STATE OF MINNESOTA

IN SUPREME COURT

ADM07-8001

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

IT IS HEREBY ORDERED that a hearing be held before this court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on September 23, 2008, at 2:00 p.m., to consider a report filed on May 19, 2008 by the Supreme Court Advisory Committee to Review the Lawyer Discipline System, recommending amendments to the Rules on Lawyers Professional Responsibility. A copy of the report is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, on or before September 12, 2008; and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before September 12, 2008.

Dated: May 27th, 2008

BY THE COURT:

Russell A. Anderson
Chief Justice

REPORT OF

THE SUPREME COURT ADVISORY COMMITTEE TO REVIEW THE LAWYER DISCIPLINE SYSTEM

ADM07-8001

May 19, 2008

Allen I. Saeks, Chair

Hon. James Broberg
Eric T. Cooperstein
Roger W. Gilmore
Karen Brown Kepler
Geri L. Krueger
Eric D. Larson
John C. Lervick
Charles E. Lundberg
Michael J. McCartney
Judith M. Rush
Murray Shabsis
Thomas Vasaly
James E. Wilkinson
Bruce R. Williams
Todd A. Wind

Hon. Helen M. Meyer
Supreme Court Liaison

Frederick K. Grittner
Clerk of the Appellate Courts
Staff

EXECUTIVE SUMMARY

INTRODUCTION AND OVERVIEW

The Committee was charged with reviewing and assessing the process, procedures, and operations of the Lawyers Professional Responsibility Board ("LPRB") and the Office of Lawyers Professional Responsibility ("OLPR") in administering the attorney discipline system in Minnesota.

On the whole, the lawyer discipline system in Minnesota is "healthy" and working well. The LPRB and the OLPR are doing, in general, a very good job of handling legal ethics complaints and the subsequent disciplinary processes. The LPRB is perceived as fair and is generally well respected by the Bar in the state. Employee morale at the OLPR is high and there are no major problems that are impeding the effectiveness of the discipline system.

FINDINGS AND RECOMMENDATIONS

The Committee explored 11 major topics and has made 12 Findings and accompanying Recommendations.

1. **ACCESS TO THE DISCIPLINE SYSTEM.** The Committee considered the adequacy of access to the lawyer discipline system by individuals with limited English proficiency (LEP) or with disabilities. The OLPR is aware of and responsive to these issues. Although the Director's Office does not have formal policies in place addressing access issues it does respond to LEP and disability circumstances as they arise.

   RECOMMENDATION: The Committee recommends that the OLPR be directed to consult with the Minnesota State Council on Disability, with state councils (or their equivalent) whose constituents include persons with limited English proficiency, and with other interested parties, for purposes of drafting and proposing for adoption by the OLPR and the LPRB amendments to the Policies and Procedure Manual, and to the Panel Manual so they will reflect a formal policy addressing access issues.

2. **CASE MANAGEMENT—AGING FILES.** As a result of a review of the LPRB 2007 Annual Report, the Committee focused upon the statistics reported regarding the length of time disciplinary files have remained open. These statistics reflected

that the number of cases at least one-year-old had increased significantly since 2002. The Committee also received anecdotal reports from some attorneys who frequently represent Respondent lawyers that they had matters before the OLPR in which there had been no activity in over a year. The upward trend in the aging of files began well before Director Cole's tenure. Director Cole indicated that this trend likely would be reversed after the staff was up to its full complement and had additional experience in handling cases.

RECOMMENDATIONS: The Committee recommends: (1) That there be better reporting of statistics on individual Respondent files over one-year-old; Revising the "old file" category in the Annual Report to reflect items such as cases "on hold" pending the outcome of litigation in other forums, cases held in a District Ethics Committee ("DEC") for a set period of time, or cases awaiting charges etc.; (2) The application of differentiated case management methods in which files are designated, within a relatively short time after they are received (such as within 90 or 120 days) as either "complex" or as presumptively candidates only for private discipline; (3) The Director should reallocate resources from lower priority functions such as, for example, presentation of CLEs and providing advisory opinions, to the investigation and prosecution of violations of the Minnesota Rules of Professional Conduct ("MRPC") by attorneys; and, (5) The LPRB Executive Committee should hold whoever is serving as Director accountable for the aging of files both through annual performance reviews and through a quarterly review of file aging statistics.

3. **PROBABLE CAUSE HEARINGS.** A majority of the Committee concluded that several changes to the probable cause process are necessary in order to address issues of delay and inefficiency, and to ensure that the system reflects an appropriate balance between the goal of treating the Respondent lawyer fairly and the goal of protecting the public. The Committee found that there did not exist a convincing rationalé for giving the Respondent a right to two separate evidentiary hearings on probable cause when that right is not required by due process, is not necessary to ensure the fairness of the proceeding, is not available to other citizens of this state in criminal legal proceedings, and is not available to lawyer Respondents in other states.

   RECOMMENDATION: A majority of the Committee recommends that in most cases the probable cause determination should be made by a Lawyers Board panel based on the Director's and the Respondent's written submissions without a

formal evidentiary hearing. The panel would, however, have the discretion to conduct an adversarial evidentiary hearing if it determined that special circumstances required such a hearing, such as, *e.g.*, the need for a credibility determination. Accordingly, the Committee proposes that Rules 9, 10, and 15 of the Rules on Lawyers Professional Responsibility (RLPR) be amended to accommodate these changes.

4. **PANEL MANUAL.** The Lawyers Board Panel Manual was originally adopted in 1989 by the LPRB. It was intended to promote consistency among the hearing panels, to make the board panel procedure more open to the bar and to the public, and to assist *pro se* Respondent lawyers, and those lawyers who represent Respondents only infrequently, to make a more effective appearance before a panel. The Manual has been revised or updated only occasionally since then, with some substantive revisions appearing to have been made in 1995 and 1998. There have been no revisions or updating of the Manual in any respect since 2000.

   RECOMMENDATION: The Committee recommends that the Panel Manual be updated promptly to bring it up to date to reflect case law and other pertinent developments over the past eight or more years. Once the Manual has been updated, the Committee further recommends that the Director develop an ongoing process whereby each new case or other development suggesting a change to the Panel Manual be incorporated promptly into the Manual. Finally, the Committee recommends that the updated Panel Manual should be posted to the LPRB website for easy access by all concerned persons, as well as the public in general.

5. **PRIVATE DISCIPLINE.** The Committee looked at the use of private admonition and private probation as forms of discipline. It revisited the issue of whether private discipline was effective in educating a Respondent lawyer and deterring future misconduct. The Committee also examined the issue of whether it was ever appropriate to use private discipline in situations where the discipline might better be public so as to avoid harm to future clients who would otherwise be unaware of "serial offenders." The Committee also considered whether or not private discipline should be eliminated from the panoply of sanctions. In addition, the Committee reviewed whether lawyers are inappropriately receiving multiple private admonitions owing to the lack of a clear interpretation of the "isolated and non-serious" standard set out in Rule 8(d)(2), RLPR.

RECOMMENDATION: The Committee concluded that private disciplinary options serve a valid purpose in the circumstances for which they were intended. As to the meaning of "isolated and non-serious," the LPRB should consider incorporating the ABA definition, or other guidance, in the Panel Manual to assist panels in determining whether or not a private admonition is appropriate.

6. **PUBLIC REPORTING OF PRIVATE DISPOSITIONS.** The Committee considered the methods used to report discipline to the public and to the bar. Currently, only public discipline cases and admonition appeals are publicly reported. The Committee considered the benefit of systematically reporting private dispositions so that they could be used as precedent for future cases. Because many dispositions result from negotiations, or are decided by panels, or are settled because of the particular facts or the quality or quantity of available evidence, the individual cases providing for private dispositions often are of little benefit as precedent.

   RECOMMENDATION: The Director's Office should not be required systematically to report private dispositions. However, the Committee recommends that the Director be encouraged to publish on the OLPR web page and elsewhere, annually or even more frequently, commentary describing private dispositions of note, including statistics or other information that would be of assistance both to the practicing bar and to Respondent attorneys.

7. **REACHING IMPAIRED LAWYERS IN THE DISCIPLINE SYSTEM.** The Committee looked at the extent to which the current disciplinary system is able to make referrals out to assist Respondents, or otherwise to communicate to impaired lawyers, the resources available to them from the court-funded Lawyer Assistance Program (LAP). Lawyers who fail to respond in any way to proceedings brought by the OLPR very likely could have some serious substance abuse or mental health problems in addition to their professional ethics issues. This situation has prompted other state disciplinary authorities to adopt procedures for contacting their state's comparable LAP in those circumstances.

   RECOMMENDATIONS: The Committee recommends that the OLPR implement procedures to (1) routinely provide information regarding the LAP to Respondent attorneys and attorneys involved in the work of the disciplinary system including attorneys who represent Respondents; (2) to assist the LAP by providing petitions

and other public information to the LAP; and, (3) to ensure that OLPR staff and Board, DEC and probation volunteers receive information about the resources of the LAP along with suggestions as to how best to disseminate that information.

8. **COMMUNICATION BY DIRECTOR WITH DECs AND COMPLAINANTS.** The Committee examined two communications issues relating to the Director's Office. First, the Committee looked at whether the Director's Office could improve its training and communications to the bar association DECs in two areas: (a) providing training and guidance to the DEC members, particularly those who are inexperienced, and (b) providing adequate explanations to the DECs when the Director's Office does not follow the DEC recommendations as to discipline. Second, the Committee reviewed whether the Director's Office could improve its communications to Complainants when a complaint is dismissed.

