may issue subpoenas; and the respondent attorney may obtain a subpoena to compel witnesses and production of documents for the hearing. While Rule 119(3) provides that unless otherwise provided, the Nevada Rules of Civil Procedure apply, the short time period for a hearing after assignment of a panel gives little time for discovery, and there are no express provisions for discovery in any of the Rules. In contrast, Rule 109(1) and (2) state that the service of a complaint and other papers are governed by the Nevada Rules of Civil Procedure.

Evidence Rules.

Rule 105(e) provides that the rules applicable to the admission of evidence in the district courts of Nevada also apply to a hearing before a hearing panel and that the findings of the hearing panel must be supported by clear and convincing evidence.

Public or Confidential.

Rule 121 provides that all proceedings and records in a disciplinary case are confidential until the filing of a formal complaint.

NEW HAMPSHIRE

The New Hampshire disciplinary system is contained in Rule 37 of the Rules of the Supreme Court of New Hampshire.

Discovery.

Rule 37 of the Rules of the Supreme Court of New Hampshire sets forth the structure of the disciplinary system in New Hampshire featuring a professional conduct committee, a hearings committee, a complaint screening committee and the attorney discipline office. The professional conduct committee has the overall responsibility for the actions of the disciplinary system subject to appeal to the New Hampshire Supreme Court. Panels of the Hearings Committee conduct hearings.

Rule 37(8) of the Rules of the Supreme Court of New Hampshire provides that at any stage of proceedings before a Hearings Committee panel or in preparation for a hearing before a Hearings Committee panel, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys themselves may conduct discovery, including interrogatories and depositions. This provision, however, appears to be modified by Rule 37A(III), which governs formal proceedings. Rule 37A(III)(b)(5)(A) provides for discovery by a disciplinary counsel and a respondent once an Answer to Charges is filed. Rule 37A(III)(b)(5)(B) identifies discoverable matter. Rule 37A(III)(b)(5)(D) allows for depositions to preserve testimony, requiring any other deposition to be requested by counsel at a pre-trial conference. Rule 37A(III)(b)(5)(F) provides that the failure to produce discoverable information may be excluded from trial.

Subpoena Power.

Rule 37(8) of the Rules of the Supreme Court of New Hampshire provides that at any stage of proceedings before a Hearings Committee panel or in preparation for a hearing before a Hearings Committee panel, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys themselves may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents.

Evidence Rules.

Rule 37(4)(c)(2) states that the Hearings Committee is to conduct hearings in conformance with Rule 37A of the Rules of the Supreme Court of New Hampshire, and Rule 37(4)(c)(3) charges the Hearings Committee with making all findings by the clear and convincing evidence. Rules 37A(III)(c)(1) of the Rules of the Supreme Court of New Hampshire provides for public hearings, and Rule 37A(III)(c)(6) provides that the hearing panel may receive all evidence deemed to be relevant, competent and not

privileged in order to reach a just and proper determination and that formal rules of evidence do not apply.

Public or Confidential.

As just noted, Rules 37A(III)(c)(1) of the Rules of the Supreme Court of New Hampshire provides for public hearings before the Hearings Committee. In addition, there are provisions for the availability to the public of records and materials (other than work product, internal memoranda and deliberations) relating to a disciplinary case. Rule 37(20)(a)(2) provides that all records and materials (other than work product, internal memoranda and deliberations) relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing are open to the public in accordance with Rule 37A. Rule 37(20)(b) provides that all records and materials (other than work product, internal memoranda and deliberations) relating to a docketed complaint are open to the public in accordance with Rule 37A upon the earliest of either (1) the disposition of a complaint not going to charges, (2) issuance of notice of charges, (3) the filing of a petition with the supreme court, or (4) the respondent attorney requests the matter be public. Also open to the public are records and materials (other than work product, internal memoranda and deliberations) relating to a proceeding for reinstatement or a proceeding based upon a criminal conviction or reciprocal discipline. The exception to the provisions for opening records to the public relate to proceedings involving allegations of disability of an attorney.

NEW JERSEY

New Jersey's disciplinary procedures are contained in provisions of Rule 1:20 of the New Jersey Supreme Court. Under Rule 1:20, the New Jersey Supreme Court establishes district ethics committees to administer disciplinary functions and an Office of Attorney Ethics to manage all district ethics committees. A disciplinary matter proceeds before a District Ethics Committee with either the Office of Attorney Ethics or a District Ethics Committee member serving as prosecutor.

Discovery & Subpoena Power.

Rule 1:20(g) provides for investigations of grievance complaints against attorneys. Rule 1:20(g)(6) provides for the issuance, in the name of New Jersey Supreme Court, of investigative subpoenas pursuant to the subpoena power in disciplinary cases that is contained in Rule 1:20-7(i). No provision is expressly made for an attorney initiating discovery during investigations.

For cases that have progressed to formal proceedings, Rule 1:20-5(a) provides for discovery. Rule 1:20-5(a)(1) provides that "[d]iscovery shall be available to the presenter [prosecutor]. Discovery shall also be available to the respondent, provided that a verified answer in compliance with R. 1:20-4(e) has been filed." Rule 1:20-5(a)(2) defines the scope of discovery as relevant information in the possession, custody or control of the presenter, respondent or counsel and states that it is subject to discovery; included in the listed items for production for copying are written statements, physical and mental reports, scientific tests, witness information, police and investigative reports, and expert information. Rule 1:20-5(a)(4) defines the discovery not permitted: written interrogatories, requests for admissions and oral depositions except to preserve testimony of a person likely to be unavailable to testify at trial. Thus, while Rule 1:20-5 begins by seemingly providing for wide discovery, the Rule then limits what discovery that is actually available, amounting to production of certain kinds of documents and reports.

Rule 1:20-7(i) provides for the subpoena power for investigation and the hearing. Rule 1:20-7(i)(2) does provide for subpoenas to be issued in the name of the New Jersey Supreme Court for the production of books, records, documents or other items. Such subpoenas may be signed by a hearing panel member, special ethics master or the Disciplinary Review Board.

Evidence.

Rule 1:20-6 governs hearings. According to Rule 1:20-6(a), hearings are before hearing panels of three members. Rule 1:20-6(c)(2)(B) provides that charges of unethical conduct shall be established by clear and convincing evidence. Rule 1:20-6(c)(2)(C)

provides that the burden of proof in seeking discipline or showing aggravating factors relevant to unethical conduct is on the presenter (prosecutor). Rule 1:20-6(c)(2)(F) makes all hearings public. There is not, however, an express provision in Rule 1:20 for the application of any rules of evidence or any standard for the admissibility of evidence.

Public or Confidential.

Rule 1:20-9(a) provides that prior to the filing of a complaint in a disciplinary matter, or a motion for reciprocal discipline or the approval of a motion for discipline by consent, the disciplinary matter and all written records gathered and made shall be kept confidential, except that the pendency, subject matter and status of a grievance may be disclosed if the respondent attorney has waived or breached confidentiality, the proceeding is based upon allegations of reciprocal discipline or a pending criminal charge or a guilty plea or conviction of a crime, there is good cause to notify another person or organization such as the Lawyers' Fund for Client Protection, the Supreme Court has granted an emergent disciplinary application for relief or the matter has become common knowledge to the public. Rule 1:20-9(b) provides that a for grievance pending on or filed after October 19, 2005, the grievant may make a public statement regarding the disciplinary process and the grievance and that if the grievant makes a statement, the respondent may reply publicly. Rule 1:20-9(c) provides that all proceedings shall be public except as provided in Rule 1:20-9(a), prehearing conferences, deliberations of the trier of fact, Board or Supreme Court, information subject to a protective order or proceedings alleging a disability. Rule 1:20-9(d)(1) provides that subject to Rules 1:20-9(a) and 1:20-9(c), documents and records shall be available for public inspection and copying. Rule 1:20-9(d)(3) provides that there shall be no private discipline and that private admonitions issued prior to the effective date of this rule shall remain confidential.

