STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042
ADM10-8043

ORDER REGARDING THE REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONAL REGULATION ON THE MINNESOTA LAWYER DISCIPLINE SYSTEM

We are responsible for regulating lawyer discipline proceedings and the rules that govern those proceedings. *See* Minn. Stat. § 480.05 (2022); *In re Riehm*, 883 N.W.2d 223, 231–32 (Minn. 2016). In 2022, we asked the Standing Committee on Professional Regulation of the American Bar Association (the ABA), which evaluates a state's lawyer discipline system, to review and evaluate Minnesota's lawyer discipline system and provide recommendations. The ABA provided its report and recommendations to us in September 2022. We opened a public comment period. Written comments were filed by the Office of Lawyers Professional Responsibility (OLPR), the Lawyers Professional Responsibility Board (the Board), the Minnesota State Bar Association (MSBA), the State Court Administrator, the chairs of three district ethics committees, and attorney Richard Jellinger. We held a public hearing on March 14, 2023, at which the Director of the OLPR, the Chair of the Board, and representatives of the MSBA presented remarks.

The ABA's review was thorough. The evaluation team met with OLPR staff, Board members, district ethics committee members, other participants in the lawyer discipline system (referees, complainants, respondents, and lawyers who represent respondents in

disciplinary matters), and members of our court. The ABA team also reviewed an expansive list of documents and materials in reaching its conclusions and recommendations.

As the ABA reported, there are many strengths to Minnesota's lawyer discipline system, perhaps most importantly the "[e]ngagement by and commitment of the system's dedicated volunteers" including lawyers and public members. Minn. Rep. on the Law. Discipline Sys. at 8 (Sept. 2022) ("ABA Rep."). We fully endorse this conclusion: Minnesota's lawyer discipline system benefits from the dedicated service and talents of many, including the lawyers who serve on the Board and on district ethics committees, the lawyers and staff of the OLPR, and the considerable, beneficial contributions from members of the public, who serve on the Board and on district ethics committees. These participants are engaged, committed, and take their responsibilities and work seriously.

We have viewed the ABA's recommended changes in light of our responsibility to protect the public and administer justice, *see In re Udeani*, 945 N.W.2d 389, 396 (Minn. 2020), and also with an eye on preserving the strengths of Minnesota's discipline system, *see* Rule 2, Rules on Lawyers Professional Responsibility (RLPR) (stating that "[i]t is of primary importance to the public and to the members of the Bar" for cases of alleged misconduct to "be promptly investigated and disposed of with fairness and justice"). We fully expect that the changes we adopt here will support important goals in our lawyer discipline system, including fairness, public confidence in the discipline proceedings, and transparency.

As explained in the accompanying memorandum, we adopt some of the ABA's recommendations, adopt modified versions of other recommendations, refer some recommendations to the Director, the Board, or elsewhere for further consideration, and decline to implement other recommendations. In reaching these decisions, we have carefully considered the concerns and positions expressed in the written comments and made at the public hearing.

The decisions made here will require amendments to the Rules on Lawyers Professional Responsibility. Although the Board is responsible for administering the rules, Rule 4(c), RLPR, we conclude that the amendments needed to implement the adopted recommendations will benefit from the broader input, public process, and collaboration that can be achieved in a committee process. Thus, in a separate order filed today, we have appointed an Advisory Committee to develop recommendations for rule amendments to implement the decisions we have made here.

We are grateful for the thorough and robust work by the ABA Standing Committee on Professional Regulation. We also appreciate the cooperation extended by the OLPR, the Board, the MSBA, and many others during the ABA evaluation process. Finally, the thoughtful and incisive comments submitted in the public phase of these proceedings were helpful in the result reached here.

IT IS HEREBY ORDERED that the recommendations made by the ABA Standing Committee on Professional Regulation that are adopted, in full or in part, or are modified in part and adopted, are referred to the Advisory Committee as explained in the accompanying

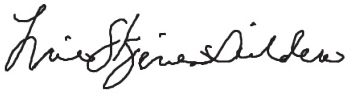
memorandum for consideration of amendments to the Rules on Lawyers Professional Responsibility to implement these decisions.

IT IS FURTHER ORDERED that unless adopted and subject to the preceding paragraph, or unless rejected as explained in the accompanying memorandum, recommendations made by the ABA Standing Committee on Professional Regulation are referred to the Director of the Office of Lawyers Professional Responsibility, the Lawyers Professional Responsibility Board, or State Court Administration, as explained in the accompanying memorandum, for further consideration.

IT IS FURTHER ORDERED that unless governed by one of the two preceding paragraphs, no action is being taken at this time on the recommendations made by the ABA Standing Committee on Professional Regulation.

Dated: August 23, 2023

BY THE COURT:



Lorie S. Gildea
Chief Justice

M E M O R A N D U M

Minnesota's lawyer discipline system, through the Office of Lawyers Professional Responsibility (the Office) and the Lawyers Board of Professional Responsibility (the Board), has operated for over 50 years with a commitment to fairness and transparency in lawyer discipline. We announced in July 2021 that a "review of Minnesota's attorney discipline and disability system" would be undertaken, *Order Promulgating Amends. to the Rules on Laws. Pro. Resp.*, No. ADM10-8042, at 4 (Minn. filed July 14, 2021), because past reviews have been beneficial in shaping the successful system of lawyer discipline in Minnesota. *Id*. By 2021, it had been over 10 years since the last review of our discipline system. *See Rep. of the Sup. Ct. Advisory Comm. to Review the Law. Discipline Sys.*, No. ADM07-8001 (filed May 19, 2008). Further, the components of Minnesota's discipline system—the Office, the Board, the district ethics committees, and the procedures governing those entities—had been largely the same for almost 50 years. We concluded that it was appropriate to consider updating our lawyer discipline procedures with a goal of adopting the best practices for efficient administration, sanctions, and education.

The comprehensive report that the ABA delivered[1] on the lawyer discipline system in Minnesota identified several strengths that support that system and inefficiencies that

[1] The ABA Standing Committee on Professional Regulation has provided consultation and evaluation services to state lawyer discipline systems for over 40 years. The committee's review team includes, among others, judicial officers and lawyers who represent other lawyers in discipline matters. The services provided by the ABA Standing Committee are designed to help the state supreme court and those responsible for administering the state's discipline system to improve the system by considering the

needed attention. We received written comments from the Office, the Board, the Minnesota State Bar Association (MSBA), the chairs of three separate district ethics committees, the State Court Administrator, and Minnesota lawyer Richard Jellinger. The Director of the Office, the chair of the Board, and representatives of the MSBA provided additional comments at the public hearing held on March 14, 2023. We have carefully and thoroughly considered each of the ABA's recommendations.

In this memorandum, we explain whether the recommendation is adopted, in full, in part, or as modified; rejected; referred to the Director, the Board, or the State Court Administrator for further consideration; or, due to some specific factor or circumstance, whether no action will be taken. Many of the decisions that we make today will require amendments to the Rules on Lawyers Professional Responsibility (RLPR). In general, we have not identified specific amendments in this memorandum. Instead, given the nature of some of the changes required by our order, broad input from the practicing bar, the Office, the Board, and others will be useful in ultimately deciding how best to implement some of these changes. Thus, in a separate order filed today, we have appointed an Advisory

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collective experiences of other discipline systems, national practices and trends, and the unique local factors and characteristics that strengthen discipline systems.

In its evaluation of our lawyer discipline system, the ABA committee reviewed over 2,000 pages of material, in addition to our rules, budgets, case statistics and case processing data, case records, case documents, annual reports, the earlier evaluations of our discipline system, and public decisions. The committee also conducted in-person interviews with 35 people, and additional follow up interviews.

Committee that will recommend amendments to the rules and, importantly as to one particular recommendation, will propose a structure for a diversion program.[2]

Finally, a word on organization is useful here. The ABA's report includes 25 recommendations with multiple sub-recommendations, some of which refer to or depend on decisions made on other recommendations. We have addressed the ABA's recommendations below by category—e.g., structure, probable cause, *see* Rule 9, RLPR, reinstatement, *see* Rule 18, RLPR—rather than proceeding numerically through each individual recommendation in the ABA's report. To aid in comparing our decisions to a specific ABA recommendation, the table attached to this memorandum provides a succinct summary of the disposition of each ABA recommendation.

I. The Structure of the Board, Office Responsibilities and Procedures, and Advisory Opinion Practices (ABA Rec. Nos. 1–2, pp. 27–41).