   RECOMMENDATIONS: The Committee recommends that: (1) The Director periodically meet with, and review the activities of, each of the OLPR liaisons to the DECs to make sure that communications with each DEC are adequate; (2) When the liaison meets with DECs, the liaison should discuss the reasons for past departures by the OLPR from the DEC recommendations and should encourage the DEC members to contact the Chair, the liaison, or the Assistant Director who is responsible for the file, when the investigator wants to know the reasons for departures from the DECs disciplinary recommendations; (3) Changes should be made to the forms and memoranda dismissing complaints to improve communications with Complainants; and, (4) Language should be added to the Notice of Complainant's Right to Appeal paragraph in dismissal notices to more clearly inform the Complainant that an appeal is unlikely to be successful unless the Complainant provides compelling reasons or offers strong evidence why the complaint should not be dismissed.

9. **PROBATION.** The Committee looked at the ABA statistics which showed that the number of public probations imposed in Minnesota is slightly above the average in other states. Issues explored included the effectiveness of probation and the appropriateness of probation where chemical dependency or mental health issues were involved.

RECOMMENDATION: The Committee concluded that the present probation system was working well and that no changes needed to be recommended.

10. **EDUCATING LAWYERS THROUGH DISCIPLINE.** The Committee examined whether various forms of education could be used to a greater extent with lawyers who are disciplined. The Board's published articles and written advisory opinions, CLE seminars, and advisory opinion service do serve to educate the profession in this regard. However, the Committee found that these good efforts should be further extended by incorporating them into the disciplinary system itself.

    RECOMMENDATIONS: The Committee recommends that the LPRB reference the availability of the advisory opinion section of its website in all its decisions. The LPRB should highlight these website resources and encourage their use. In addition, the Committee recommends that in appropriate cases disciplined lawyers be directed to read specified articles or attend specific CLE seminars germane to the rules found to have been violated by the lawyer and that these assignments be part and parcel of the discipline meted out.

11. **LAWYER RECIDIVISM.** The Committee used statistical data to look at questions regarding the effectiveness of private discipline in educating lawyers regarding "low-level ethics violations," correcting that improper conduct, and deterring future misconduct. One notable finding is that the time between disciplines is short for lawyers with multiple disciplines and that few lawyers receive discipline more than 10 years after an initial discipline.

    RECOMMENDATIONS: The Supreme Court should consider adopting a rule expunging private admonitions if the lawyer has had no discipline for 10 years after the last admonition. Such a policy would be consistent with the rehabilitative goals of the discipline system and have a negligible impact on efforts to protect the public. Moreover, it would provide a significant incentive for lawyers to avoid future misconduct. Second, the LPRB and OLPR should consider modifying their approaches to enforcement based on the relatively brief time that elapses, on average, between a lawyer's disciplines.

12. **PERIODIC REVIEW OF THE LAWYER DISCIPLINE SYSTEM.** The Committee found the process of reviewing the lawyer discipline system in Minnesota to be a productive and worthwhile endeavor.

RECOMMENDATION: The Committee recommends that the lawyer discipline system be reviewed at least every 10 years. Objective reviews serve to strengthen the trust and confidence of the public and the Bar in the lawyer discipline system. Periodic reviews also help the LPRB and the OLPR in assessing the structure, rules, and day-to-day workings of the discipline system.

The Committee thanks Frederick K. Grittner, Clerk of the Appellate Courts, for his skilled and professional assistance to the Committee and work on this Report.

INTRODUCTION

The Supreme Court Advisory Committee to Review the Lawyer Discipline System was established on February 14, 2007, to "review and assess the process, procedures, and operations of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility in administering the attorney discipline system in Minnesota and to report its findings and make recommendations for improvements it deems advisable." (See Order in Appendix A). This was the third time the Supreme Court has appointed an advisory Committee to review the workings of the lawyer discipline system. The 1985 Dreher Report focused on improving the process for lawyer discipline and contained over 60 specific recommendations that dealt with every aspect of the system. The report also recommended that the Lawyers Professional Responsibility Board ("LPRB") undergo periodic review. The 1994 Henson-Dolan Report conducted a review that centered on recommendations from the American Bar Association's McKay Commission to improve lawyer discipline throughout the United States. The report examined these proposals and made recommendations as to whether such changes were warranted in Minnesota. This report also recommended that the LPRB and the Office of Lawyers Professional Responsibility ("OLPR") undergo periodic review.

The Supreme Court appointed members of the Committee in a July 26, 2007 order (See Appendix A). The Committee consisted of 16 lawyers and 3 non-lawyers, all of whom had served or are currently serving on the LPRB or District Ethics Committees.[1] Members, all of whom have demonstrated a long-standing commitment to public service, were drawn from around the state.

The Committee met monthly from September 2007 to February 2008 and bi-weekly in March, April, and May 2008. It met twice with Martin A. Cole, Director of the OLPR, and also with Kent A. Gernander, Chair of the LPRB, in another session. As work progressed the Committee established seven subcommittees to investigate major topics of interest. (See Appendix B). Subcommittee reports were presented for comment to the full Committee. In addition, many of these reports were submitted to Director Cole for comment. Final reports of the subcommittees were submitted to a vote by the full Committee. The Committee also solicited letters from lawyers and citizens concerning their impressions of the lawyer discipline system and invited suggestions for improving

[1] Members James Campbell, Jill Frieders, and Thomas Schumacher were not able to participate in preparation of this report.

the system. The contents of these letters were shared by the Chair with the Committee. Further details on the Committee's work will be contained in the discussion of the individual findings and recommendations. The following report summarizes the issues considered by the Advisory Committee, makes findings and recommendations for ways of improving the lawyer discipline system, and includes one proposed amendment to the Rules on Lawyers Professional Responsibility ("RLPR"). A minority position that discusses this proposed amendment is included in the report.

I. THE MINNESOTA LAWYER DISCIPLINE SYSTEM: AN OVERVIEW

At the outset the Committee emphasizes that on the whole the lawyer discipline system in Minnesota is "healthy" and working well. The LPRB is perceived as fair and is generally well respected by the Bar in the state. Employee morale at the OLPR is high and there are no major problems that are impeding the effectiveness of the discipline system. Unlike the orders establishing the Dreher and Henson-Dolan Advisory Committees, where the Court asked these bodies to investigate specific areas of concern and interest, the order establishing the present Committee did not highlight any specific issues that needed to be addressed. Though the Committee has identified approaches to improving the system, in no way should the Committee's work be misinterpreted as signifying that there are serious problems. The LPRB and the OLPR are doing, in general, a very good job of handling legal ethics complaints and the subsequent disciplinary processes.

The Committee solicited comments from all participants in the system, including complainants, complainants' counsel, lawyers representing Respondent lawyers, Chairs of District Ethics Committees ("DECs"), former and present members of the LPRB, and others interested in the workings of the lawyer discipline system. A number of Respondents' counsel submitted letters, providing insights on their experiences with all levels of the discipline system. Several made specific comments about issues the Committee explores in this report but the overall tenor of the comments was positive about the LPRB and the OLPR.

Some past and current members of the DECs and the LPRB also submitted letters and they contained thoughtful and incisive statements about the workings of the system. Again, the OLPR received many positive comments. Several lawyers with a general interest in the disciplinary process made written comments as did a staff lawyer with the national organization HALT (An Organization for Legal Reform, Inc.). HALT identified three issues—leniency, lack of transparency, and delay—that it believed the Committee

should address. The Committee did explore these issues during the course of its work. In sum, this correspondence confirmed the consensus of the Committee that the discipline system in Minnesota is working well.

Members of the Committee conducted separate interviews with two staff lawyers and two support staff in the OLPR to learn how they perceived the workings of the Office, leadership, and morale. There was general agreement that morale is high, in large part due to the leadership style of Director Cole. He is not a micro-manager. Staff is comfortable approaching him whenever something is needed or someone has an idea. He encourages open communication within the Office.

The turnover in the Director and staff attorneys of the OLPR the past five years, including three Directors in the past five years, has been based on positive external forces, including promotions to the bench, retirement, and life changes. All four staff members emphasized that these departures were not based on dissatisfaction with the Office and that they are hopeful that having finally attained a full complement of lawyers, Office efficiency will improve. Although the Director expressed some concern regarding the difficulty in attracting attorney candidates with private practice experience, the Director was confident that the Office has hired well-qualified attorneys who will be able to dispatch all the duties of the job.

II. BASIS FOR FINDINGS AND RECOMMENDATIONS

The Committee's findings and recommendations that are set out below are the result of a process that began with open-ended discussions on what issues the Committee should address. Because of the Supreme Court's general charge to the Committee, Committee members spent their first meetings reviewing the Dreher and Henson-Dolan Reports, examining the LPRB's Annual Reports, interviewing Director Cole and Chair Gernander, and sharing their insights, knowledge, and concerns. Through this process, specific areas for investigation emerged that warranted extensive review by seven subcommittees. (See Appendix B). The recommendations in this report have some commonalties: (1) Improving communication with members of the public and ensuring that they have access to the system; (2) Improving communication with lawyers, whether they are the subject of a complaint, representing a Respondent lawyer, or simply seeking information on the disciplinary process; (3) Identifying ways to improve the efficiency and timeliness of disciplinary investigations; and, (4) Strengthening confidence in the lawyer discipline system.

III. ACCESS TO THE DISCIPLINE SYSTEM

--FINDINGS--

The Committee considered the adequacy of access to the lawyer discipline system by individuals with limited English proficiency (LEP) or with disabilities. Minnesota adults with limited English proficiency numbered about 130,000 according to the 2000 U.S. Census. The increase in demand for Court interpreter services reflects the increased use of the judicial system by LEP persons. Most Minnesota counties have adopted a LEP plan in order to "provide a framework for the provision of timely and reasonable language assistance to LEP persons who come in contact with the Minnesota District Courts."