NEW MEXICO

New Mexico has an administrative system of attorney discipline found in the New Mexico State Court Rules - Rules Governing Discipline, which have a Disciplinary Board providing evidentiary hearing panels and Disciplinary Counsel prosecuting cases brought to hearing.

Discovery

Rule 17-301 provides that unless clearly inconsistent inapplicable or otherwise provided in the Rules, the New Mexico Rules of Civil Procedure apply to formal disciplinary proceedings. Rule 17-311 provides that a party may apply to the chair of the hearing committee for permission to conduct discovery prior to a formal hearing and that upon a showing of good cause, the chair may permit discovery upon such terms as may be appropriate under the circumstances. Rule 17-312 also provides for a pre-hearing conference where stipulations of fact are encouraged and requires that witnesses be disclosed.

Subpoena Power

Rule 17-306 provides subpoena authority. Rule 17-306A provides, among other things, that the chair of the Disciplinary Board may issue subpoenas at any stage of the investigation to the respondent attorney or any other witness. Rule 17-306B provides that at the stage of formal disciplinary proceedings, the chair of the hearing committee may issue a subpoena at the request of either the respondent attorney or the disciplinary hearing compelling the attendance of a witness for deposition authorized under Rule 17-311 and, if so authorized, compel the production of documents or compelling the attendance of a witness at a formal hearing and produce documents at that hearing. A subpoena must state the reason or purpose of the investigation or hearing.

Evidence Rules

Rule 17-302 provides that in formal hearings, a hearing committee shall only consider only evidence as would be admissible in the trial of a civil case although it may consider evidence considered to be cogent and credible in the exercise of sound judicial discretion.

Public or Confidential

Rule 17-304A provides that investigations, including investigatory hearings, are to be held “entirely confidential” but that the filing of formal specification of charges with the Disciplinary Board are a matter of public record. Rule 17-301B provides that the respondent attorney may waive confidentiality. Rule 17-304G provides that hearings before a hearing committee or Disciplinary Board are open to the public.

NEW YORK

In New York, attorney disciplinary is governed by Judiciary Law § 90 and separate rules of the four Judicial Departments of the Appellate Division. Each Department needs to be separately discussed.

New York: First Judicial Department.

The disciplinary procedures of the First Department are found at Part 605, Rules and Procedures of the Departmental Disciplinary Committee for the First Department, Section 605 *et seq.*, of the First Department Rules.

Discovery.

Section 605.17b of the Rules and Procedures of the Departmental Disciplinary Committee for the First Department provides that where there is good cause to believe that the testimony of a witness will be unavailable at the time of hearing, testimony may be taken by deposition initiated and conducted in accordance with the taking of depositions in the New York Civil Practice Law and Rules and that subsequent use of such depositions shall be in accordance with use of depositions under the New York Civil Practice Law and Rules. There is no rule providing for depositions generally, or in other situations or on other grounds. As a matter of practice not stated in any formal rule, “*Brady* material” is disclosed to respondent counsel by the Disciplinary Committee Counsel’s Office.

Subpoena Power.

Section 605.17a of the Rules and Procedures of the Departmental Disciplinary Committee for the First Department provides that both Staff Counsel and respondent have the right to summons witnesses and require production of documents by issuance of subpoenas in accordance with the rules of the Court.

Evidence Rules.

Section 605.13 the Rules and Procedures of the Departmental Disciplinary Committee for the First Department governs the conduct of referee proceedings. Staff Counsel and respondent have the right to present evidence, cross-examine, object, make motions and argue. All evidence that the referee deems relevant, competent and not privileged shall be admissible in accordance with making a just and proper determination.

Public or Confidential.

New York Judiciary Law § 90(10) provides that “[a]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. . . .Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.” Additionally, Section 605.24(a) of the First Department Rules provides that Disciplinary Committee members, Disciplinary Committee lawyers, Disciplinary Committee employees and all other individuals associated or affiliated with the Disciplinary Committee shall keep Disciplinary Committee matters confidential in accordance with applicable law. Section 605.24(b) further provides that upon the written waiver of confidentiality by any respondent, all participants shall thereafter hold the matter confidential to the extent required by the terms of the waiver. There are no First Judicial Department’s Rules that provide for referee hearings and Hearing Panel proceedings to be open to the public, and the wording of Section 605.24 reflects the orientation to confidential proceedings until an Appellate Division decision sustaining charges.

New York: Second Judicial Department.

The disciplinary procedures of the Second Department are found at Part 691, Conduct of Attorneys, Sections 691.1 *et seq.* of the Second Department Rules. Section 691.4 provides for the appointment of Grievance Committees to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Second Judicial Department.

Discovery and Subpoena Power.

There is a provision for discovery during the investigation before formal proceedings in the subpoena power. Section 691.5 of the Rules and Procedures of the Second Department provides that in the event there is an investigation (which precedes formal disciplinary proceedings), upon application of the chairman of or counsel to a Grievance Committee conducting such investigation or application of an attorney under such investigation, the Clerk of the Second Department may issue subpoenas in the name

of the Presiding Justice for the attendance of witnesses and the production of documents before a Grievance Committee or counsel to the Grievance Committee or a subcommittee of a Grievance Committee. There is not an express provision for depositions (unlike when there are formal proceedings), but the language “attendance of witnesses” arguably permits the taking of such depositions.

Section 691.5-a of the Rules and Procedures of the Second Department contains provisions relating to discovery in the event that formal proceedings are instituted. Section 691.5-a(a) provides for subpoena power to compel witnesses and produce documents for the hearing: upon application of the petitioner or respondent attorney, the Clerk of the Second Department may issue subpoenas for the attendance of witnesses and the production of documents before the referee, justice or judge designated by the court to hear the issues raised in the proceedings. Section 691.5-a(b) also states that where there is good cause to believe that a potential witness will be unavailable at the time of a hearing, the testimony of the witness may be taken by deposition in accordance with article 31 of the CPLR. There is not an express provision for a deposition of a witness once there is a formal proceedings other than to preserve testimony of a witness where there is good faith belief the witness will be unavailable for the hearing.

Evidence Rules.

Section 691.4(f) of the Second Department provides that the Grievance Committee or subcommittee thereof “shall decide all questions of evidence.”

Public or Confidential.

New York Judiciary Law § 90(10) provides that “[a]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. . . .Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.”” Additionally, Section 691.4(j) of the Second Department provides that unless otherwise ordered by the Second Department, all proceedings conducted by a grievance committee shall be sealed and deemed private and confidential.

New York: Third Judicial Department.

The disciplinary procedures of the Third Department are found in Part 806, Conduct of Attorneys, Section 806.1 *et seq.* of the Third Department Rules. Section 806.3 provides for the appointment of a Committee on Professional Standards to, among other things, consider and cause to be investigated matters involving misconduct by attorneys in the Third Judicial Department.

Discovery & Subpoena Power.

Section 806.1(b) provides for a deposition of an attorney under investigation, but does not contain any provision for the deposition of other persons. Section 806.4(e) provides for subpoenas to be issued “[i]f it appears that the examination of any person is necessary for a proper determination of the complaint,” the chief attorney for the Committee or the attorney under investigation may apply to the Clerk of the third Department for the issuance of subpoenas for the attendance of witnesses and production of documents. The subpoena issued by the Clerk will state where the subpoena is returnable at a time and place before the chief attorney or a member of the Committee.

Evidence Rules.

Section 806.4(c) provides that the Committee on Professional Standards may after investigation take a number of steps, including formal proceedings against the attorney. The Rules of the Third Department do not contain provisions for the conduct of a hearing.

Public or Confidential.

New York Judiciary Law § 90(10) provides that “[a]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. . . . Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.” The Rules of the Third Department do not appear to contain additional provisions with respect to confidentiality.

New York: Fourth Judicial Department.

The disciplinary procedures of the Fourth Department are found in Part 1022, Sections 1022.17-1022.28 of the Fourth Department Rules. Section 1022.19(a)(1) provides for the appointment of an attorney grievance committee structure.