The ABA proposed multiple changes to the structure, responsibilities, and procedures of the Board and the Office. ABA Rep. at 27–41.

The first recommendation focused primarily on the structure of the Board. The ABA recommends eliminating the Executive Committee of the Board, *see* Rule 4(d), RLPR, and replacing it with a separately appointed Administrative Oversight Committee

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[2] Shortly after the public comment period on the ABA's report and recommendations closed, the Board filed a petition with proposed amendments to the Rules on Lawyers Professional Responsibility, some of which reflected the Board's positions on the ABA's recommendations and some of which are intended to conform the language of the rules to actual practice. We deferred a decision on that petition until after we had addressed the ABA's report. *See In re Petition to Amend the Rules on Laws. Pro. Resp.*, No. ADM10-8042 (Minn. filed Feb. 28, 2023). The Board's petition is referred to the Advisory Committee for consideration at the same time that the committee develops recommended rule amendments to implement the decisions made here.

that would function apart from the Board, ABA Rep. at 27–32. In this recommended structure, administrative functions are performed by the Administrative Oversight Committee, and adjudicative functions are performed by the Board. The ABA also recommended reducing the size of the Board and eliminating the seats on the Board that are currently reserved for appointments from nominees of the MSBA, ABA Rep. at 29, 32; *see* Rule 4(a)(2), RLPR (authorizing appointment of 13 lawyers, "six of whom the [MSBA] may nominate" and 9 public members to the Board). Implementing these structural changes, the ABA wrote, would clarify the separate roles and responsibilities of the Office and the Board, and further complement the amendments we made to Rules 4–5, RLPR, in 2021.

Neither the Board nor the MSBA supports the recommendation to establish an Administrative Oversight Committee, asserting that such a change is unnecessary and will diminish the beneficial and important role played by public members of the Board. The Office, on the other hand, supports the proposal to create an Administrative Oversight Committee. An Administrative Oversight Committee is not unique—other states use a similar structure, *see* Colo. R. Civ. P. 242.3–.4 (stating duties for Advisory and Legal Regulation committees); La. Sup. Ct. R. XIX, § 2(A), (G) (establishing Administrative and Adjudicative committees, with separate duties); Wis. Sup. Ct. R. 21.10 (establishing Board of Administrative Oversight to assist lawyer regulation office and the court)—but it would be a significant change to the structure of our discipline system.

The ABA's recommendation is grounded to some extent in a need to clarify the roles and responsibilities of the Board, whether it operates with an Executive Committee

or an Administrative Oversight Committee. We amended Rules 4 and 5 two years ago to address these issues. *See Order Promulgating Amends. to the Rules on Laws. Pro. Resp.*, No. ADM10-8042, at 2 (Minn. filed July 14, 2021) (stating that the rules were amended "to clarify the Board's" responsibilities, "place responsibility for the day-to-day operations" of the Office with the Director, and provide an "appropriate division of responsibilities"). Because these changes are so recent, a longer period of adjustment is appropriate. We also recognize that the Board has independently taken steps to further separate its work from the work of the Office. Finally, although we conclude that no change is presently needed to the rules assigning responsibilities to the Board and the Office beyond the specific steps we take here, we ask the Advisory Committee to consider whether further clarifying amendments to the language of Rules 4 and 5 would be useful, particularly as the committee considers the Board's recent petition to amend the Rules on Lawyers Professional Responsibility.[3] To be clear, however, we reject the ABA's recommendation to establish an Administrative Oversight Committee.

Nor do we see a current need to reduce the size of the Board. The Board has 22 members, but primarily operates in three-member panels. *See* Rule 4(e), RLPR. Further,

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[3] The ABA recommended several changes to or refinements of the Board's responsibilities, albeit in the context of its recommendation to implement an Administrative Oversight Committee. ABA Rep. at 30–32. The Board already engages in some of the activities the ABA listed, e.g., working with the Director on the Annual Report, on proposed rule amendments, and on training programs. As stated above, we do not see a need to amend Rule 4 to *change* the Board's current responsibilities, although we recognize that the committee may recommend some amendments to that rule as it also considers the Board's February 2023 petition.

the Board has already reduced the size of the Executive Committee, rather than reducing overall Board membership. We agree that a slightly smaller Executive Committee is the better adjustment to make now.[4]

We agree with the ABA, however, that a reduction in the number of Board members appointed from MSBA nominees for Board membership is appropriate. We have a long and fruitful relationship with the MSBA, and that includes longstanding participation by the MSBA in the lawyer discipline process, which we want to continue. But limiting MSBA participation on the Board to one nominee allows for an expansion of participation by other entities, lawyers, or members of the public. We see significant value in public member service on the Board and make no change to that provision.

We turn next to the ABA's recommendation to eliminate the current requirement for the Board to approve Director-initiated investigations, Rule 8(a), RLPR. *See* ABA Rep.

We adopt the ABA's recommendations to eliminate the 2-year review of the Director's appointment and the requirement that the Director obtain Board approval to hire new employees, *see* ABA Rep. at 37; Rule 5(a), (c), RLPR. These recommendations were not opposed and are consistent with the clarifying amendments we made to Rules 4 and 5 in 2021. We have notified the Board and the Director that these two specific changes are effective immediately, even though the actual rule amendments will be promulgated later. We note, however, that nothing precludes the Director from soliciting the Board's input on hiring decisions, and we continue to welcome the Board's input on the Director's performance.

[4] The ABA stated that Board members should serve staggered, 3-year terms, limited to no more than two terms. ABA Rep. at 32. Our rules are consistent with this recommendation. Rule 4(a)(2), RLPR (stating that "nearly" one-third of appointments should expire each year and no member can serve more than two 3-year terms).

The ABA also recommended that a process be adopted to vet and select Board members. ABA Rep. at 29–30. The Office and the Board already have robust recruitment and review processes in place, so no further action on this recommendation is required.

at 30 & n.160. The Board has already pre-approved a wide category of investigations that the Director can initiate on her own, and the Director and the Board indicated in their public comments that approval has generally been given. Thus, there is little apparent value to retaining this requirement. Further, ending this requirement is consistent with the Board's preference to remain separate from the Office's prosecutorial activities. We therefore adopt this recommendation.

The third area the ABA addressed in structure and responsibilities concerned some Office practices that may benefit from changes to enhance efficiency and transparency.[5] Specifically, the ABA recommended substantially shortening the length of summary dismissal notices and dismissal notices after investigation, establishing deadlines in the

[5] The ABA recommended that the Director's final review of summary dismissals be eliminated, relying instead on the review completed by a supervising attorney. ABA Rep. at 38–39. We agree that a prompt response to a complainant, even for a summary dismissal, may not favor multiple levels of review. We refer this particular recommendation to the Director and encourage her to evaluate how best to use staff resources for these reviews, particularly given the recent delegation of review authority to the Deputy Director.

The ABA also recommended that the Director assign cases involving allegations of financial misconduct according to expertise within the Office. *Id*. at 37–38. We take no action on this recommendation, preferring to leave case-assignment decisions to the Director, who has the relevant knowledge about capacity, case volume, and expertise within the Office.

rules for responses to inquiries from the Director, and limiting complainant appeals of dismissals. ABA Rep. at 38–41.[6]

We agree that these steps can lead to efficiency gains. We also agree with the ABA that dismissal notices can be shorter, and though concise, can convey to a complainant in relatable, understandable language that their concerns have been heard. ABA Rep. at 39–40. We therefore adopt the ABA's recommendation to streamline dismissal notices and refer that recommendation to the Director to develop and implement practices that favor concise, yet informative and relatable, dismissal notices and decisional memoranda.

