CM - Note 9 - Stay of Enforcement Procedure, Challenge and Application

As of July 3, 2004, comprehensive changes to the Rules of Discipline regarding the procedures for obtaining a Stay of Enforcement in Remedial cases and in Appeals became effective. There are several challenges of interpretation around the new procedures that will require review and discretion on the part of the individuals who are approached to sign a request for a Stay of Enforcement.

First, a Stay of Enforcement is now defined as a "**written instruction, …, that orders the implementation** [by a governing body] **of a decision or action be delayed until a complaint or appeal is finally determined**." D-6.0103.

A. Effectiveness of the Stay of Enforcement

The new rules provide that a Stay of Enforcement is effective depending upon the procedure chosen to obtain the Stay of Enforcement. This is different from the old rule that provided that the Stay of Enforcement was effective upon the filing of a Stay of Enforcement with the governing body, commission or respondent whose action or decision is to be stayed. The Stay of Enforcement must become effective no later than forty-five days after the governing body took the decision or action challenged in the remedial complaint.

B. Obtaining the Stay of Enforcement

There are three ways of obtaining an effective Stay of Enforcement.

1. **The first way to obtain a Stay of Enforcement of an action of a governing body is with the concurrence of the governing body that made the decision.** This is possible by gathering the signatures of one third of the members of the governing body recorded as present when the decision or action was made by the governing body on a Request for a Stay of Enforcement. These signatures must be filed concurrently with a remedial complaint signed by an entity or persons who have standing to file the complaint no later than 45 days after the complained about decision or action taken by the governing body. There is no constitutional standard for signatories to this Stay of Enforcement. It seems reasonable that the members of the governing body signing the stay will do so if, in their judgment, the complainants will suffer irreparable harm if the action continues. The Stay of Enforcement is effective upon the filing of both the signatures and the complaint with both the stated clerk of the governing body whose action the complainant seeks to stay and the stated clerk of the governing body whose permanent judicial commission has jurisdiction. It is important to note that both stated clerks must receive these signatures and complaint for the stay to be effective.

2. **The second way to obtain a Stay of Enforcement of an action of a governing body (in this case a decision of a permanent judicial commission made on behalf of the governing body) is by requesting that at least one third of the members of the permanent judicial commission who decided the case sign a**

Stay of Enforcement of their decision. This request must be directed to the commission through the clerk of the permanent judicial commission or the stated clerk of the permanent judicial commission's governing body. There is no constitutional standard for signatories to this Stay of Enforcement. It seems reasonable that the members of the permanent judicial commission signing the stay will do so if, in their judgment, the complainants will suffer irreparable harm if the action continues. The rules are silent as to when the Stay of Enforcement becomes effective. It seems reasonable to interpret that the resulting Stay of Enforcement will become effective when the Stated Clerk of the governing body that decided the case receives the signatures of at least one third of the members of the permanent judicial commission. It also seems reasonable to interpret that the Stated Clerk should immediately send a copy of the Stay of Enforcement to the parties including the governing body, commission or respondent whose action or decision is to be stayed.

3. **The third way a Stay of Enforcement of an action of a governing body may be obtained is by a complainant or appellant requesting that at least three members of the permanent judicial commission who has jurisdiction over the remedial complaint or appeal sign a Stay of Enforcement of the lower governing body action or decision.** This request must be accompanied by a copy of the complaint or notice of appeal and given to the stated clerk of the governing body of the permanent judicial commission who has jurisdiction to hear the complaint or appeal by the complainant or appellant. This particular request must contain a short statement of the basis for challenging the decision or action, a short statement of the harm that will occur if the decision or action is not stayed, and a list of telephone numbers and addresses for the complainant or appellant and the opposing party or governing body. The Stay of Enforcement will become effective when the stated clerk of the governing body of the permanent judicial commission who has jurisdiction to hear the complaint or appeal receives three signed certifications from the members of the permanent judicial commission that in their judgment probable grounds exist for finding the decision or action erroneous and for finding that harm will occur if the decision or action is not stayed. The stated clerk shall immediately advise the parties (including the respondent governing body whose action is to be stayed).

   In the third option, the members of the permanent judicial commission who has jurisdiction must determine two items before they may sign:

   a. The members must certify that in their judgment probable grounds exist for finding the decision or action erroneous. It seems reasonable to interpret that the judicial commission members must presume that the facts alleged in the complaint are true before making this determination.

   b. The members must additionally now certify that in their judgment probable grounds exist for finding that the complainants or appellants will suffer harm if the decision or action is not stayed. There is no opportunity for an answer or challenge from the responding governing body prior to the initial signatory decision by the members. There will be no opportunity at the first certification to weigh harm to the complainants

versus harm to the responding governing body. In the civil world, this standard is usually irreparable harm. It would seem reasonable to interpret that the definition of harm necessary for certification should approach irreparable harm rather than minor harm.

C. Challenging The Stay Of Enforcement

Finally, the rules provide that the governing body whose action is stayed may challenge the Stay of Enforcement. The rules also provide that that governing body must file an Answer to the Complaint. The rules do not mandate that the Answer and the Challenge be the same document. However, it seems reasonable to interpret that the Answer and the Challenge may be the same document and may include a motion to dismiss for lack of standing, timing, jurisdiction or failure to state a claim.