Discovery & Subpoena Power.

Section 1022.19(d)(1)(iii) provides for the “legal staff” of the Attorney Grievance Committee to direct the subject of a complaint to appear for a deposition; and section 1022.19(d)(1)(iv) provides that when it appears the examination of any person necessary for a proper determination of the validity of a complaint, the “chief attorney” may apply to the Clerk of the Appellate Division for a judicial subpoena to compel a deposition and document production, and the subpoena may be returnable before the chief attorney or staff attorney at a time and place specified in the subpoena.

Evidence Rules.

Section 1022.20 provides for formal disciplinary proceedings that when fact issues are raised are referred to a Supreme Court justice or referee, but the Rules of the Fourth Department do not contain provisions for the conduct of the hearing itself.

Public or Confidential.

New York Judiciary Law § 90(10) provides that “[a]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. . . . Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.”” Additionally, the Rules of the Fourth Department do not appear to contain provisions with respect to confidentiality.

NORTH CAROLINA

Discovery.

Formal disciplinary proceedings in North Carolina occur before a hearing committee within 90 to 150 days after the attorney receives service of the complaint. During this time, both parties may undertake discovery in accordance with the North Carolina Rules of Civil Procedure (following same nomenclature as the Federal Rules of Civil Procedure). Any discovery undertaken must be completed before the date scheduled for the hearing unless the time for discovery is extended for good cause shown by the chair of the hearing committee.

In addition, the parties may meet during discovery to stipulate as to any facts, issues, or rules of law. And, upon request of one of the parties, the committee, at their discretion, may require a preliminary conference amongst the parties for obtaining admissions and narrowing the issues.

Subpoenas.

Both parties are entitled to subpoenas and subpoenas *duces tecum* of books, papers and other documents deemed necessary or material to any hearing. Subpoenas are issued to the parties by the committee.

Evidence.

Admissibility of evidence at the formal hearing is governed by the North Carolina Rules of Evidence.

NORTH DAKOTA

North Dakota has an administrative attorney disciplinary system found in the North Dakota Rules for Lawyer Discipline in the North Dakota Supreme Court Rules. Rule 2.3 of the North Dakota Rules for Lawyer Discipline sets up hearing panels from the State Disciplinary Board to conduct hearings. Rule 2.4 of the North Dakota Rules for Lawyer Discipline sets up District Inquiry Committees to review investigation reports and recommendations and act on each complaint. Rule 2.5 of the North Dakota Rules for Lawyer Discipline establishes the powers and duties of Disciplinary Counsel. Rule 3.1 provides for court review of the Disciplinary Board's findings and recommendations with objections involving briefing and oral argument handled in accordance with the North Dakota Rules of Appellate Procedure.

Discovery

Rule 3.5(C) of the North Dakota Rules for Lawyer Discipline provides that for sixty days following service of a petition in formal proceedings, disciplinary counsel and the respondent attorney are entitled to reciprocal discovery pursuant to North Dakota Rules of Civil Procedure of all non-privileged matters. Rule 3.5(C) further provides that the hearing panel chair may extend the period of discovery, that disputes concerning the scope and other aspects of discovery to be determined by hearing panel and that discovery orders are interlocutory and may not be appealed prior to entry of final order.

Subpoena Power

Rule 3.5(B) of the North Dakota Rules for Lawyer Discipline provides that Rule 45 of the North Dakota Rules of Civil Procedure are applicable to authorize a disciplinary counsel to compel witnesses and production of books, papers and documents before any hearing. May compel attendance of witnesses and the production of documents Rule 3.5(B) provides that Rule 45 of the North Dakota Rules of Civil Procedure are applicable to authorize a lawyer to compel witnesses to give testimony and production of books, papers and documents before any hearing after formal disciplinary proceedings are instituted.

Evidence Rules

Rule 3.5(A) of the North Dakota Rules for Lawyer Discipline provides that the North Dakota Rules of Evidence and North Dakota Rule of civil Procedure apply in disciplinary cases. Rule 3.5(B) of the North Dakota Rules for Lawyer Discipline provides that the standard of proof is clear and convincing evidence. Rule 3.5(B) of the North Dakota Rules for Lawyer Discipline provides that Disciplinary Counsel has the burden of proof in proceedings seeking discipline.

Public or Confidential

Rule 3.5(B) provides that subpoenas issued in an investigation are to indicate on their face that they are issued in connection with a confidential investigation. Rule 6.1(A) provides that pre-petition proceedings are confidential unless the lawyer has waived confidentiality or the accusations are based on a crime. Rule 6.1(A) provides that post-petition proceedings are public, excepting deliberations of a panel, board or court, information for which protective order issued, and work product of counsel, hearing panels, inquiry committees and the board.

OHIO

Ohio's disciplinary procedures are contained in Rule V and Appendix II of the Rules of the Ohio Supreme Court. Rule V establishes a Board of Commissioners on Grievances and Discipline of the Supreme Court consisting of 17 practicing attorneys, 7 active or retired judges and 4 non-lawyers. The Board of Commissioners on Grievances and Discipline of the Supreme Court has exclusive jurisdiction over grievances alleging misconduct by attorneys and judges.

Discovery.

Procedures and requirements for disciplinary complaints, discovery and disciplinary hearings are stated in Appendix II to the Rules of the Ohio Supreme Court. Section 3(A) of Appendix II states that "the Board and hearing panels shall follow the Ohio Rules of Civil Procedure wherever practicable unless a specific provision of Gov. Bar R. V. provides otherwise." The Ohio Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure and thus provide for discovery in accordance with its provisions, including depositions, found at Rules 26 through 37 of the Ohio Rules of Civil Procedure. Section 3(B) of Appendix II expressly states that "[d]epositions taken in Gov. Bar R. V. proceedings shall be filed with the Secretary as Rule 32 of the Ohio Rules of Civil Procedure prescribes." Also, Rule 11(A)(1) of Rule V provides that the Board and hearing panels shall follow the Ohio Rules of Civil Procedure wherever practicable unless there is a contrary provision in Rule V (there does not appear to be).

The Ohio disciplinary system is established in Rule V of the Rules of the Ohio Supreme Court. It is an administrative system, and Rule V itself makes only oblique reference to discovery. Ohio's disciplinary system starts with a grievance that is investigated either by Disciplinary Counsel or a Certified Grievance Committee; by one of them, either there is a dismissal of the grievance or a finding of substantial credible evidence of misconduct, in which case a complaint is drafted that has attached sufficient investigatory material to demonstrate probable cause, including "depositions," the response of the respondent attorney, investigation reports and statements. This assumes, then, that at least Disciplinary Counsel or a Certified Grievance Committee or a Special Investigator can take depositions in the pre-probable cause stage of the proceeding, which is reinforced by the provisions governing subpoenas in Rule 7(A) of Appendix II to the Rules of the Ohio Supreme Court. The disciplinary case then proceeds to a probable cause review by the Probable Cause Panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court. If no probable cause is found, the complaint is dismissed. If probable cause is found, the complaint becomes public and an answer is demanded of the respondent attorney. If the respondent attorney answers, a disciplinary hearing is to be held before a three-person panel of the Board of Commissioners on

Grievances and Discipline of the Supreme Court. Before that hearing, however, once the answer is filed, the respondent attorney should be able to seek discovery, including the taking of depositions, given the applicability of the Ohio Rules of Civil Procedure and the subpoena provisions of section 7(A) of Appendix II to the Rules of the Ohio Supreme Court. The hearing is then held and the panel, after the hearing, makes findings and a recommendation to the full Board as to whether a violation occurred and what is the appropriate sanction. The full Board then makes a report and recommendation to the Ohio Supreme Court. The Ohio Supreme Court proceeds by an Order to Show Cause to the respondent attorney to show why the Board report and recommendation should not be confirmed, and oral argument may be held.

Subpoena Power.