Next, we agree with the ABA that deadlines in the rules governing the investigation of a complaint are useful. ABA Rep. at 39. Neither Rule 7, which authorizes investigation by a district ethics committee, nor Rule 8, which authorizes an investigation by the Director, *explicitly* provides for response periods for the lawyer or the complainant when an investigation is undertaken. Rule 7 (a), (c), RLPR (requiring a district ethics committee to complete an investigation within 90 days, by written, telephone, or personal interviews, without response times); Rule 8(a), RLPR (authorizing the Director to conduct investigations, but without providing deadlines for the investigation); *see* Rule 6(d), RLPR (allowing a "complainant an opportunity to reply to the lawyer's response to the complaint," without a specific deadline to do so). We therefore adopt this recommendation

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[6] The ABA recommended limiting complainant appeals of dismissal to a single level of review by a Board member. ABA Rep. at 32; *id*. at 33, 40. This procedure is already embedded in our rules. Rule 8(e), RLPR. There is no express right to appeal the Board member's decision. *See* Rule 9(l), RLPR (allowing a complainant to seek review of a "Panel's disposition," but not providing a right to review of a Board member's decision). Thus, we take no action on this recommendation.

and ask the Advisory Committee to recommend amendments to the rules that will establish response deadlines and promote transparency on the status of an investigation.[7]

Finally, the ABA recommended that the Board's current authority to provide advisory opinions be discontinued, and that we consider transferring responsibility for the Office's advisory opinion service to the MSBA, noting that there are risks that accompany advisory–opinion services. ABA Rep. at 32, 41. We reject these recommendations. The advisory–opinion service provided by the Office is time consuming but highly valued by the Minnesota bar. This service has appropriate limitations, as opinions are not provided for past conduct or the conduct of other lawyers and are limited to the facts provided. Further, our rules already protect against the risks of compelled testimony, *see* Rule 20(a)(4), RLPR (stating that the Director, Office staff, and District Ethic Committees are not subject to "deposition or compelled testimony" absent a showing of "extraordinary circumstances and compelling need"); Rule 21(b), RLPR (stating that the Director, Office staff, and district ethics committees are "immune from suit for any conduct in the course of their official duties").

We also see no reason to eliminate the Board's opinion authority. *See* Rule 4(c), RLPR (authorizing the Board, "from time to time," to "issue opinions on questions of

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[7] The ABA recommended that complainants and respondents be "kept apprised of the status of matters" but did not recommend embedding specific time intervals for those updates in the rules. ABA Rep. at 40–41. We agree that it is not necessary to provide specific timing requirements in the rules. *See* Rule 7(e), RLPR (requiring the Director to "keep the complainant advised of the progress" of an investigation). We refer this recommendation to the Director to develop appropriate policies on the timing of status updates.

professional conduct"). The Board has not exercised this authority extensively, and even though those opinions are not binding on our court, we have acknowledged the Board's advisory opinions in discipline matters. *In re Admonition Issued in Panel File No. 99-42*, 621 N.W.2d 240, 245 (Minn. 2001).

The advisory opinions provided by the Office and the Board have been an important component of Minnesota's lawyer discipline system for decades. Absent indications that these services do not work well in our system and under our rules, we see no reason to eliminate them.

II. Probable Cause: Definitions and Procedures (ABA Rec. No. 1(B), pp. 32–36).

Subject to certain exceptions, the Director must submit charges of unprofessional conduct to a panel of the Board when she determines that public discipline is warranted, Rules 8(d)(4), 10(a)–(e), RLPR, and the panel must determine "whether there is probable cause to believe that public discipline is warranted," Rule 9(i)(1)(i), RLPR; *see* Rule 9(j)(1)(i)–(ii), RLPR. The ABA recommends that we adopt a definition of probable cause, clarify that the Board is not to reach a decision on the merits at this stage, and streamline the procedures now found in Rule 9 for probable-cause determinations. *See* ABA Rep. at 32–36.

We begin with the recommendation to adopt a definition of probable cause. The Board and the Office agree that adopting a definition will help panels in conducting proceedings under Rule 9; they disagree on the specifics of that definition, however.

"Probable cause" in the criminal context is typically understood as a "reasonable ground to suspect that a person has committed" an offense. *Probable Cause, Black's Law*

Dictionary (11th ed. 2019). We have said that probable cause to support criminal charges exists when the evidence " 'brings the charge' " against the defendant " 'within reasonable probability.' " *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quoting *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962)). The probable-cause proceeding is not, however, a decision on the merits. *State v. McDonough*, 631 N.W.2d 373, 386 (Minn. 2001) ("A grand jury proceeding is not a trial on the merits and grand jurors do not determine guilt or innocence but rather whether there is probable cause to believe the accused has committed the crime."); *see McGlothlin v. Steinmetz*, 751 N.W.2d 75, 81 (Minn. 2008) (stating in a garnishment proceeding that a "probable cause determination is not a ruling on the merits").

Probable cause is also a standard used in some civil matters, *see McGlothlin*, 751 N.W.2d at 81 (applying a probable-cause standard in a garnishment action), and other regulated professions use a probable-cause standard for some disciplinary actions, *see* Minn. Stat. § 214.077(a) (2022) (allowing a temporary license suspension when a regulatory board "has probable cause to believe that the regulated person has violated a statute or rule" the board enforces and "continued practice by [that] person presents an imminent risk of serious harm").

Some regulatory boards, including the Board on Judicial Standards, use "reasonable cause" or "reasonable basis" as the standard to proceed with formal, or public, charges. *See* Rule 6(f)(2), (5), Rules of the Bd. of Jud. Standards (directing the board to determine "whether there is reasonable cause to believe the judge committed misconduct" and if so, allowing the board to issue a private admonition, a public reprimand, or a formal

complaint); Minn. Stat. § 326.111, subd. 1(a) (2022) (authorizing the board that regulates architects, engineers, and other professions to proceed with legal action when the board "has a reasonable basis to believe that a person has engaged in an act or practice constituting the unauthorized practice of architecture, engineering," or other practices administered by the Board); Minn. Stat. § 326A.082, subd. 1 (2022) (authorizing the Accountancy Board to conduct further investigation or pursue legal action when it has a "reasonable basis to believe that a person or firm has engaged in or is about to engage in a violation" of laws administered by the board).[8]

We conclude that "reasonable cause," rather than "probable cause," is a more useful standard for Board panels to use when considering whether to authorize the Director to proceed with public discipline charges. Although probable cause has a well-understood meaning in criminal proceedings, reasonable cause is more familiar as a civil litigation concept. *See In re Daly*, 189 N.W.2d 176, 178 (Minn. 1971) (acknowledging that discipline proceedings have been described as "adversary proceedings of a quasi-criminal nature" but stating that "they are not considered in the same light as an ordinary adversary proceeding") (citation omitted) (internal quotation marks omitted)); *see, e.g.*, *People v.*

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[8] Both probable cause and reasonable cause are used by other states in lawyer discipline proceedings. *See, e.g.*, Colo. R. Civ. Proc. 242.16(a) (using a reasonable-cause standard); R. Regulating Fla. Bar 3-2.1(k) (using a probable-cause standard); Ind. R. Admission to the Bar & Atty. Discipline 23, § 11(c) (using a reasonable-cause standard); Ky. Sup. Ct. R. 3.163 (using a probable-cause standard); Neb. Sup. Ct. R. 3-309(H)(4) (using a reasonable-grounds standard); S.C. App. Ct. R. 413, Rules for Disciplinary Enf't 2(x) (using a reasonable-cause standard); Wyo. R. Disciplinary Proc. 10(g)(3) (using a probable-cause standard).

Kanwal, 321 P.3d 494, 496 (Colo. 2014) (noting that the procedures for lawyer discipline have "much in common with criminal prosecution," but the court follows "a largely civil model" in formal discipline proceedings).

We therefore adopt the ABA's recommendation in part but adopt a different standard. Defining the reasonable-cause standard will be a task for the Advisory Committee as it considers how to best amend Rule 9 to incorporate this standard.

The ABA stated that our rules should "make clear" that the panel's role is "**not** to reach a decision on the merits" of the misconduct allegations when making a cause determination. ABA Rep. at 34. We agree. The panel decides only whether the Director should proceed with public charges; there is no weighing of the evidence or a decision on the merits. Further, we believe the panel owes a degree of deference to the Director, who has already completed an investigation, in determining whether there is cause to proceed with a public petition. We therefore remind the committee to focus only on defining the reasonable-cause standard, understanding that a decision on the merits of the misconduct allegation is not before the Board panel at this stage.