It is estimated that more than 520,000 adult Minnesotans have some form of disability. (2005 American Community Survey, U.S. Census). In 2005, the Department of Human Services estimated that 190,000 people had a serious mental illness. Disabilities may make it difficult, if not impossible, for such persons to effectively participate in the lawyer discipline system.

As a matter of good public service, Minnesota should ensure that all of its legal system consumers, including disabled and LEP persons, do not encounter serious barriers in the lawyer discipline system. The integrity of the profession cannot be properly safeguarded if a segment of the community cannot effectively bring complaints to the lawyer discipline system or if the system is unable to gather information from and interact with persons with communication limitations and disabilities.

The Committee considered laws that address disability and language barriers to public services and accommodations as background for suggesting these changes. Title II of the Americans with Disabilities Act of 1990 (ADA) provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity." 42 U. S. C. §12132. The case of *Tennessee v. Lane*, 541 U.S. 509 (2004), applied Title II to a state court system. The Minnesota Human Rights Act sets out similar principles. Minn. Stat. §§363A.11, subd.1(2) and 363A.12, subd.1.

With respect to *language* access, Minn. Stat. §546.43, subd. 2 provides:

> In a proceeding before a board, commission, agency, or licensing authority of the state… where a witness or the principal party in interest is a

> disabled person, all of the proceedings that are pertinent shall be interpreted in a language the disabled person understands by a qualified interpreter appointed by the board, commission, agency, or licensing authority.

In this provision, disability refers to communication disabilities and includes limitations on English language proficiency. Minn. Stat. §546.42.

The OLPR is aware of and responsive to these issues. Director Cole reports that there are only a few cases during his tenure that have been affected by disability or LEP issues. The Director does not know if this low incidence of cases with disability issues involving disabled or LEP persons and lawyers are realistically low, or if there is little awareness of difficulties in accessing the lawyer discipline system by the disabled.

The Director's Office does not have formal policies in place addressing access issues but does respond to situations as they arise. Its facilities include some accessible design features. Oral complaints have been recorded and transcribed for people who cannot write. Brochures have been translated into Spanish, Hmong and Somali, and there are plans to do a Russian brochure. Interpreters are hired on an as-needed basis. Complainants are sometimes encouraged to supply their own translator. Best practices suggest that this is a potential problem because informal interpreters are not subject to quality-control standards, and they may not refrain from interjecting their own views in place of information actually provided by the Complainant or a witness. The Office itself could take on cases that might otherwise be handled by DEC volunteers if significant disability-related accommodations or interpreting services are needed. Director Cole suggested that the Office could develop and incorporate policies addressing these issues in the Office's Policies and Procedures Manual. Comparable improvements could be incorporated in a revised Panel Manual.

RECOMMENDATIONS:

The Committee recommends that the OLPR be directed to consult with the Minnesota State Council on Disability, State Councils whose constituents include persons with limited English proficiency, and with other interested parties, for purposes of drafting and proposing for adoption by the OLPR and the LPRB amendments to the Policies and Procedure Manual, and the Panel Manual. The goal of the amendments would be to

provide effective access to the lawyer discipline system for people with disabilities and limited English language abilities.[2]

The following illustrative, but not limiting points should be considered for inclusion in the manuals:

- The LPRB, the OLPR, and the DECs and panels should communicate using a Complainant's, witnesses' or Respondent's preferred language or method, if the person cannot communicate effectively in English. Interpretation may include communication in alternative formats including sign language, Braille, oral interpretation of documents and written translation of critical documents.
- OLPR, Staff, DEC volunteers, panel members, Complainants, Respondents and witnesses may request that the OLPR retain qualified interpreters to assist in communications with LEP and disabled Complainants, Respondents and witnesses as necessary for effective investigation of a complaint.
- A Complainant, witness or Respondent who cannot effectively communicate in the course of a proceeding without assistance shall be provided with an interpreter by the OLPR on his or her request.
- Complainants and Respondents with disabilities whose participation in the Lawyer Discipline System are materially limited because of disability, should receive such reasonable accommodations in the lawyer discipline process as may be necessary to afford them equal access and participation. Examples may include holding interviews or hearings in accessible spaces for persons with mobility limitations, sign language interpretation for the hearing impaired and the provision of supplemental information and explanations for people with cognitive disabilities.

IV. CASE MANAGEMENT—AGING FILES

--FINDINGS--

As a result of a review of the LPRB 2007 Annual Report, the Committee noted its concern with the statistics regarding the length of time disciplinary files have remained open. The 2007 Annual Report tabulates this data. (See Table 1, Appendix D).

The number of cases at least one-year-old has increased significantly since 2002. At his meetings with the Committee in September and October 2007, Director Cole indicated

[2] These recommendations are based on the Committee's views of appropriate policy. The Committee did not determine that these recommendations are required by law.

that his Office had experienced an increase in complaints in 2007, and had experienced some turnover in staff. These were factors, he noted, that contributed to the total number of open files and also to the files open for longer than one year. In his February 2008 *Bench & Bar* column, the Director indicated that because of a drop in new complaints in November and December 2007, the total number of files open at the end of that year had dropped to about 500, consistent with the long-standing LPRB goal. (*See* M. Cole, "Hello, Goodbye" *Bench & Bar of Minnesota* February 2008). The Director's column did not indicate the number of files open for over one year.

The Committee received anecdotal reports from attorneys who frequently represent Respondent lawyers, some of whom indicated that they had matters before the OLPR in which there had been no activity in over a year. Given that previous annual reports indicate that the LPRB goals were met in years in which the volume of complaints received were even somewhat higher than current levels, the Committee decided to inquire further regarding the aging of files. A subcommittee chaired by Geri Krueger, a current member of the LPRB, was designated to obtain the necessary information.

The importance of timeliness on cases was considered by the Committee as a primary issue not only because of fairness to both the Respondent and the Complainant but also to the public perception of the discipline process as it relates to the Complainants' trust in the system and the Respondents' right to finalize any action required based on the complaint so as to continue their livelihood.

The subcommittee noted that the total number of files at the OLPR appeared to be at 500, the target maximum, although the cases more than one year old still appeared to exceed the target. Also, the volume of complaints, following the upswing in the first half of 2007, appeared to be trending downward. The subcommittee questioned Director Cole on this topic. Director Cole indicated that a staff lawyer's work is broken into five categories of work: (1) handling trial litigation and appeals (*i.e.*, cases in which the Director has issued charges of unprofessional conduct or filed a petition for disciplinary action); (2) rendering admonitions and dismissals; (3) presenting CLEs (including preparing and researching); (4) issuing advisory opinions; and, (5) carrying out various administrative activities.

Director Cole stated that year-old files are distributed amongst the lawyers fairly evenly and that Case List meetings have traditionally been held every three to four months, during which the status of every case is discussed. Though deadlines are set for several

files at each meeting, Director Cole qualified these as "soft" deadlines. If there have been no communications on a case for a certain period of time, a form letter is automatically sent to the Complainant every three months stating that the case is still under consideration, and the case is then diaried for further follow up. There is no similar tracking system or letters sent to the Respondent, although the Director indicated this could be incorporated into the diarying and computer generated tracking system.

As to the issue of aging files, the upward trend in aging files began well before Director Cole's tenure. Director Cole indicated that this trend likely would be reversed after the staff is up to its full complement and has received additional experience. The Committee determined that while this information was encouraging, it still needed to actually examine some aging case files.

Advisory Committee Chair Allen Saeks requested that the Director allow Ms. Krueger to review selected case files maintained in the Director's Office. As a current LPRB member, Ms. Krueger could review files without breaching the confidentiality provisions of Rule 20, Rules on Lawyers Professional Responsibility, as long as she did not share any identifying information regarding Respondents with any other members of the Committee.

The subcommittee, in consultation with Mr. Saeks, identified the following categories of files to be obtained and reviewed by Ms. Krueger:

1) The five (5) oldest files in which the matter has been referred to the DEC but in which no charges have as yet been filed.
2) The five (5) oldest files being investigated at the board level in which no charges have as yet been filed.
3) The five (5) oldest files in which charges have been filed but the matter has not as yet been resolved.
4) The five (5) oldest files in which charges have been filed subsequent to July 1, 2007. (The oldest matter pending (filed in August 2007) was settled in March 2008 by agreement thus canceling a panel hearing scheduled for April 15, 2008).

Director Cole was very accommodating with this request, making available the requested files along with a chronological memorandum for each file produced.[3] The Director produced the "complaint" files for 15 Respondent attorneys, including two attorneys seeking reinstatement.

On March 13, 2008, samples of open cases assigned to each of the Director's Office staff attorneys were reviewed at the Director's Office. There was some overlap among the requested categories. The files contained a total of 34 complaint files pertaining to 13 attorneys and 2 reinstatement files. The complaints that were filed ranged in date from 2004 to 2006. A table summarizes some of what could be gleaned from these files. (See Appendix D, Table 2).

Those files awaiting the results of pending lawsuits or proceedings were being tracked and diaried to have follow-up letters sent out routinely. They appeared to be acted upon in as timely a manner as possible. The remaining files, however, reflected long delays in activity. They appeared to be files that required additional attention without firmer timelines for resolution. There were often many months with no activity (other than the mailing of computer-generated form letters to Complainants).

An efficient prompt determination on how to proceed with each complaint received by the Director's Office, possibly by utilizing an in-take person to implement an established policy that states how complaints are to be assigned for processing with set timelines and goals, may expedite the files to disposition. Those files that have a question as to the type of discipline required may require review at least monthly during staffing to increase input into the decision to establish timely resolution.