Section 7(A) of Appendix II provides for the issuance of subpoenas “upon application of the Disciplinary Counsel, the Secretary, or chair of a Certified Grievance Committee authorized to sign a certificate under Section 4(I)(7) of Gov. Bar R.V. [for a complaint], *respondent*, realtor, chair of the hearing panel of the Board, and its Secretary shall have the authority to cause testimony to be taken under oath before the Special Investigator, Disciplinary Counsel, a Certified Grievance Committee, or a hearing panel of the Board.” (Emphasis supplied.) The handling of subpoenas is done in accordance with the Ohio Rules of Civil Procedure.

Evidence Rules.

Section 11(A)(1) of Rule V provides that the Board and hearing panels shall follow the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence wherever practicable unless a specific provision of Section 11 or Board hearing procedures and guidelines provide otherwise. The Ohio Rules of Civil Procedure, at Rules 38 through 53, have provisions governing trials, but they do not address the admissibility of evidence. There is an Ohio Rules of Evidence that is modeled on the Federal Rules of Evidence; and given Section 11(A)(1) of Rule V, hearings should be governed by the Ohio Rules of Evidence as there appears to be no contrary Board rule or procedure.

Public or Confidential.

Neither Rule V nor Appendix II have a provision stating whether a Board disciplinary hearing is open to the public, may be open to the public upon request or is confidential. All notices served by the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court to the Clerk of the Ohio Supreme Court are public records.

OKLAHOMA

Appendix 1-A to Title 5 of the Oklahoma Statutes (Attorneys and the State Bar) contains the Rules Governing Disciplinary Proceedings. Oklahoma has an administrative system with a Professional Responsibility Commission to investigate complaints of attorney misconduct, a General Counsel to prosecute and a Professional Responsibility Tribunal to hold hearings on formal charges.

Discovery

Rule 6.8 provides that depositions may be taken and documents and things required to be produced in the same manner as in civil cases. Rule 6.8 further provides that the respondent attorney is entitled, upon written request made 15 days before trial, to names and addresses of prosecution witnesses.

Subpoena Power

Rule 2(b) authorizes the Professional Responsibility Commission, in its investigations, to among other things hold hearings and issue subpoenas to compel testimony and production of documents. Rule 6.11 provides that the trial panel can issue subpoenas.

Evidence Rules

Rule 6.12 provides that so far as practicable, disciplinary proceedings and the receipt of evidence are governed generally by the rules in civil proceedings and that to sustain a charge against a respondent attorney required clear and convincing evidence.

Public or Confidential

Rule 5.7 provides that investigations by the Professional Responsibility Commission and Disciplinary Counsel are confidential. Rule 6.9 provides that hearings before a trial panel and the Supreme Court are open to the public.

OREGON

Oregon's disciplinary process is in the Rules of Procedure approved by the Oregon Supreme Court, referred to as "Bar Rules" and cited as "BR." A Disciplinary Board is appointed by the Oregon Supreme Court under BR 2.4 to hear and decide disciplinary cases, and Disciplinary Counsel are employed to investigate and prosecute disciplinary cases. Oregon also has, under BR 2.3, Local Professional Responsibility Committees and a State Professional Responsibility Board involved in the process. Under BR 4.1, a probable cause determination is made by the State Professional Responsibility Board that results in Disciplinary Counsel filing a formal Complaint.

Discovery & Subpoena Power.

BR 4.5 provides for discovery and subpoena power, stating that discovery is intended to promote identification of issues and a prompt and fair hearing and is to be conducted expeditiously. BR 4.5 authorizes use of depositions, requests for production of documents and requests for admissions. The manner for the taking of depositions, making requests for document production and making requests for admission shall conform as much as practicable with the Oregon Rules of Civil Procedure. Discovery subpoenas may be issued when necessary by the Trial Panel Chair, Bar Counsel, Disciplinary Counsel, the accused or his or her attorney of record at any time after the service of a formal complaint. The Trial Panel Chair may limit discovery to avoid undue expense or delay. For hearings, BR 5.3(b) provides that subpoenas may be issued when necessary by the Trial Panel Chair, Bar Counsel, Disciplinary Counsel, the accused or his or her attorney of record.

Evidence Rules.

BR 2.4(i) provides that a Trial Panel appointed by the Disciplinary Board shall pass on all questions of admission of evidence. BR 5.1 provides that Trial Panels may admit evidence commonly accepted by reasonably prudent persons in the conduct of their affairs. The Bar has the burden of proof of establishing misconduct by clear and convincing evidence.

Public or Confidential.

BR 1.7(b) states that Bar Records of disciplinary proceedings are available for public inspection.

PENNSYLVANIA

Pennsylvania's disciplinary procedures are contained in the Pennsylvania Rules of Disciplinary Enforcement. Rule 205 of the Pennsylvania Rules of Disciplinary Rules establishes the Disciplinary Board of the Supreme Court of Pennsylvania as the state disciplinary authority.

Discovery & Subpoena Power.

Pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, Disciplinary Counsel, among other things, investigates and prosecutes; pursuant to Rule 208, Disciplinary Counsel institutes and conducts investigations. Formal proceedings are initiated by Disciplinary Counsel who file a petition with the Disciplinary Board.

Rule 213 of the Pennsylvania Rules of Disciplinary Enforcement governs the subpoena power and discovery. Rule 213(a)(1) provides that “[a]t any stage of an investigation, both Disciplinary Counsel and a respondent-attorney shall have the right to summon witnesses before a hearing committee or special master and require production of records before the same by issuance of subpoenas.” Rule 213(a)(2) provides that before assignment of a case to a hearing committee or special master, Disciplinary Counsel has the right to require production of records by issuance of subpoenas, and respondent attorney has the right to receive copies paid for by the respondent attorney. Rule 213(d) governs how challenges to subpoenas are handled. Rule 213(f) provides that “[w]ith the approval of the hearing committee or special master, testimony may be taken by deposition or by commission if the witness is not subject to service of subpoena or is unable to attend or testify at the hearing because of age, illness or other compelling reason.” Rule 213(g) allows both the Disciplinary Counsel and the respondent-attorney to seek to enforce a subpoena by petition to the Pennsylvania Supreme Court. Rule 213(h) provides that other rules and statutes regarding discovery do not apply to disciplinary cases. Thus, general discovery is not available; discovery by deposition requires unavailability or a “compelling reason” for it.

Evidence.

Rule 208(c) of the Pennsylvania Rules of Disciplinary Enforcement provides that proceedings before hearing panels and special masters shall be conducted by Board rules. Rule 220 provides that a Board member, a hearing committee member or a special master shall withdraw from participating in a proceeding where there is a substantial showing he or she cannot participate in a fair and reasonable manner because, among other things, he or she has a fixed bias.

Public or Confidential.

Rule 402 of the Pennsylvania Rules of Disciplinary Enforcement govern access to disciplinary information and confidentiality. Rule 402(a) provides that proceedings are to be open to the public after the filing of an answer to a petition for discipline, the time to file an answer to a petition for discipline has expired or the filing and service of a petition for reinstatement. Rule 402(b) provides that an informal proceeding that results in the imposition of private discipline but subsequently results in the filing of formal charges shall not be open to the public until or unless the Supreme Court enters its order for public discipline. Rule 402(c) provides that until proceedings are open to the public under either Rule 402(a) or Rule 402(b), all proceedings involving allegations of misconduct shall be kept confidential unless the respondent attorney request that the matter be public or waives confidentiality for a particular purpose specified in writing, the investigation is predicated upon a conviction of the respondent attorney for a crime or reciprocal discipline, the Supreme Court enters an order transferring the respondent attorney to inactive status due to disability or there is a need to notify another person or organization in order to protect the public, the administration of justice or the legal profession. Rule 402(d) protects the access to relevant information to, among others agencies investigating qualifications of judicial candidates and law enforcement agencies. Rule 402(e) protects work product of Board, Disciplinary Counsel, hearing committee members, and special masters.