Separate from defining a cause standard, the ABA recommends that we streamline the procedures for the cause determination, which it found to be "unnecessarily elaborate." ABA Rep. at 33–36. Rule 9 allows the lawyer to request a hearing or the panel to hold a hearing, allows affidavits and "other documents" to be submitted, and allows for discovery procedures that would typically be considered adversarial if a hearing is held. *See* Rule 9(a), (c)–(d), RLPR (allowing a hearing to be requested, for documents to be submitted, and to use requests for admission and depositions). The Director advises us that a hearing

is rarely held, but as explained at the public hearing, the lawyer's right to present an answer, affidavits, or other documents in support of finding no cause to proceed makes the panel proceeding, with or without a hearing, "fully contested."[9]

We do not believe a fully contested proceeding is necessary at the cause determination stage, nor is it the intended purpose of the panel proceeding. Submitting testimony and oral arguments to the panel to support one outcome or another is the essence of an adversarial proceeding and effectively duplicates the proceeding that will be held—if cause to proceed is found—before the referee. We do not understand the purpose of the cause proceeding to be either adversarial or the equivalent of a hearing on the merits. *See, e.g.*, *Brief of Dir. of Laws. Pro. Resp. In Support of Petition for Amends. to Minn. Rules on Law. Pro. Resp.*, No. A-8 (46994) (C1-84-2140), at 9 (filed Apr. 30, 1982) (stating that the purpose of proposed amendments to Rule 9, while allowing the panel to receive as much information as needed, was to avoid the "luxury" of "duplicat[ing]" the hearing later held on the merits of a public petition). As the ABA points out, streamlined procedures will allow the panel to review relevant information—draft charges, exculpatory information, investigation responses and supporting documentation—without compromising a lawyer's due process rights. ABA Rep. at 35–36. We agree. Thus, we adopt the ABA's

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[9] Although a cause proceeding cannot be used as a substitute for discovery, *see Florence*, 239 N.W.2d at 898 (acknowledging that discovery is a distinct process and a probable-cause proceeding "should not be used as a substitute for disclosure and discovery"), the Director's materials are generally available to the lawyer, *see* Rule 20(a)(4) (allowing the Director's nonprivileged materials to be produced upon request of the lawyer). The Advisory Committee should consider whether discovery tools need to be part of Rule 9, given the express disclosure requirements in Rule 20(a).

recommendation to streamline the cause proceedings, refer this recommendation to the Advisory Committee, and ask for its input on how to streamline the cause proceeding by limiting the adversarial nature of the submissions and presentations to the panel, while avoiding a duplication of the ultimate hearing on the merits (assuming cause is found).[10]

We note for the committee's benefit that Rule 9 currently allows the panel to make one determination on the merits: to conclude that the lawyer committed misconduct of "an isolated and nonserious nature" that warrants an admonition, Rule 9(j)(1)(iii), RLPR. In other words, a panel may find the Director has not shown cause for public discipline but has shown that discipline, albeit non-public, is warranted. We question whether combining these separate, but functionally different, dispositions in a single paragraph is necessary or useful. Certainly, it seems to us, this structure can contribute an adversarial flavor to a proceeding to the extent that a lawyer argues for a determination to be made under subparagraph (iii), as an alternative to a finding under subparagraph (ii) that cause exists to proceed with public charges. Although we will retain the panel's admonition authority, we ask the committee to review how to best arrange the panel functions in Rule 9 to achieve the objectives we set out here: streamline the process, limit the submissions, avoid

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[10] The ABA noted that Rule 9 could still allow a lawyer to appear before the panel "as a matter of fairness," or as an alternative, be given a "short period to provide additional materials to the Panel." ABA Rep. at 35–36. The Advisory Committee should consider both options, though we remind the committee that hearings should be reserved for exceptional cases.

The ABA also recommended that we eliminate the option to use a referee for a cause determination, Rule 9(g), RLPR, and eliminate the option to use a Board panel rather than a referee to hear a disciplinary petition, Rule 14(f), RLPR. ABA Rep. at 36. We reject the first recommendation and adopt the second recommendation.

adversarial proceedings in the cause determination, and avoid duplicating the hearing on the merits.

III. Reinstatement Proceedings (ABA Rec. No. 13, pp. 62–65).

Finding Minnesota's proceedings to petition for reinstatement to be time-consuming and resource-intensive, the ABA made three recommendations to modify those proceedings: using referees, rather than Board panels, for reinstatement hearings; amending Rule 18, RLPR, to identify the documents and information that must be submitted with a reinstatement petition; and, allowing lawyers suspended 6 months or less to be automatically reinstated after the filing of an affidavit that attests to compliance with the suspension conditions. ABA Rep. at 63–64.

We begin with the recommendation to use referees for reinstatement hearings. Currently, petitions for reinstatement are considered by a three-member panel of the Board that makes findings, conclusions, and recommendations on the petition. Rule 18(c), RLPR. Referees, all of whom are current senior judges, are equally familiar with the fact-finding process required for these petitions. However, we conclude that there are factors that weigh against using referees, rather than Board panels, for these hearings. Most importantly, we value the input provided by the public Board members who sit on these panels. Public members bring a different perspective to these proceedings that is worth retaining. And, although these proceedings can be time-consuming, none of the public comments suggested that the Board does not have the capacity to manage these proceedings. Referees, on the other hand, already have the responsibility to conduct hearings on the

Director's petitions for discipline. We therefore reject the ABA's recommendation to use referees for reinstatement hearings.

Next, we consider the recommendation to clarify Rule 18 by adding details to that rule about the documents and information that are required for reinstatement. Currently, the rule directs the suspended lawyer to simply file an affidavit or a petition, without identifying the information or materials needed to support a request for reinstatement. Some of these details are, of course, found in our case law. *See In re Mose*, 993 N.W.2d 251, 261 n.5 (Minn. 2023) (stating that a lawyer must demonstrate "moral change," "the intellectual competence to practice law," and "compliance with the conditions" imposed during the suspension). Some of these requirements are spelled out in Rule 18. *See, e.g.*, Rule 18(f), RLPR (stating that a lawyer cannot be reinstated unless the lawyer is "current in [CLE] requirements"). Even so, given the Director's obligation to investigate the "appropriateness" of the suspended lawyer's reinstatement, Rule 18(b), RLPR, providing guidance in the rule on the specific materials to include with a reinstatement petition or affidavit will increase efficiency for the Director and the lawyer, can reduce the overall time for an investigation, and will promote transparency in the reinstatement process.

Related to this recommendation, we conclude that the moral change standard should be incorporated in Rule 18. We have long required evidence of moral change as a condition for reinstatement when a lawyer petitions for reinstatement. *In re Trombley*, 947 N.W.2d 242, 245 (Minn. 2020). We have said that moral change is shown by "remorse and acceptance of responsibility for the misconduct," a change of conduct "that corrects the underlying misconduct," and a commitment to the ethical practice of law. *Id*. at 246

(citation omitted) (internal quotation marks omitted). Although our case law provides guidance on the framework for moral change, *see In re Peterson*, 274 N.W.2d 922, 925 (Minn. 1979) (denying Peterson's fourth petition for reinstatement following disbarment, and distinguishing between "personal moral character," which the court does not have "license" to judge, and "professional moral character," which the court can judge), embedding this standard in the rule will guide suspended lawyers as they prepare to seek reinstatement.

In summary, we adopt the ABA's recommendation to include detail in the rule on the information and materials that must be submitted with an affidavit or petition seeking reinstatement. We also direct the Advisory Committee, as it considers this recommendation, to include proposed language for the rule on the moral change requirement.[11]

Finally, we consider the ABA's recommendation to allow lawyers suspended 6 months or less to be reinstated by affidavit. Currently, a lawyer suspended 90 days or less may be reinstated after filing an affidavit with our court. Rule 18(f), RLPR.[12] A

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[11] The public comments generally agreed with the ABA's recommendation to eliminate the requirement to pass the exam on professional responsibility for suspended lawyers who may be reinstated by affidavit, Rule 18(e)(3), RLPR. A similar requirement applies to suspended lawyers who must petition for reinstatement. *See* Rule 18(e)(3), RLPR. We adopt the ABA's recommendation and conclude that the exam requirement for suspended lawyers who must petition for reinstatement should also be eliminated.

[12] We have on occasion exercised our discretion to suspend a lawyer for 90 days *and* require the lawyer to seek reinstatement by petition, rather than by affidavit. *In re Moulton*, 945 N.W.2d 401, 411 (Minn. 2020) (suspending a lawyer for 90 days and requiring the lawyer to petition for reinstatement); *In re Crandall*, 699 N.W.2d 769, 772 (Minn. 2005)

lawyer suspended for a longer period must petition for reinstatement, the Director must investigate that petition and report her conclusions to a Board panel, and after the panel makes recommendations, a hearing may be held before our court. Rule 18(a)–(d), RLPR. Noting the time-consuming and resource-intensive nature of reinstatement proceedings, the ABA recommended that a lawyer suspended for 6 months or less be "automatically reinstated at the end of the suspension" period by filing an affidavit with our court. ABA Rep. at 63. This standard can be implemented "consistent with public protection," the ABA concluded, and would avoid "the unfair and unnecessary extension of the" suspension term. *Id*.