Overall there appeared to be some files that remained in a pending status due to mitigating circumstances (such as awaiting results in pending lawsuits), thus placing those timelines beyond the control of the Director's Office. However, the remaining files appeared to require firmer timelines with set goals in order to establish the type of discipline required on the complaint while at the same time maintaining timely contact with the Complainant and the Respondent, or the attorney for the Respondent as to progress being made on the file. Sending a computer-generated letter every three months to the Complainant only stating "your complaint continues to be worked on" is

[3] Any files in the requested categories in which members of the Advisory Committee were involved either as Attorneys or LPRB Panel members were omitted from review per the Advisory Committee request and the Director's concurrence.

unsatisfactory to the Complainant, to the Respondent or the attorney for the Respondent, and, ultimately, the goals of the Director's Office.

RECOMMENDATIONS:

Based upon the above findings and conclusions, the Committee makes the following recommendations:

A. **Reporting of Statistics on Individual Respondent Files over One year-old.** From year to year, it is difficult to determine whether fluctuations in the file aging statistics are due to multiple complaints against individual attorneys in some years and only single complaints against individual attorneys in other years. Reporting of statistics in the Annual Report both by the total number of separate complaint files and also by the number of Respondent attorneys would provide both a basis for historical comparison and better file tracking. The old file category would be more statistically accurate and of more historical value if it were refined to reflect items such as cases on hold pending litigation in another arena, cases held in DEC over a set period of time, awaiting charges, etc. The OLPR should consider refining its case-tracking system to identify cases that meet certain criteria that indicate that the case may not be moving. For example, the case-tracking system could generate a report of those cases that have been open more than six months and as to which a DEC report has been submitted but neither charges nor an admonition has been issued.

B. **Differentiated Case Management.** It appears that there may be a tendency for the staff to devote attention to the most serious cases, while the matters that are on the borderline between granting a dismissal and seeking private discipline receive less attention. While this prioritization is understandable, the Committee believes that some limits should be set on how long a complaint file can remain inactive before it is resolved. The LPRB should consider implementing a differentiated case management system, either by internal policy or by amendments to the Rules on Lawyers Professional Responsibility, in which files are designated, within a relatively short time after they are received (such as 90 or 120 days) as either "complex" or presumptively candidates for private discipline. Complex files could include those in which (1) public discipline is a likely outcome, (2) those which are likely to be delayed by pending litigation or similar proceeding in another forum, and (3) those involving multiple complaints. Presumptively private disposition files (or some other suitable nomenclature) would include all other

files. For this latter category, the Director should be required to issue an initial disposition (dismissal or admonition) within a limited period of time, such as a year. Complainant or Respondent appeals within the system should be excluded from the operation of such a rule. Statistical tracking of the *outcome* of complex files would discourage the over-categorization of matters as complex.

C. Reallocation of Resources. Because the primary function of the OLPR is the investigation and prosecution of violations of the MRPC by attorneys, there can be times during which the Director should reallocate resources from lower priority functions such as, for example, presentation of CLEs and providing advisory opinions. This could be accomplished by deferring or declining CLE requests or closing down the advisory opinion service on particular days. The Director might also set a policy that restricts more recently hired staff lawyers from doing CLEs or Minnesota Lawyer articles during periods of heavy case loads. The Committee believes that implementation of this recommendation should be left to the LPRB and the Director.

D. Monitoring by the Executive Committee. The subcommittee had noted that the present increase in files over one year predates the tenure of Director Cole. Actually, this situation has arisen periodically over the past twenty years. The Committee recommends that the LPRB Executive Committee hold the Director accountable for aging files both through annual performance reviews and through a quarterly review of file aging statistics. The Director would in turn hold the staff accountable in a like manner. The Executive Committee also could, in its discretion, require the Director to implement additional case management techniques, such as regular and formal case reviews with staff attorneys, reassignment of cases, reallocation of non-prosecution responsibilities amongst attorneys, etc. The Director may wish to set a scheduling plan for certain types of cases.

In sum, more and varied efforts should be generated within the disciplinary system to significantly shorten the time that cases remain pending. The result will be that (1) sanctions for violation of the Minnesota Rules of Professional Conduct ("MRPC") will be administered more promptly so as to more quickly discourage repetition of inappropriate conduct, (2) Respondents who are not found to have violated the MRPC will be exonerated more quickly, and (3) Complainants will sooner learn how the disciplinary system has dealt with their complaints.

V. PROBABLE CAUSE HEARINGS

--FINDINGS--

The Committee considered whether the probable cause process in the Minnesota lawyer discipline system is working well. A majority of the Committee concluded that several changes to the process are necessary to ensure that the system reflects an appropriate balance between the goal of treating the Respondent lawyer fairly and the goal of protecting the public.

In the Minnesota lawyer discipline system, three-member panels of the LPRB determine whether to allow the Director to file public charges against a Respondent. Rule 4(e), RLPR. The standard is "whether there is probable cause to believe that public discipline is warranted on each charge." Rule 9(i)(1)(i), RLPR. This determination is made following a hearing that in some respects resembles a trial. The Respondent is typically represented by counsel; the Respondent and often the Complainant testify and are subject to cross-examination; affidavits, deposition transcripts, and documents may be offered into evidence; and the attorneys present final oral arguments. Rule 9(i), RLPR. If the panel finds probable cause, the Director files a petition for disciplinary action with the Minnesota Supreme Court. Only then does the matter become public. Rule 20(c) and (d), RLPR. The Court then assigns the matter to a sitting or retired district court judge who, acting as a referee, holds another hearing on the matter at which the Respondent, and often the Complainant, again appear and testify. Rule 14, RLPR. The judge's findings and recommendation are then submitted to the Supreme Court for briefing, oral argument, and a decision. Since a panel must conduct an evidentiary hearing before a case is filed, after which the Respondent has the right to a second hearing before a referee, the procedure results in delay and inefficiency.[4]

The ABA conducted a study of the Minnesota discipline system in 1981. The ABA found:

> This duplication of the adjudicative function [in the Minnesota system], which in practice provides two adversary hearings prior to the final disposition of public discipline, is burdensome for the Complainant, an expense for the discipline system, and a substantial drain on limited counsel

[4] The panel hearing adds an estimated three to five months to the process. There are approximately 15 panel hearings per year. However, since Respondents may waive the probable cause hearing or the referee hearing or both, double hearings are not necessarily routine.

> resources. Although some individuals expressed the view that these procedures are needed to provide a check on prosecutorial authority and to assure due process to the Respondent, the team concludes that the multiple stages encompassed in the hearing process are a major factor contributing to the delay in dispositions and exceed the requirements of due process. We note that an individual charged with a capital offense is entitled to only indictment by a grand jury and one trial.[5]
>
> The [ABA] Lawyer Standards contemplate a hearing process which provides a probable cause review of the recommendation of counsel for disposition by the Chairman of a hearing Committee and formal disciplinary proceedings before a hearing Committee, rather than a referee. While we recognize that a restructuring of the discipline system may not be feasible, we believe that the proceedings would be streamlined and delay would be minimized by the adoption of a hearing process consistent with the Lawyer Standards.

ABA Standing Committee on Professional Discipline, "Evaluation of the Lawyer Discipline System in the State of Minnesota / Final Report" (June 1981) at 20.

The ABA recommended that Minnesota adopt the ABA's model discipline structure in whole. In the alternative, the ABA recommended that the probable cause determination be based on written submissions supplemented by oral argument, but without an adversary presentation or cross-examination of witnesses. *Id.*, Recommendation 12.2 at 21. Neither recommendation was adopted in Minnesota.

Under the ABA's Model Rules for Lawyer Disciplinary Enforcement, when disciplinary counsel determines that formal charges against a lawyer are appropriate, the lawyer is notified and given an opportunity to respond to the disciplinary counsel in writing. The disciplinary counsel then asks the hearing Committee Chair for authorization to file formal charges. The hearing Committee Chair makes the decision to authorize charges *ex parte*, *i.e.*, without further input from the Respondent lawyer. If formal charges are authorized, the hearing on the merits is conducted by the hearing Committee. The board

[5] A criminal defendant may challenge probable cause, but only after the matter has become public.

makes the final decision, and the state supreme court has discretionary review jurisdiction.[6]

Although the Committee did not attempt a systematic review of the disciplinary systems in other states, it is not aware of another state with a probable cause hearing process providing for a mandatory evidentiary hearing. The Maryland system was similar to the Minnesota system until 2001, when the Maryland Supreme Court, apparently in reaction to the delay and inefficiency of that system, modified it.[7] In other states, the director either has the discretion to file public charges, or may do so with the approval of the board or other disciplinary body.[8]

The Committee found that there did not exist a convincing rationalé for giving the Respondent a right to two separate evidentiary hearings when that right is not required by due process, is not necessary to ensure the fairness of the proceeding, is not available to other citizens of this state in criminal legal proceedings, and is not available to lawyer Respondents in other states.

RECOMMENDATION:

The Committee concluded that the present procedure for probable cause hearings by Lawyers Board panels does not reflect an appropriate balance between the goal of treating the Respondent lawyer fairly and the goal of protecting the public. The procedure inappropriately compromises the goal of protecting the public by giving the Respondent lawyer an unnecessary procedural right that also results in inefficiency and delay. The probable cause process should be brought more in line with procedures recommended by the ABA and with procedures in other states.

The Committee recommends that in most cases the probable cause determination should be made by a Lawyers Board panel based on the Director's and the Respondent's written submissions without a hearing. The panel would, however, have the discretion to conduct an adversarial hearing if it determined that special circumstances required such a hearing, such as the need for a credibility determination. In any event, the panel would

[6] The Committee's recommendation is limited to the probable cause process. The Committee did not find any problems with the referee hearing process now in place in Minnesota and does not propose modifying it.

[7] According to Melvin Hirshman, Bar Counsel for Maryland's Attorney Grievance Commission, Maryland requires bar counsel to submit proposed charges to a peer review body, which conducts a hearing at which the Respondent appears and may be represented by counsel. Prior to 2001, the hearing was testimonial in nature. In 2001, the hearing was made informal and non-testimonial. Mr. Hirshman stated that this and other changes in 2001 significantly improved the efficiency of the Maryland system.