RHODE ISLAND

The Rhode Island disciplinary system is contained in Article III of the Rules of the Supreme Court of Rhode Island. A 12-person Disciplinary Board is appointed by the Supreme Court of Rhode Island and operates under the disciplinary Rules of Procedure.

Discovery.

The Rhode Island disciplinary system has a procedure for less serious cases for considering a screening panel recommendation to issue a letter of reprimand to the complained about attorney; that procedure involves an informal show cause hearing at which the only witness who testifies is the respondent attorney. For more serious cases, there are “formal proceedings” as provided in Section 3 of the Rules of Procedure. Section 3.2 of the disciplinary Rules of Procedure states that the procedures for “formal proceedings” are “civil administrative proceedings.” Section 3.31 of the disciplinary Rules of Procedure addresses the giving of testimony by witnesses at the disciplinary hearing and expressly permits the use of deposition testimony, and in that context Rule 3.31 references the taking of testimony by deposition authorized by the Disciplinary Board as provided by Article III, Rule 11 of the Supreme Court of Rhode Island. There is no express provision in the disciplinary Rules of Procedure for respondent attorneys to initiate the taking of depositions, although a respondent attorney could request the Disciplinary Board to authorize such depositions.

Subpoena Power.

The provision for subpoenas is not found in the disciplinary Rules of Procedure, but rather in Article III, Rule 11 of the Supreme Court of Rhode Island. Rule 11 provides that at any stage of an investigation, counsel shall have the right to summons witnesses and to require production of documents by issuance of subpoenas and that a respondent attorney shall have the right to summons witnesses and to require production of documents before the Board by issuance of subpoenas. The subpoenas issued under this rule are to indicate on their face that they are issued in connection with a confidential matter and breach of confidentiality shall be regarded as contempt of court.

Evidence Rules.

Section 3.34 of the disciplinary Rules of Procedure provides that “the admissibility of evidence shall be governed by the Rhode Island Rules of Evidence.” Section 3.35 of the disciplinary Rules of Procedure provides that the Board “shall rule on the admissibility of all evidence.”

Public or Confidential.

Section 3.21 of the disciplinary Rules of Procedure provides that proceedings before the Disciplinary Board shall be governed by Article III, Rule 21 of the Supreme Court Rules, which provides that proceedings shall be kept confidential until a probable cause determination is made by the Disciplinary Board, except where a proceeding is based on a conviction of the respondent attorney of a crime. Upon a probable cause determination, the petition for discipline and the respondent attorney's answer shall be made public, although the Chief Disciplinary Counsel or the respondent attorney may move for a protective order, provision for which is not to be construed to deny access to information to law enforcement agencies.

SOUTH CAROLINA

Discovery.

Both parties may conduct discovery for 60 days following the attorney's filing of his or her answer in response to a formal disciplinary complaint. During this time, both parties are required to make initial disclosures of all non-privileged relevant evidence in both parties' possession, witness lists and witness statements, and all documents to be presented at the disciplinary hearing. The parties may also conduct depositions if they mutually agree to such or if either party establishes good cause for the allowance of such. The remaining discovery tools (interrogatories and requests for admissions) are available to both parties in accordance with South Carolina Rules of Civil Procedure 33 and 36 respectively; however, because of the 60 day limit to discovery, leave from the hearing panel is usually required for the respondent to have time to utilize them.

Subpoenas.

Prior to the initiation of a full investigation, disciplinary counsel may compel the attendance of the lawyer or witnesses and the production of documents for the purposes of the investigation upon a showing of exigent circumstances. After formal charges have been filed, both parties may have subpoenas and subpoenas *duces tecum* issued.

Evidence.

The South Carolina Rules of Evidence govern the admissibility of evidence during formal disciplinary proceedings.

SOUTH DAKOTA

Section 16-19-24 of the South Dakota Statutes establishes a seven-person State Disciplinary Board, and section 16-10-21 provides that attorneys admitted in South Dakota are subject to discipline by the South Dakota Supreme Court and the State Disciplinary Board, although Section 16-19-22 provides that the Supreme Court has the exclusive power to suspend or disbar. Section 16-19-29 provides that the Board is responsible for investigations of complaints of attorney misconduct and prosecutions before the Missouri Supreme Court of complaints of attorney misconduct.

Discovery

There appear to be no provisions in South Dakota law for discovery in an attorney disciplinary proceeding.

Subpoena Power

Section 16-19-55 provides that the Board, counsel for the Board and the Attorney General are authorized to issue subpoenas to compel witnesses to testify and produce documents.

Evidence Rules

Under section 16-19-67, the findings of fact, conclusions of law and recommendations of the investigatory agency responsible for investigation constitute the formal accusation against the respondent attorney, and the investigatory agency then is responsible to prosecute the formal proceedings. Then, under section 16-19-68, the respondent attorney answers the accusation, and the matter is tried by the Supreme Court or referred to a circuit judge or referee to try the case as provided by law for reference of cases in the circuit courts.

Public or Confidential

The South Dakota statute does not expressly states whether any part of the attorney discipline process is confidential or public, although it may be inferred that trials of formal accusations under section 16-19-68 would be public.

TENNESSEE

The Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary cases.

Discovery.

The available discovery in disciplinary proceedings in Tennessee is as follows.

Prior to the institution of formal proceedings, the respondent attorney may not conduct discovery unless he or she obtains permission from the Chair of the Board of Professional Responsibility of the Supreme Court of Tennessee. The Chair will only grant such permission for good cause.

Once formal proceedings have begun, both parties are required to make initial disclosures at a pre-hearing conference. Additionally, at such time the parties may make stipulations as to facts and as to the authenticity of documents.

Neither party may depose witnesses or issue interrogatories unless (1) such party receives approval from the hearing panel in advance and, (2) in the case of depositions, the witness to be deposed is not able to attend or testify at the hearing. Testimony may be taken by deposition or interrogatories if the witness is not subject to service or subpoena or is unable to attend or testify at the hearing because of age, illness or other infirmity.

Subpoenas.

Both the disciplinary counsel and the respondent attorney may obtain subpoenas and subpoenas *duces tecum*. Respondent attorney's right to such subpoenas begins after a formal complaint by the disciplinary counsel is filed against him or her.

Evidence.

Admissibility of evidence at a disciplinary hearing is governed by the Tennessee Rules of Evidence.

TEXAS

The Texas attorney discipline procedures are found in the Texas Rules of Disciplinary Procedure promulgated by the Texas Supreme Court, and those procedures establish an administrative system. Part II of the Texas Rules of Disciplinary Procedure establish District Grievance Committees, acting through panels, which are responsible for the disposition of attorney disciplinary complaints and evidentiary hearings. The Grievance Committee is the client of the Chief Disciplinary Counsel for every complaint not dismissed by the Committee's Summary Disposition Panel.

Discovery

Rule 2.17D provides that a party may request, no later than thirty days before the first setting of the hearing, disclosure of the following:

1. The correct names of the parties to the Disciplinary Proceeding.
2. In general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial).
3. The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the disciplinary matter.
4. For any testifying expert, the expert's name, address, and telephone number; the subject matter on which the expert will testify, and the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them.
5. Any witness statements.

Rule 2.17E provides that In addition to the Request for Disclosure, the Commission and the Respondent may conduct further discovery with the following limitations (subject to being modified by the Evidentiary Panel chair or by agreement of the parties):

1. All discovery must be conducted during the discovery period, which begins when the Evidentiary Petition is filed and continues until thirty days before the date set for hearing.
2. Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions.

3. Any party may serve on the other party no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

4. Any party may serve on the other party requests for production and inspection of documents and tangible things.

5. Any party may serve on the other party requests for admission.

Rule 2.17F provides that upon a showing of reasonable need, the chair of the Evidentiary Panel may modify the discovery limitations stated in Rule 2.17E, and the parties may by agreement modify the discovery limitations stated in Rule 2.17E.