The Office supports the ABA's recommended 6-month standard for reinstatement by affidavit for two reasons: the "inequity created by a relatively short suspension becoming a year or more" will be addressed, and the resource demands of these proceedings will be better managed. The Office also notes that many other states reinstate lawyers by affidavit following a 6-month suspension, without "material public protection issues." The MSBA agrees that the current reinstatement procedures can be improved but disagrees with the recommendation to allow reinstatement by affidavit for suspensions of

(suspending a lawyer for 90 days and requiring the lawyer to petition for reinstatement); *see* Rule 18(f), RLPR ("Unless otherwise ordered by this Court," the petition requirements do not apply to lawyers suspended for 90 days or less).

6 months or less, questioning whether public protection can be adequately preserved with this standard.

For over 30 years, we have drawn the dividing line between reinstatement by affidavit, versus by petition, at 90 days. *Order Promulgating Amends. to the Rules on Laws. Pro. Resp.*, No. C1-84-2140, at 16–17 (Minn. filed Feb. 11, 1991) (amending Rule 18(f), RLPR, to allow for reinstatement by affidavit for suspensions of 90 days or less). Some states also use 90 days as a dividing line in the reinstatement process. *See* Ala. R. Disciplinary. Proc. 28(b)-(c); R. Regulating Fla. Bar 3-7.10(a); Idaho Bar Comm'n R. 518(a); S.D. Codified Laws § 16-19-83 (2022); W. Va. R. Law Disciplinary Proc. 3.32(a). More states, however, use 6 months as the dividing line. *See* Ariz. Sup. Ct. R. 64(e)(2)(A); Del. Law. R. Disciplinary Proc. 22(b); Ky. Sup. Ct. R. 3.501(1); Me. Bar R. 28; Md. R. Att'ys 19-751(a); Mass. Sup. Jud. Ct. R. 4:01, § 18(1)(a); Mich. Ct. R. 9.123(A); R. Discipline Miss. State Bar 12(a); Mont. R. Law. Disciplinary Enf't 29(A); Nev. Sup. Ct. R. 116(1); N.H. Sup. Ct. R. 37(14)(a); N.M. R. Gov. Discipline 17-214(B)(1); N.D. R. Law Discipline 4.5(B); Or. Bar R. Proc. 8.1(a); Utah Sup. Ct. R. Pro. Prac. 11-591(a); Vt. Admin. Order 9, R. 22; Wis. Sup. Ct. R. 22.28(2).[13]

[13] Still other states allow for reinstatement without a petition procedure following even longer suspensions. *See, e.g.*, Alaska Bar R. 29(c) (allowing a lawyer suspended 2 years or less to be automatically reinstated unless Bar counsel objects); Haw. Sup. Ct. R. 2.17(b)(2) (allowing a lawyer suspended 1 year or less to be reinstated by filing an affidavit); Okla. Stat. tit. 5, ch. 1, app. 1-a, § 11.8 (2022) (allowing a lawyer suspended 2 years or less to be reinstated upon filing the appropriate affidavit); Wash. Enf't Law. Conduct 13.3 (allowing a lawyer suspended 3 years or less to be administratively reinstated "without further order by the Court").

After fully weighing the ABA's recommendation, we adopt it: a lawyer suspended for a fixed period of 6 months or less can seek reinstatement by affidavit. We carefully considered how the ABA's recommendation would fit with our discipline system and in doing so, we have identified several important elements that will govern the application of this new standard.

First, we recognize that the interests of the public, the lawyer who is the subject of the proceedings, and the legal profession are paramount in these proceedings. *See* Rule 2, RLPR. To balance these interests, we will retain our discretion to require a lawyer suspended for 6 months or less, in the appropriate case, to seek reinstatement by petition, rather than by affidavit. Rule 18(f), RLPR (stating that petition requirements may be waived "[u]nless otherwise ordered by [the] Court"); *see In re Moulton*, 945 N.W.2d 401, 411 (Minn. 2020) (requiring a lawyer suspended for 90 days to petition for reinstatement). Thus, even though we make reinstatement by affidavit available for a suspension of less than 6 months, we may order otherwise in a particular case.[14] We may decide the appropriate sanction requires a suspension of 6 months or less, with reinstatement by petition "based on the unique facts" of the case. *In re Nathanson*, 812 N.W.2d 70, 79 (Minn. 2012); *see In re Kennedy*, 946 N.W.2d 568, 579 (Minn. 2020) (noting that we strive

[14] Currently, Rule 18(f), RLPR, allows for reinstatement by affidavit for a lawyer suspended for a "fixed period of ninety (90) days or less." We look to the Advisory Committee's recommendation on the wording of the standard we adopt here. Some states allow for reinstatement by petition for suspensions of 179 days or less, Mich. Ct. R. 9.123(A), some states use "less than 6 months" as the dividing line, Del. Law. R. Disciplinary Proc. 22(b), and some states use "six months or less" as the dividing line, Me. Bar. R. 28.

for consistency in discipline sanctions, but each case is decided based on its own unique facts). We will also continue to closely scrutinize stipulations for discipline and will not hesitate to impose stronger sanctions, including requiring a petition for reinstatement regardless of the length of the suspension when the facts of a particular case demand it. *See In re Halunen*, 987 N.W.2d 585, 585–86 (Minn. 2023) (order) (rejecting a stipulation that proposed waiving the petition process, notwithstanding a proposed 6-month suspension); *In re Duckson*, 868 N.W.2d 686, 687–88 (Minn. 2015) (order) (rejecting a stipulation for a 30-month suspension, concluding the "appropriate disposition" was an indefinite suspension with no right to petition for reinstatement for 5 years).

Second, we have long said that we expect a renewed commitment to ethical conduct after a lawyer is disciplined. *In re Milloy*, 571 N.W.2d 39, 45, 47 (Minn. 1997) (suspending a lawyer for 90 days and requiring a petition for reinstatement); *In re Haugen*, 543 N.W.2d 372, 375 (Minn. 1996). We enforce this expectation because we impose discipline to protect the public, protect the judiciary, and deter future misconduct. *Duckson*, 868 N.W.2d at 688. Thus, our decision to move the line for reinstatement by affidavit out to 6 months comes with one critical exception: a lawyer who has been suspended previously, for any period, will be required to petition for reinstatement. We will also not hesitate to require a petition for reinstatement when a lawyer's past disciplinary history demands that sanction, even if that history does *not* include a previous suspension. *See In re Nelson*, 733 N.W.2d 458, 464–65 (Minn. 2007) (suspending a lawyer and requiring a petition for reinstatement, even though the lawyer had not previously been before the court on a petition for public discipline).

Third, we extend the affidavit process up to 6 months because we agree that a relatively short suspension, such as for 120 or 150 days, should not effectively operate as a suspension of 1 year or longer as the reinstatement process plays out. To further address concerns about the length of the process to petition for reinstatement, we conclude that transparency in the Director's process and specific deadlines must be part of Rule 18. We note, for example, that some states require disciplinary counsel to state, within a short period of time after an affidavit or petition is filed, whether reinstatement is opposed. *See, e.g.*, Ariz. Sup. Ct. R. 64(e)(2)(B) (stating that disciplinary counsel is "deemed to consent" to reinstatement if no objection to the affidavit is filed); Procs. Ark. Sup. Ct. Regul. Pro. Conduct of Att'ys § 23 (allowing disciplinary counsel to respond to a reinstatement request within 10 days if counsel objects); Colo. R. Civ. Proc. 242.38(b)(3)(A) (stating that disciplinary counsel must file an objection to a reinstatement request within 14 days); 27 N.C. Admin. Code ch. 1B, § .0129(b)(6) (stating that a petition for reinstatement is granted if disciplinary counsel does not file a response "before the date the [lawyer] is first eligible for reinstatement"); W. Va. R. Law Disciplinary Proc. 3.32(b) (requiring disciplinary counsel to file a report within 30 days after a petition is filed if counsel determines that a hearing on the petition is unnecessary). Several states allow the suspended lawyer to file an affidavit or petition before the suspension period ends. *See, e.g.*, Ariz. Sup. Ct. R. 64(e)(1)–(2) (allowing an affidavit to be filed "no sooner than ten (10) days before the expiration of the period of suspension" and a petition to be filed "no sooner than ninety (90) days prior to the expiration of the period of suspension"); Colo. R. Civ. Proc. 242.39(b)(1) (allowing a petition to be filed not sooner than 13 weeks before the suspension

period ends); Haw. Sup. Ct. R. 2.17(b)(3) (allowing a petition to be filed once at least one-half of the suspension period has expired); Idaho Bar Comm'n R. 518(b)(1) (allowing a petition to be filed 90 days before the end of the suspension period); La. Sup. Ct. R. XIX, § 24 (allowing a petition for reinstatement to be filed 6 months before the end of the suspension period).