[8] This information is based on an informal survey in 2002 to which discipline Offices in 28 states responded. This survey was obtained by Director Marty Cole and furnished to the Committee.

determine whether or not there was probable cause with respect to the Director's charges generally; the panel would not go through the individual charges to determine whether or not there was probable cause for each separate charge.

If the panel does not find probable cause for public discipline, the panel would have the options of dismissing the case or issuing an admonition.[9] If the panel finds probable cause, the Respondent would, as presently, have the right to an adversarial hearing before a referee.

The Committee proposes amendments to Rules 9, 10, and 15 of the RLPR to implement its recommendation. (See Appendix C).

Comments upon Opposition to the Recommendation. Some members of the Committee did not agree with this recommendation and have filed a Minority Report. (See page 45 of this Report). They argue that this recommendation would not increase efficiency. However, their conclusion is necessarily speculative and is not supported by any direct evidence. The Committee contacted the directors of the lawyer disciplinary systems in several other states. Those directors who were contacted believed that the probable cause process in those states, which did not involve mandatory evidentiary hearings, was fair and efficient.[10] The fact that most, if not all, states other than Minnesota have dispensed with double hearings suggests at a minimum that a double hearing system is not more efficient than a single hearing system. In addition, efficiency is only one of the reasons warranting a change in the present system. The present double hearing structure unduly burdens Complainants, delays the process, and consumes LPRB resources. The legitimate right of Respondents to a fair process can be protected by providing for probable cause determinations based on the parties' written submissions without a hearing.

[9] If the panel issues an admonition, the Respondent could appeal the admonition to a different panel.

[10] The Committee contacted the directors in Maryland, Missouri, Wisconsin, and Illinois. Jerome E. Larkin, the Administrator of the Illinois Attorney Registration and Disciplinary Commission, stated that in approximately 1992, Illinois went from a probable cause process involving mandatory evidentiary hearings to a process in which an evidentiary hearing was discretionary with the panel. Mr. Larkin stated that the present system is significantly more efficient. He stated that at the time, the change was opposed by some Respondents' counsel, but presently Respondents' counsel do not routinely request evidentiary probable cause hearings though they have an opportunity to make such a request.

VI. PANEL MANUAL

--FINDINGS--

The Lawyers Board Panel Manual was originally adopted in 1989 by the LPRB. The Manual was intended to promote consistency among the hearing panels, to make the board panel procedure more open to the bar and the public, and to assist *pro se* Respondent lawyers, and lawyers who represent Respondents only infrequently, to make a more effective appearance before a panel.

The Manual has been revised or updated only occasionally since then, with some substantive revisions appearing to have been made in 1995 and 1998. When updated, it has been done to reflect the Supreme Court's adoption of Rule amendments; however, there have been no revisions or updating of the Manual since 2000. The Panel Manual is the responsibility of the LPRB and all revisions must be approved by the Board.

The Committee recognized that the Panel Manual is an important document in and for the Minnesota disciplinary process. The Manual should be kept up-to-date and made readily accessible. The Committee identified a number of revisions that should be made immediately, such as comments on panel or LPRB proceedings contained in Supreme Court decisions. Obviously, any changes in the Rules pertaining to panel proceedings, etc., need to be promptly updated. The OLPR has now begun to update the Manual.

RECOMMENDATIONS:

The Committee recommends that the Panel Manual be updated promptly to bring it up to date to reflect case law and other pertinent developments over the past eight or more years. The Committee recognizes that this will be a substantial undertaking. This process might best proceed by seeking input from those who are or have been a part of the Minnesota disciplinary community, *i.e.,* past LPRB members, past OLPR Directors and Assistant Directors, and Respondents' counsel who regularly appear before the panels. Each of these groups should be consulted regarding any suggestions they may have for Panel Manual revisions.

Once the Manual has been updated, the Committee further recommends that the Director develop an ongoing process whereby each new case or other development suggesting a change to the Panel Manual be dealt with promptly. Finally, the Committee recommends

that the updated Panel Manual should be posted to the LPRB website for easy access for all concerned persons as well as the public.

VII. PRIVATE DISCIPLINE

--FINDINGS--

There are two private disciplinary dispositions: a private admonition and private probation. A private admonition can be issued when the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature.[11] A private admonition is a form of non-public discipline that declares the conduct of the lawyer improper, but does not in any way limit the lawyer's right to practice.[12] According to the ABA, private admonitions should be issued only "in cases of minor misconduct, where there is little or no injury to the client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer."[13] A private admonition is generally not appropriate when a lawyer has engaged in the same or similar misconduct in the past.[14] Other aggravating factors that may militate against a private admonition, other than similar or other misconduct in the past, include a pattern of particular misconduct, or multiple offenses.[15] Private *probation* occurs when the Director concludes that a lawyer's conduct was unprofessional, that private probation is appropriate, and when the Director and the lawyer agree that the lawyer should be subject to private probation.[16]

Possible concerns include the effectiveness of private discipline in educating the lawyer and deterring future misconduct and possible inappropriate use of private discipline in situations where the discipline should be public so as to avoid harm to future clients who would otherwise be unaware of "serial offenders." The Committee considered whether or not private discipline should be eliminated from the panoply of sanctions.

A related issue is whether lawyers are inappropriately receiving multiple private admonitions owing to the lack of a clear interpretation of the "isolated and non-serious" standard in Rule 8(d)(2), Rules on Lawyers Professional Responsibility, as noted in Kent Gernander's Memorandum.[17] The subcommittee felt that if admonitions are being issued

[11] Minnesota Rules on Lawyers Professional Responsibility, Rule 8(d)(2).
[12] ABA Standard for Imposing Lawyer Sanctions (2005) § 2.6 (available at www.abanet.org/cpr)
[13] ABA Model Rules for Lawyer Disciplinary Enforcement (2008), Rule 10A (available at www.abanet.org/cpr)
[14] ABA Standards for Imposing Lawyer Sanctions (2005) §8.4.
[15] Id. §9.22
[16] Minnesota Rules on Lawyers Professional Responsibility, Rule 8(d)(3).
[17] See Memorandum of Kent Gernander to Committee Chair Allen Saeks dated October 23, 2007, pp. 2-3.

in inappropriate circumstances, the lack of a clear interpretation of the admonition standard is probably not the only cause of the problem. However, as to the interpretation of the standard, the Committee believes that the Board was in the best position to address this issue.

RECOMMENDATION:

The Committee believes that private disciplinary options serve a valid purpose in the circumstances for which they were intended. If there is a problem with the LPRB authorizing private discipline in situations where the discipline should be public, that problem should be addressed through measures that are less drastic than eliminating the option of private discipline in all cases.

Regarding the meaning of "isolated and non-serious," the LPRB should consider incorporating the ABA definition, or other guidance, in the Panel Manual to assist panels in determining when a private admonition is appropriate. Alternatively, if the Board decides that the language of the rule is problematic and should more specifically be defined, the Board should petition the Supreme Court to appropriately revise the language.

VIII. PUBLIC REPORTING OF PRIVATE DISPOSITIONS

--FINDINGS--

The Committee considered the methods used to report discipline to the public and the bar. Currently, only public discipline cases and admonition appeals[18] are publicly reported. Private dispositions which the Director believes may be of assistance in educating the bar are summarized in the Director's annual article in *Bench & Bar*. The *Bench & Bar* articles are available on the LPRB website. The Committee considered the benefit of systematically reporting private dispositions so that they can be used as precedent for future cases. Because many dispositions result from negotiations, or are decided by panels, or are settled because of the particular facts or the quality or quantity of available evidence, the cases often are of little benefit as precedent. In addition, if private dispositions were publicly reported, they would need to be sanitized of facts tending to identify the parties in order to protect confidentiality. The redaction of identifying factual information from the disposition to protect the privacy of the Complainant and Respondent could further reduce their value as precedent. The

[18] Private admonition appeals are decided and reported by the Supreme Court without using the Respondent's name.

additional resources that would be required in order to report these cases would not appear to be justified by the questionable benefits of such reporting.

RECOMMENDATION:
The Director's Office should not be required to systematically report private dispositions. However, the Committee recommends that the Director be encouraged to publish on the web page and elsewhere, annually or more frequently, commentary with private dispositions of note, including statistics or other information that would be of assistance both to the practicing bar and to Respondent attorneys.

IX. REACHING IMPAIRED LAWYERS IN A PRIVATE DISCIPLINE SYSTEM

--FINDINGS--

The Henson-Dolan Report noted the benefit of making referrals out for help to impaired lawyers and recommended the MSBA study the issue.[19] Since that time, the Supreme Court has established a lawyer-funded Lawyer Assistance Program (LAP) which can be an important resource for lawyers involved in the disciplinary process, whether they are impaired or not. Chemical dependency and mental health problem rates among lawyers are alarming[20], and this is reflected in Minnesota's discipline statistics.[21] The Committee accordingly looked at the extent to which the current disciplinary system is able to make referrals out to assist Respondents or otherwise to communicate to impaired lawyers the resources available to them from the LAP.

One issue the Committee considered was the possibility of reaching attorneys who simply fail to respond to the initial complaint or to repeated communications to reach them by the OLPR. Lawyers who fail to respond very likely could have some serious problems in addition to their professional ethics issue. This situation has prompted other state disciplinary authorities to adopt procedures for contacting their state's comparable LAP in those circumstances.[22] One possible solution to this problem is to create an additional exception to the confidentiality provisions of Rule 20 of the RLPR to allow the Director's Office to notify the LAP if a Respondent fails to respond after the Office's second

[19] See 1/28/94 Report, para. 25.
[20] ABA Subcomittee report, p. 4.
[21] 12 of the 29 probation files opened by the Director in 2006 involved either chemical dependency or mental health disabilities. Annual Report of the LPRB and OLPR, June 2007, p. 11, 12.
[22] A number of states follow this practice either by informal arrangement or rule, among them Tennessee (Rule), Wisconsin (informal), Arizona (informal), and Oregon (informal).

request for a response to the complaint. The LAP's contact would be confidential and only for the purpose of identifying resources available to assist the lawyer.