Subpoena Power

Rule 2.17G provides that the Grievance Commission or the respondent attorney may compel the attendance of a witness and the production of documents by subpoena, to be signed by Evidentiary Panel Chair.

Evidence Rules

Rule 2.17L provides that the Evidentiary Panel chair shall admit all probative and relevant evidence deemed to be necessary for a fair and complete hearing, generally in accord with the Texas Rules of Evidence. Rule 2.17M provides that the burden of proof is on the Commission to prove the material allegations of an Evidentiary Petition by a preponderance of the evidence.

Public or Confidential

Rule 2.16 provides that disciplinary proceedings are strictly confidential, but that the status, subject matter and pendency of the disciplinary case may be disclosed if the respondent attorney waives confidentiality or the proceedings are based on a crime. Rule 2.16 further provides that if an Evidentiary Panel finds professional misconduct warranting a sanction more than a private reprimand, then all information coming to the attention of the Evidentiary Panel may be made public.

UTAH

Utah's disciplinary process is contained in Article 5 of Chapter 14, the Rules Governing the Utah State Bar of the Utah Judicial Council Rules of Judicial Administration. Under Rule 14-503, an Ethics and Discipline Committee is appointed by the Utah Supreme Court; and under Rule 14-504, "OPC," Utah's disciplinary counsel office, is established. If under Rule 14-511, a screening panel of the Ethics and Discipline Committee find probable cause for public discipline, then the OPC counsel is tasked to prepare and file a complaint in Utah district state court, with the complaint signed by the chair of the Ethics and Discipline Committee.

Discovery & Subpoena Power.

Rule 14-517(a) provides that except as otherwise provided, the Utah Rules of Civil Procedure apply in formal disciplinary proceedings. The Rules do not provide otherwise to preclude application of the discovery and subpoena rules of the Utah Rules of Civil Procedure. Rule 14-503 provide for subpoena power to a screening panel of the Ethics and Discipline Committee prior of the filing of a formal complaint with the district court.

Evidence Rules.

Rule 14-517(a) provides that except as otherwise provided, the Utah Rules of Evidence apply in formal disciplinary proceedings, and the Rules do not provide otherwise to preclude application of the Utah Rules of Evidence. Rule 14-517(b) provides that the burden of proof of misconduct is on the OPC, and Rule 14-517(c) provides that the standard of proof for proving misconduct is preponderance of the evidence.

Public or Confidential.

Rule 14-515 provides that until the filing of a formal complaint, the proceeding is confidential unless the respondent attorney signs an express waiver of confidentiality or unless a few other narrow exceptions apply (*e.g.*, need to notify Lawyer's Fund for Client Protection), and there is a duty of participants to maintain confidentiality.

VERMONT

The Vermont disciplinary system is contained in Administrative Order No. 9 of the Vermont Supreme Court.

Discovery.

Rule 16B in Administrative Order No. 9 provides that the Vermont Rules of Civil Procedure apply in attorney disciplinary cases. Rule 15B states that after 20 days of the filing of the Answer, disciplinary counsel and respondent are to exchange witness information. After 60 days of the filing of an Answer, disciplinary counsel and respondent may conduct depositions and comply with requests for the production of relevant and non-privileged documents.

Subpoena Power.

Rule 15A provides that after a petition seeking the imposition of discipline, disciplinary counsel or respondent may compel by subpoena the attendance of witnesses or the production of documents for depositions or a hearing. A hearing panel chair may issue a subpoena as if a court. A county district or superior court judge may enforce such subpoenas.

Evidence Rules.

Rule 16B in Administrative Order No. 9 provides that the Vermont Rules of Evidence govern in attorney discipline cases. Rule 16C states that the standard of proof is clear and convincing evidence, and Rule 16D states that the burden of proof for discipline is on disciplinary counsel.

Public or Confidential.

Rule 12 provides that prior to the filing of formal disciplinary proceedings, all proceedings and communications with respect to the disciplinary complaint are to be held confidential unless confidentiality is waived by both the respondent attorney and complainant or is otherwise dispensed with for good cause by order of the Board chair. All formal disciplinary proceedings and records are public unless complainant, disciplinary counsel or respondent attorney obtain a protective order for specific testimony, records or documents; notwithstanding the foregoing, work product is expressly exempted from public disclosure.

VIRGINIA

Attorneys have a very limited right to discovery in disciplinary proceedings in Virginia. As a general rule, there is no right to discovery in connection with disciplinary matters, including matters before three-judge Circuit Courts, except as follows:

Their right to discovery is limited to the right to receive a copy of the investigative report from Bar Counsel; however, that right also has restrictions. Namely, Bar Counsel does not have to reveal those portions of the report that were obtained in confidence from any law enforcement or disciplinary agency, or any portions of the report that are protected under attorney-client privilege or as work product. Further, Bar Counsel does not have to reveal any communications between Bar Counsel and the investigator regarding the respondent's investigation. Bar Counsel, however, is required to timely disclose to the respondent all known evidence that tends to negate or mitigate the severity of the misconduct that the respondent is being accused of.

Neither party is allowed to take depositions unless the witness to be deposed will otherwise be unavailable to testify at the disciplinary proceeding.

Respondents must request that Bar Counsel issue subpoenas and subpoenas *duces tecum*. Bar Counsel must honor a respondent's request and issue him or her a subpoena unless, in the judgment of the Chair of the Committee, the request is unreasonable.

WASHINGTON

The Rules for Enforcement of Lawyer Conduct (ELC) states the procedures for the State of Washington disciplinary process. The State of Washington has an administrative system of attorney disciplinary enforcement with a Board of Governors with general supervisory authority (ELC 2.2), a Disciplinary Board (ELC 2.3), Review Committees (ELC 2.4), Hearing Officers and Panels to hear cases (ELC 2.5) and Disciplinary Counsel to prosecute cases (ELC 2.8). ELC 2.1 states that all persons acting in the Washington disciplinary process do so with the authority from the Washington Supreme Court.

Discovery & Subpoena Power.

ELC 5.5 provides that before filing a formal complaint, Disciplinary Counsel may depose the respondent attorney and obtain subpoena to compel respondent's or a witness's testimony and production of documents. ELC 10.11(a) provides that the parties should cooperate to exchange relevant, non-privileged information. ELC 10.11(b) provides that after a formal complaint is filed, the parties may serve requests for admission and have the right to other discovery under Washington Court Civil Rules on motion to the hearing officer. ELC 10.11(e) provides that subpoenas may be issued for depositions. ELC 10.13(e) provides for subpoenas to compel testimony and production of documents at the hearing.

Evidence Rules.

ELC 10.14(b) provides that Disciplinary Counsel have the burden of proof by the clear preponderance of the evidence. ELC 10.14(d) provides that evidence, including hearsay evidence, is admissible if (1) in the hearing officer's judgment, it is the kind of evidence that a reasonably prudent person is accustomed to rely on in the course of their affairs and (2) if not inconsistent with (1), a hearing officer may refer to the Washington Rules of Evidence as evidentiary guidelines.

Public or Confidential.

ELC 3.1 provides that disciplinary hearings, meetings of the Disciplinary Board and Supreme Court proceedings are open to the public and that the record of a formal disciplinary proceeding is open to the public. ELC 3.2 provides that all disciplinary materials not deemed public are deemed confidential, and investigatory files and information are included in what is expressly defined as confidential.

WEST VIRGINIA

The West Virginia disciplinary procedures are found in Rules of Lawyer Disciplinary Procedure promulgated by the West Virginia Supreme Court of Appeals. Rule 1 of the Rules of Lawyer Disciplinary Procedure establishes a Lawyer Disciplinary Board to investigate complaints of violations of the Rules of Professional Conduct by West Virginia attorneys or any individual admitted elsewhere but practicing in West Virginia and to take “appropriate action in accordance with the provisions of the Rules of Lawyer Disciplinary Procedure.”

Discovery & Subpoena Power.