Together, these two procedures—establishing an early deadline for the Director's statement on whether a petition for reinstatement is opposed and allowing the lawyer to file for reinstatement before the suspension ends—promote transparency and can alleviate unnecessary delays in the process to petition for reinstatement. Further, with guidance in the rule on the requirements for a petition (including on the moral change component), allowing that request to be filed before the suspension period ends, and requiring the Director to state whether the reinstatement is opposed, we expect some requests will be resolved more efficiently and expeditiously. In turn, we expect the Office to more efficiently focus its resources on the reinstatement proceedings that deserve close scrutiny. We therefore ask the Advisory Committee to provide recommendations for amendments to Rule 18 that incorporate these elements as part of the reinstatement process.

Taken together, we expect these steps will improve reinstatement proceedings by avoiding inequitable extensions of suspension periods. We reiterate that with these changes, our focus remains to protect the public, the integrity of the legal profession, and deter further misconduct. We look forward to the input of the Advisory Committee on rule amendments that will best accomplish these objectives.

IV. Admonitions (ABA Rec. No. 21, pp. 77–79).

The ABA made two recommendations regarding the use of admonitions, a form of nonpublic discipline in our system.

First, the ABA recommends eliminating the Board's authority to issue admonitions. ABA Rep. at 32, 78; *see* Rule 8(d)(2), RLPR (requiring the Director to issue an admonition "if so directed by a Board member reviewing a complainant appeal"); Rule 8(e)(3), RLPR (allowing a Board member to "instruct the Director to issue an admonition" if the DEC recommended discipline but the Director found discipline not warranted); Rule 9(j)(1)(iii), RLPR (allowing a Board panel to "issue an admonition" in a cause proceeding). Second, the ABA recommends that complainant ***and*** lawyer rights to appeal an admonition be eliminated. ABA Rep. at 32. The ABA states that if a lawyer objects to a proposed admonition, the remedy is to demand "that the matter be resolved" by filing a public discipline petition. *Id*. at 78.

We agree that the procedures for nonpublic admonitions are detailed and intricate. Admonitions can be issued by the Director, Rule 8(d)(2), RLPR, and if an appeal is taken by the lawyer, approved by a Board panel or our court, Rule 8(d)(2)(iii), RLPR (allowing a lawyer to demand that the charges be presented to a panel when the Director has issued an admonition and directing the panel to "consider the matter de novo"), Rule 9(m), RLPR (allowing a lawyer to appeal an admonition to this court). A lawyer who objects to an admonition may also be entitled to consideration by a second panel. *See* Rule 9(j)(1)(iii), RLPR (allowing for "a hearing de novo before a different Panel" if a panel issues an admonition "based on the parties' submissions"). Admonitions may be issued as directed

by a single Board member even though the Director determined that discipline is not warranted, Rule 8(d)(3), RLPR, or issued by a panel as a disposition reached following a probable cause hearing, Rule 9(j)(1)(ii), RLPR. A complainant can appeal the Director's decision to issue an admonition to a Board member, Rule 8(e), RLPR (authorizing a complainant to appeal to "a board member"), and may file a petition for review of a panel's decision to issue an admonition with our court, *see* Rule 9(l), RLPR.

Nevertheless, admonitions serve an important role in the discipline system, providing a tool to address nonserious, isolated, misconduct. Although admonitions are useful in our lawyer discipline system, some refinements are required. Thus, we reject the ABA's recommendations, with two limited exceptions.

First, we conclude that a single Board member should not have the authority to overturn the Director's decision that discipline is not warranted, by instructing the Director to issue an admonition. *See* Rule 8(e)(3), RLPR (authorizing a Board member to "instruct the Director to issue an admonition" if the Director disagreed with a district ethics committee's recommendation for discipline). Review by a single Board member should be limited to either approving the Director's disposition or requiring further review, by either the Director or a Board panel. Rule 8(e)(1)–(2), (4), RLPR. Second, consistent with our decision to streamline the proceedings in Rule 9, a lawyer should not have, nor does due process require, two opportunities to have a Board panel review an admonition. Rule 9(j)(1)(iii), RLPR.

We reject the ABA's recommendation to eliminate complainant and lawyer appeals of admonitions because none of the comments supported this recommendation.[15] We agree that eliminating these appeals is unlikely to result in a material impact on efficiency or resource management. We also view these appeals as an important component in ensuring due process. Additionally, appeals of admonitions have provided important opportunities to clarify the law. *See, e.g.*, *In re Rev. of Panel Decision Against Resp., Panel Case No. 35104*, 851 N.W.2d 620 (Minn. 2014).

V. Diversion (ABA Rec. No. 19, pp. 71–74).

The ABA recommended, and the presenters at the public hearing agreed, that a diversion program would be a welcome and useful tool in Minnesota's discipline system. This program would address isolated instances of nonserious misconduct, could eliminate the need for private probation, *see* Rule 8(d)(3), RLPR, and could serve as an alternative to discipline by educating lawyers on proactively addressing situations to avoid conduct that can lead to misunderstandings or dissatisfaction. A diversion program would also engage the broader legal community in Minnesota and use the resources available to the Office and the Board more efficiently.

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[15] The ABA also recommended that a panel chair approve the Director's decision to issue an admonition. ABA Rep. at 78. That approval process is not part of the current rule. *See* Rule 8(d), RLPR. The ABA's approval concept appears to stem from the separate recommendation to require a lawyer to demand public proceedings if the lawyer objects to an admonition. *See* ABA Rep. at 78 (explaining that if a lawyer demands public proceedings, the panel chair's previous approval of the admonition substitutes for a cause proceeding and fulfills due process). We have rejected that recommendation, and, thus, we also reject the recommendation to require a panel chair to approve the Director's decision to issue an admonition.

We appreciate the unanimous support for this concept, and we agree that a diversion program may better serve the needs of Minnesota's bar for education and guidance in some cases of nonserious conduct, rather than responding to those instances with discipline sanctions.[16] Many other states have implemented diversion programs and we believe Minnesota can draw on these experiences to shape a program that works well for our bar. *See, e.g.*, Ariz. Sup. Ct. R. 56; Colo. R. Civ. Proc. 242.17; R. Regulating Fla. Bar 3-5.3 (Practice and Professionalism Enhancement Program); Okla. Stat. tit. 5, ch. 1, app. 1-a, § 5.1 (2022). We therefore adopt the ABA's recommendation to establish a diversion program. We ask the Advisory Committee appointed today to consider the components of such a program, *see* ABA Rep. at 72–73, research the diversion programs used in other states, and propose a format and structure for such a program.[17]

VI. Staffing, Training, Public Outreach, and Technology (ABA Rec. Nos. 3–7, 9–12, pp. 42–49, 56–61).

The ABA made several recommendations for additional staff resources for the Office, the Board, and referees; expanded training opportunities for Office staff and the

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[16] The Director suggested, in the comment filed by the Office, that we provide guidance on the line between conduct that would be subject to an admonition and conduct that would be better addressed in a diversion program. This suggestion is best considered by the Advisory Committee as it undertakes the work of identifying and defining the scope of a diversion program.

[17] Although we take no specific action on the ABA's recommendation to eliminate private probation, ABA Rep. at 81, we agree that adopting a diversion program is likely to make this discipline sanction unnecessary. But until we make a final decision on a diversion program, private probation remains a discipline tool available to the Office. We therefore ask the Advisory Committee to address the appropriate disposition of Rule 8(d)(3), RLPR, with its recommendations for a diversion program.

volunteers who serve on the Board and district ethics committees; and enhanced and updated public outreach efforts, public access, and technology tools. ABA Rep. at 42–49, 56–61.

We agree that training is a critical component, particularly for the volunteers who contribute so much to our discipline system. We also agree that additional staff, updated technology tools, and public outreach efforts are important enhancements that will increase public awareness of our regulation of the Minnesota bar, make efficient use of limited resources, and promote transparency in our discipline system. But each of these recommendations—Nos. 4–7 and 9–12 in the ABA Report—implicate the funding model for our discipline system, which depends on lawyer registration fees. *See* Rule 10, Supreme Court Rules on Lawyer Registration (allocating collected fees among the Boards). Additionally, the Director identified in her public comments the many competing budget priorities faced by the lawyer discipline system. We refer recommendation Nos. 4–7 and 9–12 to the State Court Administrator, the Director, and the Board for consideration in light of all budget resources and priorities. We also encourage the Director and the Board to collaborate on how best to implement these recommendations as time and resources permit.