The Committee also considered the possibility of the Director selecting a DEC Chair or DEC member sensitive to the issues and knowledgeable about the LAP to attempt to contact the non-responding lawyer and, when appropriate, meet with the lawyer in person. This follow up would avoid the need to amend Rule 20 to allow the disclosure of private information to an outside organization. This could be technically rationalized since the disclosure of information from the Director to the DEC is already permitted by Rule 20(a)(1) and keeps the contact within the discipline system. However, such a proposal could place the DEC member in an awkward position and could also present some implementation issues. For these reasons the approach did not have the support of Director Cole.

Yet a third alternative was to send written information regarding the resources of the LAP to non-responding attorneys, or to all attorneys against whom a complaint is being investigated. Committee members met with Joan Bibelhausen, Director of Lawyers Concerned for Lawyers, which administers Minnesota's Lawyer Assistance Program. LCL provides confidential, free peer support and referrals for assessment, treatment and therapy to lawyers. Ms. Bibelhausen indicated that her organization's primary concern is that it be able to reach out to attorneys and that those attorneys who receive information about the LAP's services do so as early as possible in the process. She indicated that any method used to communicate information regarding the services of the LAP make it clear that the LAP is a confidential, independent resource that does not report to the OLPR or LPRB. In addition, the LAP seeks to regularly have opportunities to present to OLPR staff, supervisors and DEC members information regarding the resources available to attorneys in the discipline system.

The objective of giving the LAP the ability to contact lawyers involved in the discipline system can be met by the OLPR providing timely LCL information when a disciplinary matter becomes public. The Director has indicated that his Office will now routinely provide the LAP with a list of lawyers against whom a petition for public discipline has been filed. The objective of informing attorneys as soon as possible of the help available to them can be met by ensuring that LCL has the opportunity to routinely meet with OLPR staff and speak to probation supervisors and DEC members regarding the services available. The Director is amenable to mailing LAP information to Respondents in all matters being investigated.

RECOMMENDATIONS:

The Committee recommends that the OLPR implement procedures to (1) routinely provide information regarding the LAP to Respondent attorneys and attorneys involved in the work of the disciplinary system including attorneys who represent Respondents, (2) to assist the LAP by providing petitions and other public information to the LAP, and (3) to ensure that OLPR staff and Board, DEC and probation volunteers receive information about the resources of the LAP along with suggestions as to how best to disseminate that information.

X. COMMUNICATIONS BY DIRECTOR WITH DEC AND COMPLAINANTS

The Committee examined two communications issues involving the Director's Office. First, the Committee looked at whether the Director's Office could improve its training and communications to the bar association District Ethics Committees (DECs) in two areas: (a) providing training and guidance to the DEC members, particularly those who are inexperienced and (b) providing adequate explanations to the DECs when the Director's Office does not follow their recommendations as to discipline. Second, the Committee reviewed whether the Director's Office could improve its communications to Complainants when a complaint is dismissed.

A. Training of DEC Members

--FINDINGS--

The Committee received comments from several DEC members and DEC Chairs, particularly those who were relatively new to their roles. These people suggested that they did not receive adequate training and guidance from the Director's Office and that they had little contact with the Assistant Director assigned as the liaison to their DEC. (Each DEC has an Assistant Director who is assigned to act as a liaison between the Director's Office and that DEC). On the other hand, two experienced DEC Chairs reported that the communications between the Director's Office and their DECs were excellent. Although the Committee asked the DEC members for comments, the Committee did not conduct a formal survey on the issues of training and guidance.

The Director's Office sponsors an annual orientation and training program and distributes a comprehensive procedures manual for DEC members. However, the Dreher Report recommended that training for both DEC members and Board members be expanded:

> The Executive Committee and the Board should develop formalized training programs for all new district Committee and Board members. Attendance in person and by tape should be mandated. Continuing members should be encouraged to attend as well. Procedures manuals for Board members and specialized training for district Board panel Chairmen should be developed.

Dreher Report, Recommendation 60 at p. 81. In the response, the LPRB agreed that training should be done but disagreed that the Executive Committee or the Board had the resources for such training. Dreher Recommendation 60 was partially implemented, however, in that the Director's Office continues to sponsor the annual DEC seminar. *See* App. 3 to 1994 Henson/Dolan Report.

The present Committee received no complaints concerning the DEC seminars or the Procedures Manual that the Director's Office has prepared for DEC members. However, not all DEC members attend the seminar. One of the DEC Chairs stated that the key relationship is the one between the liaison and the DEC Chair; if the Chair is aware of the resources available to the DEC members, the Chair can take responsibility for ensuring that the DEC members, particularly new members, are aware of these resources. Apparently the extent of communication between the DEC Chair and the liaison varies significantly from District to District.

RECOMMENDATION:

The Committee recommends that the Director periodically meet with and review the activities of each of the DEC liaisons to make sure that the communications with each DEC are adequate. A goal should be set for each liaison to appear at a DEC meeting at least annually. These meetings could allow the liaison to accomplish at least four purposes: (1) provide guidance to DEC members regarding interaction with Complainants and Respondents, and investigations, the reporting thereon, and memoranda preparation; (2) acquaint DEC members with examples of reasons why the Director's Office sometimes decides not to take disciplinary action despite the DEC recommendation; (3) answer questions that DEC members raise; and (4) give renewed recognition to the important role that DECs play, and express appreciation for the time-consuming and sometimes difficult work that DEC investigators do.

In addition, it may be appropriate for the liaison to contact periodically the DEC Chair, particularly if the Chair is new to the position. Although the DEC members and Chairs certainly have some responsibility to initiate contact with the Director's Office if they need guidance, the Director's Office should assume a greater share of the responsibility for initiating the communications.

B. Explanations for not following DEC recommendations

--FINDINGS--

At least one DEC member expressed concern that when the Director does not follow a DEC recommendation, the Director's Office does not give the DEC investigator an adequate explanation for the departure. The concern was expressed primarily in the context of downward departures rather than upward departures. Particularly outside the metro area, the DEC may be familiar with a pattern of problems with which a local practitioner is involved. Admittedly, the DECs do not lightly recommend discipline. However, when the Director neither follows the DEC recommendation nor provides an adequate explanation, the DEC members may question the value of their time.

The Committee did not attempt to survey the DECs to determine how widespread this particular concern was. However, given the different roles of the DECs and the Director's Office, some differences in perspective are inevitable. DECs tend to focus their review of ethics complaints on whether the Respondent committed an ethics violation. In contrast, since the Director's Office is responsible for prosecution, its focus tends to be on whether, as a practical matter, the Director's Office will be able to prove the violation under the standard of clear and convincing evidence.

When the Director's Office dismisses a complaint, the dismissal includes a memorandum explaining the reasons for the decision. When a complaint has been investigated by a DEC, the DEC is given a copy of the dismissal and accompanying memorandum. It would not be surprising for the DEC investigator to find that the dismissal memorandum does not adequately explain why the DEC recommendation was not followed. The memorandum often explains the Director's decision and notes the departure from the DEC recommendation; however, it does not necessarily specify the reasons for the departure. The memorandum often must be circumspect as to the reasons for the dismissal since it will be read by both the Complainant and Respondent. For example, the Director's Office, after personally interviewing the Complainant, may determine that while the Complainant may well be telling the truth, the Complainant would not appear credible on the stand. From a public relations standpoint, it would not be helpful to tell

the Complainant in the dismissal memorandum that he/she was not credible. In addition, if the Complainant successfully appeals the dismissal, the Director's Office may find itself in the awkward position of presenting a case to a panel or referee based on the testimony of a person whom the Director's Office previously declared to be not credible. The Committee believes that, for these reasons, the explanations of the reasons behind a departure from a DEC recommendation are best given to the DEC orally rather than in writing.

RECOMMENDATIONS:

The Committee recommends that when the liaison meets with the DEC, as is recommended in the previous section, the liaison should discuss the reasons for past departures from DEC recommendations and should encourage the DEC members to contact the Chair, the liaison, or the Assistant Director who is responsible for the file when the investigator wants to know the reasons for departures from the DECs disciplinary recommendations. The Committee also recommends that if the Director learns that a particular DEC believes that it is not receiving adequate explanations for departures from its recommendations, the Director should consider implementing a policy of requiring the liaison or assigned Assistant Director personally to contact the Chair of that DEC when there is a departure.

C. Communications to Complainants

--FINDINGS--

Committee members made several proposals designed to improve the communications to Complainants when their complaints were dismissed. These members suggested that better communications might reduce the rate of Complainant appeals of dismissals.[23] At a minimum it could improve Complainant satisfaction with the process.

RECOMMENDATIONS:

After reviewing the standard documents produced by the Director's Office, four recommendations are made concerning the "summary dismissal form" (the form used when the Director's Office dismisses a complaint immediately after receipt without asking the Respondent lawyer for a response):

[23] In 2007, Complainants appealed 24% of the case dispositions. Unsurprisingly, an appeal was more likely when the complaint was dismissed than when it resulted in discipline. Only 6% of the appeals that were brought were successful.

- Address the document to the Complainant, with a notation that a copy is being sent to the Respondent (who should be referred to by name rather than as merely "Respondent").
- Delete the super-sized headline "DETERMINATION THAT DISCIPLINE IS NOT WARRANTED, WITHOUT INVESTIGATION."
- Convert the dismissal document in form to a letter rather than a pleading by using OLPR letterhead stationery.
- Use more personal words in the body of the letter such as "you" rather than "Complainant."