Rule 2.4 of the Rules of Lawyer Disciplinary Procedure governs evaluation and investigation of complaints by the Office of Disciplinary Counsel. If information alleges violations of the Rules of Professional Conduct, then Disciplinary Counsel shall docket a complaint and conduct an investigation. For the investigation of docketed complaints, Disciplinary Counsel may obtain a subpoena from the chair of the Investigative Panel or the Clerk of the Supreme Court of Appeals for evidence and the testimony of witnesses and production of documents. Per the Rules, a docketed complaint after investigation is subjected to a probable cause determination, and if there is probable cause, formal charges will be filed. Pursuant to Rule 2.12, a respondent attorney files responsive pleadings as provided in the West Virginia Rules of Civil Procedure.

Rule 3.4, as amended in May 1999, provides for mandatory pre-hearing discovery. Within 20 days from the service of Statement of Charges and 60 days prior to the scheduled hearing, Disciplinary Counsel is to provide to the respondent attorney: (i) the names, addresses and telephone numbers of any person with knowledge of the facts of any of the charges (ii) a copy of any statement in the possession or control of Disciplinary Counsel or which can be reasonably obtained by Disciplinary Counsel; (iii) a list of proposed witnesses, including names, addresses, telephone numbers, and summaries of testimony; (iv) disclosure of any expert pursuant to the requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure; (v) inspection and copying of the results of any reports of physical or mental examinations or scientific tests; and (vi) a list of hearing exhibits. In addition, within 20 days from the service of Statement of Charges, Disciplinary Counsel is to disclose to the respondent attorney any exculpatory evidence, and that duty continues throughout the disciplinary process. Within 30 days after receiving the mandatory disclosure from Disciplinary Counsel, the respondent attorney is to provide to Disciplinary Counsel: (i) the names, addresses and telephone numbers of any person with knowledge of the facts of any of the charges (ii) a list of proposed witnesses, including names, addresses, telephone numbers, and summaries of testimony; (iii) disclosure of any expert pursuant to the requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure; (iv) inspection and copying of the results of any

reports of physical or mental examinations or scientific tests; and (v) a list of hearing exhibits.

Rule 3.4 also provides that “[t]he respondent shall be entitled to depose the complainant or complainants on any charge.” Otherwise, “[n]o other depositions or other method of discovery shall be permitted except upon motion to the chair of the Hearing Panel Subcommittee [assigned to the hear the case] and only upon a showing of good cause for such additional discovery.” The chair of the Hearing Panel Subcommittee assigned to hear the case shall have authority to hear and resolve objections to discovery.

Rule 3.8 provides that the Hearing Panel Subcommittees of the Lawyer Disciplinary Board shall have the power to issue subpoenas or any other lawful process through their chair or the Clerk of the Supreme Court of Appeals and that the chair of a Hearing Panel Subcommittee or Clerk of the Supreme Court of Appeals “shall prepare and have available for issuance at the request of *any party*, subpoenas returnable before the Hearing Panel Subcommittee, *or the parties in the case of a deposition*, for attendance of witnesses or for the production of documentary witnesses.” (Emphasis supplied.) Rule 3.8 further provides for handling of subpoenas pursuant to West Virginia Rules of Civil Procedure. The wording of this rule makes the subpoena power available to the parties before the hearing assuming that the discovery is permitted per Rule 3.4.

Evidence Rules.

Rule 3.6 of the Rules of Lawyer Disciplinary Procedure provides that “the provisions of the West Virginia Rules of Evidence shall govern proceedings before the Hearing Panel.” The West Virginia Rules of Evidence West Virginia Rules of Evidence are modeled on the Federal Rules of Evidence.

Public or Confidential.

In the phase prior to the filing of formal charges, Rule 2.6 also provides that the details of complaints or investigations shall be confidential, except that the Office of Disciplinary Counsel or the respondent may release information confirming or denying the existence of a complaint or investigation or defending the right of the respondent attorney to a fair hearing, with notice required to the respondent attorney when the Office of Disciplinary Counsel make such disclosure. Formal charges and the Response to formal charges are filed with the Clerk of the Supreme Court of Appeals. Rule 3.6 of the Rules of Lawyer Disciplinary Procedure provides that hearings on formal charges shall be open to the public.

WISCONSIN

The Wisconsin Supreme Court determines attorney misconduct and medical incapacity and imposes discipline or directs other action in attorney misconduct and medical incapacity proceedings filed with the court. Day to day disciplinary issues are the responsibility of the Office of Lawyer Regulation, which is responsible for screening, investigating, and prosecuting cases. The director, appointed by and serving at the pleasure of the Court, investigates attorney misconduct and medical incapacity allegations and presents results to the Preliminary Review Committee. The Office of Lawyer Regulation consists of the director, intake and investigative staff, staff counsel and retained counsel.

Sixteen District Investigative Committees, composed of lawyers and members of the public and appointed by the Supreme Court, are an integral part of the Office of Lawyer Regulation's investigative program. The committees ensures local input into the grievance process and provides peer review services.

Discovery & Subpoena Power.

Chapter 22 of the Wisconsin Supreme Court Rules, sets forth the procedures for the lawyer regulatory system.

Within 20 days of the filing of an answer, a scheduling conference is held. If an answer is filed, the referee will, among other tasks, provide for depositions, and time limits for completing deposition, determine the firm and extend of other discovery to be allowed and time limits for its completion.

During an investigation, the director, district committee or a special investigator may require the attendance of lawyers and witnesses and the production of documentary evidence by subpoena. In any disciplinary proceeding before a referee, both OLR (and disciplinary personnel/investigators) and the respondent or counsel for respondent may obtain subpoenas from the referee for the attendance of witnesses or the production of documentary evidence.

Evidence Rules.

Wisconsin rules of civil procedure and evidence are following in all proceedings before a referee. The Office of Lawyer Regulation has the burden of proof on misconduct. The standard is "clear and convincing evidence." Appeal and/or reconsideration of the referee's report is permitted for both respondent and OLR.

Public or Confidential.

Prior to the filing of a misconduct complaint, medical incapacity petition or petition for temporary license suspension, all papers, files, transcripts and communications are confidential. Further, any proceedings related to a potential issue of attorney incapacity are confidential.

However, unless otherwise provided by law, the hearing before a referee and any paper filed in the proceeding is public.

WYOMING

Wyoming's disciplinary process is contained in the Disciplinary Code of the Wyoming State Bar. Under Rule 9 of the Disciplinary Code of the Wyoming State Bar, the Wyoming Supreme Court appoints a Board of Professional Responsibility that, among other things, assigns a Disciplinary Judge or member of the Board of Professional Responsibility to preside over a specific matter, to hold hearings upon formal charges and when misconduct is proven by clear and convincing evidence, to determine appropriate discipline or recommend public discipline.

Discovery & Subpoena Power.

After institution of formal proceedings with the service of a complain under Rule 11, Rule 11(n) makes applicable a long list of Rules of the Wyoming Rules of Civil Procedure, including for amended pleadings, discovery, subpoena power and summary judgment (Rules 5, 6, 7, 8, 10, 11, 15, 16, 26, 29, 30, 32, 33, 34, 35, 36, 42, 45, 46, 56, 58, 60 and 61). By this incorporation, depositions, interrogatories, requests for production of documents, physical and mental examinations, requests for admission are all available, and subpoenas are available to obtain non-party testimony and production of documents. Rule 11(i) expressly provides that subpoenas are available under Rule 45 of the Wyoming Rules of Civil Procedure.

Evidence Rules.

Rule 19(b) makes applicable the Wyoming Rules of Evidence to formal disciplinary proceedings. Rule 19(c) requires that a violation be proven by clear and convincing evidence.

Public or Confidential.

Rule 5 provides for confidentiality until the Court orders public discipline or otherwise orders disclosure or the respondent attorney waives.