The ABA also recommends that we consider providing "specific criteria" in the rules to guide the Director when deciding whether to refer a matter to a district ethics committee, ABA Rep. at 42–43, and that the Director's de novo review of committee recommendations for dismissal be discontinued. *Id*. at 40. The Director did not support eliminating the de novo review standard, and the chair of the Sixth District Ethics

Committee stated, in opposing that recommendation, that de novo review promotes consistency in discipline results.

We reject these recommendations. The Director has broad authority to retain or refer an investigation, Rules 6(b), 7(d), RLPR, and nothing in the public comments or the ABA's report suggested that there is uncertainty or confusion in how to exercise that authority. Absent some indication that the Director and the district ethics committees do not agree on when a particular investigation should remain with either the Director or a committee, or be referred to a committee, we see no reason to change this well-functioning component of our system. Similarly, even though efficiency gains may be had by eliminating the de novo review of a committee's dismissal recommendation, this review provides useful oversight on a process that relies heavily on volunteers. We believe the benefits of that review outweigh the resource demand it imposes.

VII. Other Rule Amendments (ABA Rec. Nos. 14–18, 20, 23–25, pp. 66, 68–70, 75–76, 81–87).

The ABA made several recommendations to update, clarify, and amend the Rules on Lawyers Professional Responsibility. ABA Rep. at 66–70, 75–76, 81–87. For example, the ABA recommended that we adopt amendments to Rule 19, RLPR, which addresses the admissibility of prior discipline charges, and to Rule 24, RLPR, which addresses taxation of costs and disbursements. Other amendments are recommended for clarity, ABA Rep. at 68, or for transparency in case processing when reviewing referee reports, to clarify

temporary suspension procedures, or to codify the conditions for public probation, ABA Rep. at 69, 75–76, 81.

We adopt the ABA's recommendation Nos. 16, 18, 24, and 25. We agree with the ABA that the language of Rules 11, 19, 24, and 28, should be reviewed, and recommendations made on how the language of these rules can be updated or clarified.[18] We direct the Advisory Committee to review the ABA's recommendations, the comments regarding these recommendations, and the language of these rules, as it considers possible rule amendments. In particular, we note for the committee's benefit that the Office proposed additional procedures for the disability proceedings authorized by Rule 28, RLPR, and the MSBA raised confidentiality concerns with respect to some of those cases. *See* Rule 20(a), (c), RLPR (stating a presumption against disclosure of "files, records, and proceedings," but once probable cause has been determined, records of the matter "are not confidential"). We agree that both issues deserve consideration when the Advisory Committee reviews the ABA's recommendation to update the language of Rule 28.

In recommendation No. 15, the ABA suggested that we consider alternatives to appointing the Director as trustee, *see* Rule 27(a), RLPR (authorizing the appointment of a trustee in cases of disability, death, suspension, disbarment, or other circumstances that require review of files and/or accounts). ABA Rep. at 67. The Director acknowledged the

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[18] In recommendation No. 14, the ABA considered whether clarifying amendments were needed to Rule 10(e), RLPR, which provides a process for presenting additional charges to a Board member when a petition is already pending. The ABA concluded that the existing process "makes sense," ABA Rep. at 66, and the Director agrees. Thus, no further action is necessary.

time demands imposed by these appointments and recognized that participation by other constituents may be useful. We agree with the Director. Although we reject the ABA's specific recommendation, we encourage the Director to continue to work with the MSBA on succession-planning resources for members of the bar that may alleviate the need for trustee appointments in some cases.

We reject the ABA's recommendation No. 17, to provide for discretionary review of referee reports. ABA Rep. at 69. This recommendation would not apply to cases in which there is an objection to the referee's findings or conclusions, in which case a transcript is ordered; would not apply to cases in which the parties adopt the referee's recommendation and stipulate to discipline; and would not apply to cases in which, although there is no stipulation, the only issue is the appropriate discipline. Rule 14(e), RLPR (stating the referee's findings and conclusions are "conclusive" if a transcript is not ordered); *In re Mollin*, 940 N.W.2d 470, 474 (Minn. 2020) (noting findings and conclusions are conclusive in a case involving only the appropriate discipline); *In re Fundan*, 796 N.W.2d 158, 158 (Minn. 2011) (order) (considering a stipulation for discipline). Given the very few cases to which this recommendation might apply, we do not see a need to embed this review standard in a rule.

We also reject the ABA's recommendation No. 20, to amend Rule 16, RLPR, by streamlining the process for temporary suspensions. We have temporarily suspended lawyers based on stipulations, after an evidentiary hearing, and after briefing to the court. *See In re Saliterman*, 983 N.W.2d 922, 922 (Minn. 2023) (order) (evidentiary hearing); *In re Oberhauser*, 664 N.W.2d 847, 847 (Minn. 2003) (order) (stipulation); *In re Pang*, 502

N.W.2d 390, 391 (Minn. 1993) (order) (briefing). Although the process authorized in Rule 16 does not appear to have been used recently, temporary suspensions have been sought and granted, including on an expedited basis. Protection of the public warrants careful consideration when a lawyer's conduct poses a potential of substantial harm to the public, Rule 16(a), RLPR, but the record now before us does not provide compelling reasons to amend Rule 16.

In recommendation No. 23, the ABA proposed codifying the terms for public probation in a separate, more detailed rule. ABA Rep. at 81. Currently, public probation can be imposed "for a stated period." Rule 15(a)(4), RLPR. Putting the specific terms for public probation in a rule will promote transparency and accountability. On the other hand, we set out the detailed terms for this sanction in the order that imposes discipline. *See In re Roach*, 982 N.W.2d 699, 712–13 (Minn. 2022) (imposing supervised probation and identifying reporting requirements); *In re Pearson*, 888 N.W.2d 319, 323–24 (Minn. 2016) (imposing unsupervised probation with three conditions). Although it may be easier to put specific probation terms in a rule, we also must retain the flexibility to impose particular discipline, including specific probation terms, that is appropriate in the individual case. *In re Nielsen*, 977 N.W.2d 599, 612 (Minn. 2022) (stating that cases are "evaluated individually" and the proper discipline depends on the specific facts and circumstances of the case).

Although there are several competing considerations here, we adopt the ABA's recommendation in one narrow respect. Specifically, we seek the Advisory Committee's input on probation terms that would benefit from codification in a governing rule. We

recognize the advantage of notice to a lawyer, through a rule, about probation options (*e.g.*, length, supervised or unsupervised), and the guidance that such a rule might provide to the Office. On the other hand, we believe it is unlikely that every possible probation condition can be captured in a rule. With input from the Advisory Committee, we will determine whether a rule can be codified to appropriately guide the decision to impose public probation under specific terms and conditions considering the specific facts and circumstances of a particular case.

VIII. Miscellaneous Recommendations (ABA Rec. Nos. 8, 22, pp. 50–55, 80).

In two recommendations, the ABA proposed adopting standards for case processing and for imposing discipline sanctions. ABA Rep. at 50–55, 80.

The Office has used case processing standards of one form or another for many years. We agree with the ABA, however, that specific case processing standards should be developed and implemented, for fairness, to promote public trust and confidence, and to provide a periodic review of the efficiency of the system. We therefore refer this recommendation to the Director, to work with State Court Administration on gathering the information needed to develop and make recommendations on case processing standards.

In its second standards recommendation, the ABA recommends that we adopt, or require referees to use, the ABA's Standards for Imposing Lawyer Sanctions. These standards are intended to provide flexibility in considering the range of possible sanctions

for a particular type of misconduct. *See Annotated Standards for Imposing Lawyer Sanctions* (Ellyn S. Rosen, ed., 2d ed. 2019).

We generally consider four factors when imposing discipline: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession." *In re Hansen*, 868 N.W.2d 55, 59 (Minn. 2015) (citation omitted) (internal quotation marks omitted). In addition, we "consider similar cases for guidance, but impose discipline on a case-by-case basis after considering both aggravating and mitigating circumstances." *Id.* (citation omitted) (internal quotation marks omitted). While our multi-factor analysis aligns in many areas with the ABA's standards, there are a few areas in which we consider different factors. *See In re Trombley*, 916 N.W.2d 362, 371 (Minn. 2018) (stating, unlike the ABA, that lack of prior disciplinary history is not a mitigating factor); *In re Bonner*, 896 N.W.2d 98, 109 (Minn. 2017) (stating that cooperation with the Office is not a mitigating factor).