In addition, the three following recommendations are made for the memorandum that accompanies a determination that discipline is not warranted (a dismissal issued *after* an investigation):

- The dismissal notice should address all elements of the complaint.
- The dismissal notice should maximize the use of the Complainant's name (Mr./Ms. J.Q. Public) rather than merely "Complainant" and the Respondent attorney's name (Attorney J. Doe) in the DEC Discipline Not Warranted Memorandum.
- The DEC Discipline Not Warranted Memorandum should always be written with the Complainant's interests in mind.

These recommendations were shared with the Director, who provided written comments. Director Cole was receptive to all the suggestions but was not convinced that the recommendation to reformat the summary dismissal into a letter would accomplish its purpose. He believes that the present format of the summary dismissal makes the nature of the document clear and may help assure the Complainant that his complaint was taken seriously. As to the other proposed changes, Director Cole said that he would consider implementing them even if the full Committee did not formally adopt them but indicated that he would welcome the Committee's review. These recommendations were also shared with 14 members of the Hennepin County DEC, and 5 provided responses, all written. All 5 concurred with all of the above recommendations.

The Committee believes that all of the recommendations should be adopted by the Director's Office.

Another specific suggestion was made in Committee discussion concerning certain language in several standard paragraphs the Director's Office uses in dismissing

frequently occurring complaints. Several standard paragraphs refer to the limited resources of the Director's Office. For example, the standard paragraph used in dismissing malpractice complaints is as follows:

> This complaint alleges attorney negligence, poor quality representation or malpractice. The Director's Office generally defers consideration of these types of allegations to the civil courts. *This policy is based in part upon the limited resources of this Office.* It also recognizes that not all acts constituting negligence, poor quality representation or even legal malpractice necessarily involve conduct that violates the Rules of Professional Conduct.

(Emphasis added). The concern expressed by the Committee was that the Complainant will feel that "limited resources" are not an excuse for not investigating the complaint and that the Complainant may interpret the language as saying that the Lawyers Board did not think the complaint was important. Director Cole considered this concern and concluded that it was a legitimate concern. He has since removed the "limited resources" language from the standard dismissal paragraphs.

D. Appeal Information

--FINDINGS--

Approximately 24 percent of all complaints that were dismissed in 2007 (summary dismissals plus dismissals after investigation) were appealed. Only approximately 6 percent of these appeals were successful. Complainants undoubtedly appreciate the right to appeal a dismissal, and that right should not be diminished. It is intuitively obvious, however, that a complainant will not be pleased when dismissal of his complaint is upheld; if anything, the Complainant's dissatisfaction with the lawyer discipline system will only be intensified.

The standard "Notice of Complainant's Right to Appeal" paragraph in dismissal notices could be improved by providing more guidance to the Complainant, thereby (a) enhancing the likelihood that appeals which have merit result in the complaint's being investigated further, and (b) reducing the number of fruitless appeals and the resultant adverse effect on complainants' perceptions of the lawyer discipline system.

RECOMMENDATION:

Language should be added to the Notice of Complainant's Right to Appeal paragraph in dismissal notices to more clearly inform the complainant that an appeal is unlikely to be successful unless the Complainant states compelling reasons or offers strong evidence why the complaint should not be dismissed.

XI. PROBATION

--FINDINGS--

Probation may be private or public. *Private probations* are imposed by stipulation pursuant to Rule 8(d)(3) of the RLPR. *Public probations* are ordered by the Supreme Court as a disciplinary disposition or condition for reinstatement pursuant to Rules 15(a)(4) and 18 of the RLPR. Either type of probation can be supervised or unsupervised. The terms of *supervised probation* vary, but generally include at least quarterly office visits and reports by the supervisor, monthly file inventories prepared by the probationer. Some probationary lawyers have additional recordkeeping requirements and ongoing chemical dependency or mental health monitoring. *Unsupervised probations* allow the Director to bring charges without a panel hearing if the lawyer engages in misconduct during a probationary period.

The primary purpose of probation, as with all professional discipline, is to protect the public and reinforce the confidence the public has in the bar and the administration of justice. Probation has been used where this goal can be served without loss of licensure, and without destroying an attorney's livelihood.[24] To be successful, it must result in the renewed commitment to ethical and professional behavior.

The Committee looked at the ABA statistics which showed that the number of public probations imposed in Minnesota is slightly above the average.[25] Although no statistics were available to compare Minnesota's *private* probation statistics, the 14 private probations imposed did not seem particularly high. (2007 Annual Report). Another possible area of inquiry was the use of probations in cases involving chemical

[24] Probation Supervisor's Manual, p. 1.

[25] In 2006, Minnesota placed 13 lawyers on public probation; the nationwide average was 11. Survey on Lawyer Discipline Systems, 2006, ABA Center for Professional Responsibility (available at www.abanet.org/cpr). In addition, 2 reinstated lawyers were placed on public probation.

dependency or mental health that require monitoring.[26] Possible concerns included effectiveness of probation and the appropriateness of probation where chemical dependency or mental health was involved.

The report on Recidivism did not demonstrate any significant problem with the use of probation.[27] The Disciplinary Options Subcommittee solicited input from Senior Assistant Director Craig Klausing, who supervises the Probation Department and has been with that Department for approximately 14 years. Mr. Klausing indicated that, in his experience, probation does serve to educate lawyers and has been effective in putting probationers in a better position to succeed as lawyers to the benefit of the lawyers and the public. Mr. Klausing did not believe that focus on chemical dependency or mental illness as the underlying cause improperly diverted attention from the professional misconduct. He believed that compliance with treatment, therapy, medication, AA attendance and random alcohol or drug tests were effective in ensuring ethical conduct in those cases where mental or chemical disability factored into the misconduct. He did not believe these forms of monitoring were inappropriately intrusive and that they are certainly less "intrusive" than public discipline. Mr. Klausing also believed that the resources expended on probation matters were proportionate to the results.

RECOMMENDATION:

The Committee concluded that the present probation system was working well and that no changes needed to be recommended.

XII. EDUCATING LAWYERS THROUGH DISCIPLINE

--FINDINGS--

The 1994 Henson-Dolan Report determined that the "competency" of lawyers is a significant problem.[28] That Committee believed that improving lawyer competency through educational programs would reduce the number of complaints. It recommended that the MSBA look at the issue.[29] The Minnesota Rules of Professional Conduct

[26] Of the 29 new probations, AA attendance was required in 6, random urinalysis in 3, and mental health or therapy in 5. One or more of these conditions may be required in a single case, so the statistics cannot be taken to mean that 14 of the 29 probations were disability related probations. Annual Report of the OLPR, June 2007, pp. 11-12.

[27] Of the 1269 lawyers who had received one discipline, approximately 9% had been placed on private probation. Four percent were placed on public probation. While the percentages increased as the numbers of disciplines increased, the statistics did not shed much light on how probation affected recidivism rates.

[28] See Henson-Dolan Report , p. 10.

[29] Id. at para. 24.

recognize that discipline should involve an educational component to ensure that the "lawyer, as a member of the legal profession . . . [furthers his or her] special responsibility for the quality of justice."[30] The importance of education is also highlighted in the last paragraph in the Preamble of the Rules of Professional Conduct where it is said that for the lawyer to meet his/her special responsibility:

> [it] requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.[31]

The educational requirement to instill this "understanding" is most needed with those lawyers who have been disciplined.[32] Even in cases not warranting a private or public discipline, the lawyer may have avoided a complaint by improving the lawyer's practice. The ABA suggests educational courses as a disciplinary option.[33] The OLPR's and LPRB's charge accordingly should be to instill this required "understanding."

The OLPR's published articles and written advisory opinions, Continuing Legal Education seminars, and advisory opinion service serve to educate the profession in this regard. However, the Committee has concluded that these good efforts should be extended by incorporating them into the disciplinary system as well.

Minnesota's system focuses on discipline to address and correct lawyer misconduct, but "education" is absent as an essential discipline component—with the exception of a probation sanction or in its conditions of reinstatement. As a result, disciplined attorneys must self correct, and the official tools provided to them are solely those contained in the issued private or public discipline and those that the lawyer may independently seek.

For those lawyers who are not disciplined but whose practice has some weaknesses, the "no discipline warranted determination" typically does not identify these weaknesses or provide practice tips or resources. As a result, the "no discipline determination" could reinforce the lawyer's weak practice actions, rather than correct them. References to written educational materials with an encouragement to review them are a simple and easy means to assist lawyers to become better lawyers.

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[30] *See* Minn.R.Prof.C., Preamble [1].
[31] Id. Preamble [13].
[32] *See* Minn.R.Prof.C. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").
[33] ABA Standard for Imposing Lawyer Sanctions (2005) § 2.8

RECOMMENDATIONS:

The Committee recommends that the LPRB reference the advisory opinion section of its website in all its decisions. The LPRB should highlight these website resources and encourage their use. In addition, the Committee recommends that in appropriate cases disciplined lawyers be directed to read *specified* articles or attend *specific* CLE seminars germane to the rules violated by the lawyer as part and parcel of the discipline meted out.

These recommendations are not viewed as accomplishing the OLPR's and LPRB's education charge. The Committee notes that the Board and the Director have the obligation to marshal resources and use them in a manner that is the most efficient and effective. But, this Committee does recommend that Board and Director give more attention to the educational component of the discipline itself. The Board and Director should, at a minimum, build upon the education and training materials the OLPR has already created and more effectively distribute them to those attorneys in the discipline system.