APPENDIX B: CHART OF STATES

33	New Hampshire	X Following the filing of an Answer to Charges	X Following the filing of an Answer to Charges	X After an answer is filed, discovery of presenter, respondent and counsel is permitted in accordance with limits set forth in rules.	X Upon demand by one party, committee has discretion whether to allow	X Rule 37(b) provides that subpoenas for witnesses and documents may be issued at any time
34	New Jersey	X Only if witness is unavailable to testify at trial.	X With permission of Hearing Committee chair and showing of good cause.	X With permission of Hearing Committee chair and showing of good cause.	X Upon demand by one party, committee has discretion whether to allow	X Subpoenas for documents are permitted for investigation and hearing.
35	New Mexico	X With permission of Hearing Committee chair and showing of good cause.	X Only if witness will be unavailable	X With permission of Hearing Committee chair and showing of good cause.	X Upon demand by one party, committee has discretion whether to allow	X With permission of Hearing Committee chair and showing of good cause.
36	New York - 1st Dept	X only if witness will be unavailable	X only if witness will be unavailable	X Upon demand by one party, committee has discretion whether to allow	X Upon demand by one party, committee has discretion whether to allow	X With permission of Hearing Committee chair and showing of good cause.
37	New York - 2nd Dept	X only if witness will be unavailable	X only if witness will be unavailable	X Upon demand by one party, committee has discretion whether to allow	X Upon demand by one party, committee has discretion whether to allow	X Section 805.17b provides for subpoenas for witnesses and to require the production of documents.
38	New York - 3rd Dept	X Rules of only provide for a deposition of the attorney under investigation	X Rules of only provide for a deposition of the attorney under investigation	X Upon demand by one party, committee has discretion whether to allow	X Upon demand by one party, committee has discretion whether to allow	X Section 805.17c provides for subpoenas for witnesses and to require the production of documents.
39	New York - 4th Dept	X Attorney Grievance Commission can direct the "subject of a complaint" to appear for deposition.	X Attorney Grievance Commission can direct the "subject of a complaint" to appear for deposition.	X Upon demand by one party, committee has discretion whether to allow	X Upon demand by one party, committee has discretion whether to allow	X Section 1022.18(a)(1)(iv) allows for the "trial attorney" to apply for a subpoena to compel a deposition and document production.
40	North Carolina	X	X	X	X	X
41	North Dakota	X as provided by Rules of Civil Procedure	X as provided by Rules of Civil Procedure	X as provided by Rules of Civil Procedure	X as provided by Rules of Civil Procedure	X May compel attendance of witnesses and production of books, papers and documents.
42	Ohio	X Ohio Rules of Civil Procedure apply.	X Ohio Rules of Civil Procedure apply.	X Ohio Rules of Civil Procedure apply.	X Ohio Rules of Civil Procedure apply.	X Section 2307.02(A)(1) provides for subpoenas for witnesses and to require the production of documents.
43	Oklahoma	X as governed by rules for civil cases.	X as governed by rules for civil cases.	X requires the address of prospective witnesses only.	X requires the address of prospective witnesses only.	X Section 2307.02(A)(1) provides for subpoenas for witnesses and to require the production of documents.
44	Oregon	X	X	X	X	X The court can issue subpoenas.
45	Pennsylvania	X copy of witness are unavailable to attend or testify or other compelling reason.	X copy of witness are unavailable to attend or testify or other compelling reason.	X	X	X Witnesses may be subpoenaed at any stage of the investigation for testimony or documents.
46	Rhode Island	X By authorization of the Disciplinary Board	X By authorization of the Disciplinary Board	X	X	X At Rule III, Rule 11 of the Superior Court of RI provides right to summon witnesses and to request the production of documents.
47	South Carolina	X	X	X	X	X
48	South Dakota	X	X	X	X	X
49	Tennessee	X Allowed only for witnesses who can not attend hearing; requires hearing panel approval.	X Requires hearing panel approval	X	X	X
50	Texas	X	X	X	X	X available to both parties
51	Utah	X As provided by Rules of Civil Procedure and Evidence after charges are filed with court.	X As provided by Rules of Civil Procedure and Evidence after charges are filed with court.	X After 60 days of the filing of an answer	X As provided by Rules of Civil Procedure and Evidence after charges are filed with court.	X As provided by Rules of Civil Procedure and Evidence after charges are filed with court.
52	Vermont	X Within 20 days of filing the Answer, witness information must be exchanged.	X after 60 days of the filing of an answer	X After 60 days of the filing of an answer	X Must request from Bar Counsel, will be issued unless Chair of the Committee determines request is unreasonable	X After a petition is filed, Rule 15A provides for subpoena of witnesses or production of documents. Issued by Hearing Panel Chair. Enforced by Court.
53	Virginia	X Right to copy of Investigatory report only, excluding any sections regarding any confidential communications between Bar Counsel, the police or the investigator	X Allowed only if witness will be unavailable to testify at the disciplinary proceeding	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.
54	Washington	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.	X As outlined in Superior Court Civil Rules, with limitations as hearing officer may see fit.
55	West Virginia	X West Virginia Rules of Lawyer Disciplinary Procedure rule 3 - Power to mandatorily professional discipline.	X Deposition of complainant is permitted. Court depositions only upon motion and showing of good cause.	X Only upon motion and showing of good cause.	X Only upon motion and showing of good cause.	X Subpoenas for attendance of witnesses and production of documents.
56	Wisconsin	X Depositions are permitted upon request to referee.	X At the discretion of the referee	X At the discretion of the referee	X At the discretion of the referee	X In any disciplinary proceeding, respondent and prosecutor may obtain subpoenas for release for witnesses and/or documents.
57	Wyoming	X	X	X	X	X

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3	Proceedings Governed by State's Rules of Evidence <input checked="" type="checkbox"/> Disciplinary Commission may relax rules if strict application would preclude the admission of highly probative and noncumulative documentary or demonstrative evidence
4	<input checked="" type="checkbox"/> Alaska Rules of Civil Procedure
5	<input checked="" type="checkbox"/> Arizona State Civil Procedure Code applies
6	No
7	<input checked="" type="checkbox"/> Civil Discovery Act applies
8	
9	
10	
11	<input checked="" type="checkbox"/> Delaware Rules of Evidence apply,
12	Committee not bound by D.C.'s Rules of Evidence; all relevant, non-privileged, non-cumulative evidence is admissible
13	<input checked="" type="checkbox"/>
14	<input checked="" type="checkbox"/>
15	
16	<input checked="" type="checkbox"/> Rules of Civil Procedure
17	<input checked="" type="checkbox"/>
18	Supreme Court of Indiana has never held that the Indiana Rules of Evidence apply; in practice, however, generally followed.
19	Iowa Court Rules govern hearings. Iowa Rules of Civil Procedure and Iowa Rules of Evidence govern the presentation of evidence at hearings.
20	
21	<input checked="" type="checkbox"/>
22	<input checked="" type="checkbox"/> Louisiana Code of Civil Procedure and Code of Evidence applies (except as specifically excluded)
23	Madara Rules of Evidence govern trials.
24	<input checked="" type="checkbox"/> Maryland Rules of Evidence apply.
25	
26	<input checked="" type="checkbox"/>
27	<input checked="" type="checkbox"/> Rules of Civil Procedure apply
28	<input checked="" type="checkbox"/>
29	<input checked="" type="checkbox"/> Rules of Evidence for trials in the circuit courts
30	

33	Hearing Committees are to conduct hearings in conformance with Rule 37A of the Rules of the Supreme Court of New Hampshire
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42	X Other Rules of Evidence apply.
43	X Rules of Civil Procedure apply
44	X Rules of Civil Procedure apply
45	
46	X Admissibility of evidence is governed by the RI Rules of Evidence
47	X
48	
49	X
50	X Generally in accordance with Texas Rules of Evidence, but admission or exclusion of evidence is at discretion of Evidentiary Panel chair
51	X Rules of Civil Procedure and Evidence apply
52	Vermont Rules of Evidence apply.
53	X
54	
55	X West Virginia Rules of Evidence apply.
56	X Wisconsin Rules of Evidence and Civil Procedure are followed in all proceedings before a referee.
57	