Given the extent to which we consider the same factors or elements as the ABA standards, we do not see a benefit to adopting these standards. We have continually sought to achieve consistency in discipline sanctions, while also recognizing that the discipline appropriate in one case may not be appropriate in another in light of specific facts and circumstances. *See In re Rebeau*, 787 N.W.2d 168, 174 (Minn. 2010). We did not hear in the public comments that these competing objectives are unworkable, or that the multiple factors we consider in determining the appropriate discipline are inadequate. We do not intend to discourage the use of or citation to these standards in a particular case. We simply conclude that we need not *adopt* the standards in order to *consider* them when it is helpful

to do so. We therefore reject the recommendation to adopt the ABA's Standards for Imposing Lawyer Sanctions.

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C O N C U R R E N C E & D I S S E N T

THISSEN, Justice (concurring in part and dissenting in part).

I agree with the court's Order and Memorandum in all respects except for its decision to presumptively allow reinstatement by affidavit for lawyers suspended 6 months or less and to presumptively require a petition for reinstatement for lawyers suspended for more than 6 months. Instead, I would eliminate any time-based presumption. We should make an intentional determination in every case about whether, for purposes of public protection and deterrence, we should require the lawyer being disciplined to petition for reinstatement based on the specific facts and misconduct in that case.

Using arbitrary time-based presumptions does not serve as effectively the interest of clients, the bar, or our court in ensuring that the public is adequately protected as would a case-by-case consideration of whether the lawyer's specific misconduct merits further review by us before the lawyer is reinstated. Indeed, our current rules already allow us to consider the specific facts of a discipline matter and deviate from the presumptions that lawyers suspended for a fixed period of 90 days or less need not file a petition for reinstatement and that lawyers suspended for longer than 90 days may seek reinstatement by affidavit rather than by petition. Rule 18(f), RLPR. The time-based presumption strikes me as an unnecessary and counterproductive step in the process. Further, it creates incentives to impose a shorter or longer suspension period than we otherwise might depending on whether we think requiring a petition for reinstatement is necessary.

Summary: ABA Recommendations and the Court's Decisions.

ABA No.	ABA Recommendation	Decision
1(A-B)	**Clarify the Roles and Responsibilities of the OLPR and the LPRB**:	
	1A Create an Administrative Oversight Committee in place of the Executive Committee; reduce the size of the LPRB; eliminate MSBA Board positions.	*Reject* the recommendation to create an Administrative Oversight Committee. *Reject* the recommendation to reduce the size of the LPRB. *Adopt* the recommendation to reduce the number of Board positions allocated to MSBA nominees; referred to the Advisory Committee to recommend amendments to Rule 4, RLPR
	1(A-B) Eliminate Board approval for Director-initiated investigations, Rule 8(a), RLPR; use a single Board member to decide complainant appeals of dismissals and limit that appeal to the Board member's review.	*Adopt* the recommendation to eliminate Board approval for Director investigations; referred to Advisory Committee to recommend amendments to Rule 8(a), RLPR. No action taken because complainant's appeal of dismissal is limited to review by single Board member, Rule 8(e), RLPR.
	1B(1)-(2) Adopt a definition of probable cause; streamline probable-cause proceedings.	*Adopt in part* the recommendation to define the standard for proceeding with a public petition; referred to the Advisory Committee for recommendations on amendments to Rule 9, RLPR to define a "reasonable cause" standard and to streamline the procedures for cause proceedings.
2(A-B)	**Amend the Rules to Clarify the Roles and Responsibilities of the OLPR**:	
	2A Eliminate the Board's 2-year review of Director appointment, and Board input on Director's hiring decisions.	*Adopt* the recommendations; referred to the Advisory Committee to recommend amendments to Rule 5, RLPR.
	2A Streamline dismissal and other written notices.	*Adopt* the recommendations; referred to the Director to implement.
	2B Consider transferring responsibility for Office and Board advisory opinions.	*Reject* the recommendation.
3	Increase the efficiency of the district ethics committees.	No action taken. The Director and the Board are encouraged to work with the district ethics committees to consider, develop, and implement as appropriate, additional training resources as needed.
4-5	Provide additional administrative staff for the Board and the Office, and law clerk support for referees.	Referred to the State Court Administrator to work with the Director and the Board on administrative support needs based on budget priorities.
6-7	Enhance the technology tools available to the Office; make disciplinary precedent widely and publicly available.	Referred to the Director and the Board, to work with the State Court Administrator to develop proposals to obtain and implement updated technology tools as needed and consider how to make disciplinary precedent widely and publicly available.
8	Develop Case Processing Guidelines.	Referred to the Director and the State Court Administrator to develop and recommend the adoption of case processing guidelines.

Table-1

Summary: ABA Recommendations and the Court's Decisions.

ABA No.	ABA Recommendation	Decision
9-10	Establish separate websites for the LPRB and OLPR; enhance public outreach.	Referred to the Director and the Board to work with the State Court Administrator to develop proposals to build and launch separate websites. Referred to the Director and the Board to develop and implement enhanced public outreach programs.
11-12	Implement mandatory and regular training for staff and system volunteers.	Referred to the Director and the Board to collaborate on and support training opportunities as appropriate and needed for staff and system volunteers.
13	**Streamline Reinstatement Proceedings**. • Allow reinstatement by affidavit for suspensions of 6 months or less. • Provide guidance in Rule 18, RLPR, on the materials and documents required for reinstatement. • Use referees, rather than Board panels, for reinstatement hearings.	*Adopt in part* the recommendation to allow for reinstatement by affidavit for suspensions of 6 months or less unless the lawyer has previously been suspended; referred to the Advisory Committee to recommend amendments to Rule 18 to promote transparency and efficiency in the reinstatement process. *Adopt* the recommendation to amend Rule 18 to provide guidance on the materials and documents required for reinstatement; referred to the Advisory Committee to recommend amendments to Rule 18. *Reject* the recommendation to use referees for reinstatement hearings.
14	Amending petitions to conform to the proof, Rule 10(e), RLPR.	No action taken.
15	Consider Alternatives to Appointing the Director as Trustee.	*Reject* the recommendation, but encourage the Director to work with the MSBA on resources for succession planning
16	Update Rule 28, RLPR.	*Adopt* the recommendation; referred to the Advisory Committee to recommend amendments to Rule 28.
17	Provide for Discretionary Review of Referees' Reports.	*Reject* the recommendation.
18	Clarify the admissibility of prior discipline evidence, Rule 19, RLPR.	*Adopt* the recommendation, referred to the Advisory Committee to recommend amendments to Rule 19.
19	Adopt a diversion rule.	*Adopt* the recommendation to develop a diversion program; referred to the Advisory Committee for study and recommendations.
20	Streamline the Temporary Suspension Process, Rule 16, RLPR.	*Reject* the recommendation.
21	Streamline the Admonition Process.	*Reject* the recommendation, with the exception of eliminating the authority of a single Board member to require an admonition be imposed, Rule 8(d)–(e), RLPR. *Reject* the recommendation to eliminate a panel's authority to issue an admonition.

Table-2

Summary: ABA Recommendations and the Court's Decisions.

ABA No.	ABA Recommendation	Decision
		Reject the recommendation to eliminate right to appeal an admonition, with the exception of the de novo appeal before a second panel, Rule 9(j)(1)(iii), RLPR. Referred to the Advisory Committee to recommend amendments to Rules 8(d)–(e), 9(j)(1), RLPR.
22	Incorporate the ABA Standards for Imposing Lawyer Sanctions.	*Reject* the recommendation.
23	Eliminate private probation and codify the terms for public probation in a rule.	Defer further action on private probation until the advisory committee makes recommendations on a diversion program. *Adopt in part* the recommendation to codify terms for public probation in a rule; referred to the Advisory Committee, with directions to consider the public probation terms and conditions that should be codified in a rule.
24	Align Rule 11, RLPR, with caselaw prohibiting resignations in lieu of discipline; provide for discipline on consent.	*Adopt* the recommendation, referred to the Advisory Committee to recommend amendments to Rule 11.
25	Clarify taxable disbursements, Rule 24, RLPR.	*Adopt* the recommendation, referred to the Advisory Committee to recommend amendments to Rule 24.