XIII. LAWYER RECIDIVISM

--FINDINGS--

During LPRB Chair Kent Gernander's presentation to the Committee in December 2007, he raised questions regarding the effectiveness of private discipline in educating lawyers regarding "low-level ethics violations," correcting the improper conduct, and deterring future misconduct. The Committee determined to approach these questions in several ways, one of which was to ascertain whether discipline statistics could be obtained from the Director's Office so as to provide evidence regarding any of these issues. A subcommittee was chosen to obtain and analyze this data and report back to the full Committee.

The Director's Office provided a spreadsheet containing the available data regarding all discipline-related actions from 1986 through 2006, a 21-year period. The Office sorted the list by lawyer name and then, for privacy, substituted a unique number for each lawyer name. For each lawyer and record, OLPR provided the lawyer's admission date, city of practice, the District Ethics Committee number, the DEC recommendation (if any), the disposition category of disposition, the disposition date by month and year, current CLE and registration fee status, and some additional information about the

lengths of any applicable suspensions or probations. OLPR also provided a separate table showing the rule violations associated with each disciplinary record, where applicable.

Recidivism Statistics

Regarding the question of recidivism, *i.e.*, how often individual lawyers return to the discipline system, the data shows:

- Of the 2,092 lawyers with disciplinary records, 1,269 (60.7%) had only one discipline record, and 414 (19.8%) had two disciplinary records. Hence, it appears that most disciplined lawyers do not have repeated contacts with the discipline system.

    - Of the 1,269 lawyers with **only one** disciplinary record, there were:
        - 903 admonitions;
        - 111 private probations;
        - 51 public reprimands and/or probations;
        - 73 suspensions; and
        - 67 disbarments.

    - Of the 414 lawyers with **two** disciplinary records,
        - 198 received 2 admonitions;
        - 50 received either an admonition and private probation or 2 private probations;
        - 15 received 2 public disciplines.

- Additional information about the numbers of lawyers with multiple disciplines is found in Table 1, Appendix E.

- Regarding repeat admonitions, the data shows:
    - Of the 85 lawyers who received 4 disciplines, 10 lawyers had 4 admonitions and many more had 3 admonitions. Nine lawyers had 2 private probations or extensions of probation;
    - Of the 56 lawyers who received 5 disciplines, 14 of these lawyers had either 4 or 5 admonitions, and 7 of these lawyers had 2 private probations or extensions of probation;
    - Of the 38 lawyers who had received 6 disciplines, 5 lawyers had 6 private disciplines each (mostly admonitions); 1 lawyer had 5 private disciplines.

Three lawyers had 2 private probations each and 1 lawyer had three private probations.

- Of the 134 disbarred lawyers,
  - 67 (50%) had no prior discipline;
  - 41 (31%) had only private prior discipline; and
  - 26 (19%) had one or more previous public discipline.

Lawyer Experience and Discipline

By comparing the data reflecting the dates lawyers were admitted to practice and the dates on which they received discipline, the relationship between length of legal experience and discipline could be analyzed. A similar analysis was done on the time that has elapsed between disciplinary events for lawyers that have received more than one discipline.

Although the results varied slightly between groups of lawyers, on average a lawyer is likely to have 16 or more years of experience at the time the lawyer receives his or her first discipline. For lawyers receiving more than one discipline, the number of years experience at the time of receiving the first discipline trends downward, but the time between disciplines tends to become shorter. Table 2 in Appendix E sets out this data.

In calculating these averages, if the time between disciplines were zero (*i.e.* more than one discipline was issued on the same day, such as separate admonitions on multiple files), that data was excluded from the calculations. There are many occurrences in the data, however, where the time between disciplines was only one or two months. Although such data initially suggests multiple files were open at the same time and were being resolved in separate months for administrative reasons, this data was left in the analysis because that fact could not be conclusively determined.

This aspect of the analysis would apply almost exclusively to admonitions because when other types of *public* discipline are imposed, a single discipline record could include multiple complaint files. For example, two admonitions are issued in April against a lawyer and another one is issued in May. In the statistics, this shows up as 3 separate records. From outside the Director's Office, it would be hard to know that these admonitions had any relationship to each other. On the other hand, another lawyer is subject to a public discipline proceeding where the three complaints make up counts 1, 2, and 3 of the Petition. When the Supreme Court issues its decision there will only be one

disciplinary record (disbarment, suspension, public reprimand, or probation) created for all 3 files.

The data was also analyzed to assess whether these averages could represent "inverted bell curves," *i.e.* that disproportionate numbers of less experienced lawyers, and lawyers near retirement, make up most of the discipline. Sampling the data suggests that there is no inverted bell curve:

- Of the 1,269 lawyers who received only one discipline, only 131 lawyers had less than five years experience.
    - 97 of those lawyers received a private admonition.
    - 17 lawyers with less than five years experience received a private probation.

- Of the 414 lawyers who received two disciplines, 45 lawyers had less than five years experience when they received their first discipline. 19 of those lawyers received two disciplines in their first five years of practice.

- Regarding the time between disciplines:

    - Of the 414 lawyers who received two disciplines, 82 lawyers had disciplines between 5 and 10 years apart, and 45 lawyers had disciplines 10 years or more apart.

    - Of the 179 lawyers who had three disciplines, only 6 received their second discipline more than 10 years after the first, and only 15 received their third discipline more than 10 years after the second.

<u>RECOMMENDATIONS:</u>

The analysis of discipline data for the past two decades does not suggest any startling conclusions about the efficacy of various types of discipline in addressing or preventing lawyer misconduct. It is possible that with more study, additional patterns could be discerned from the data. One notable finding is the time between disciplines is short for lawyers with multiple disciplines and few lawyers receive discipline more than 10 years after an initial discipline. This pattern is even more pronounced amongst lawyers with more than three disciplines. Several courses of action emerge from this finding:

- The Supreme Court should consider adopting a rule expunging private admonitions if the lawyer has had no discipline for 10 years after the last admonition. Such a policy would be consistent with the rehabilitative goals of the discipline system and have a negligible impact on efforts to protect the public. Moreover, it would provide a significant incentive for lawyers to avoid future misconduct.

- The LPRB and OLPR should consider modifying their enforcement methods based on the relatively brief time that elapses, on average, between a lawyer's disciplines.

The patterns that emerged regarding the experience levels of disciplined lawyers warrants further consideration of the factors that may lead to attorneys in mid-career being more likely to have ethical lapses than less experienced attorneys. Some factors that the Committee considered during its discussion of this data were (1) depression and other mental health issues that manifest themselves later in life; (2) the tendency for less experienced lawyers to work in law firms where they are supervised and, perhaps, better shielded from misconduct; or (3) the difficulties inherent in managing a busier and more complex law practice that come with more years in the profession.

A first step toward unraveling what risk factors might lead to ethical misconduct would be to increase data collection efforts so that more information would be available for future study. For example, it would be helpful if the Director's Office gathered statistics on lawyers' ages, size of law practice, substantive areas of law practice, income level, and significant changes in physical or mental health, marital status, and health issues of close family members, particularly parents. In addition, coding categories for discipline statistics should be standardized regarding public reprimands and probations and reinstatements, and differentiated as to "short" (30 to 90 days) and "long" (over 90 days) suspensions. Discipline data then should be generated every two years, added to the existing data, and analyzed to discern any new patterns that might emerge.

Lastly, information about trends in discipline statistics should be disseminated to the bar through CLEs and written publications so as to educate lawyers about the discipline system and apparent risk factors that exist for those lawyers most likely to commit misconduct

XIV. PERIODIC REVIEW OF THE LAWYER DISCIPLINE SYSTEM

--FINDINGS--

The Committee found that its process of carefully reviewing the lawyer discipline system in Minnesota to be a worthwhile endeavor. By looking at the "big picture," as well as at the present day workings of the lawyer discipline system, the Committee confirmed the overall effectiveness of the system while at the same time identifying areas where improvements in the system could or should be made.

RECOMMENDATION:

The Committee recommends that the lawyer discipline system be reviewed at least every 10 years. Objective reviews serve to strengthen the trust and confidence of the public and the Bar in the lawyer discipline system. Periodic reviews also help the LPRB and the OLPR in assessing the structure, rules, and day-to-day workings of the discipline system.

Respectfully submitted,

ADVISORY COMMITTEE TO REVIEW
THE LAWYER DISCIPLINE SYSTEM

_____

Allen I. Saeks, Chair

MINORITY POSITION—PRESERVE PROBABLE CAUSE HEARINGS

M E M O R A N D U M

To: Lawyer Discipline System Review Advisory Committee

From: Eric Cooperstein

Date: April 30, 2008

Re: **Minority Report on Proposal to Modify the Panel Hearing Process**

By a vote of 9 to 5 (with two members absent), the Advisory Committee voted at our April 22, 2008 meeting to adopt the recommendation of the Subcommittee on Disciplinary Options to reduce the availability of contested probable cause hearings in favor of panel determinations based only on paper submissions by the Director and the Respondent. The five dissenting members of the committee present this report to explain why the recommendation is ill-advised.

In dissenting from the Advisory Committee's recommendation, the dissenting members join the views of three prior Directors of the Office of Lawyers Professional Responsibility, the current and immediate past Chairs of the Lawyers Professional Responsibility Board, and the unanimous vote of the current Lawyers Professional Responsibility Board at its March 2008 meeting.

The revised subcommittee recommendation, dated April 22, 2008, asserts that the availability of probable cause hearings should be reduced for two reasons: (1) the hearing process causes delay and inefficiency, and (2) the hearing process distorts the balance between treating the respondent lawyer fairly and protecting the public. Neither assertion is supported by relevant data.

Efficiency. Regarding efficiency, there is little to be gained in reducing the number of live panel hearings. According to the subcommittee's proposal, there are only about 15 panel hearings each year. In an e-mail to our Advisory Committee, Director Martin Cole said that an ad hoc survey of his staff indicated that 40% to 45% of cases involving a

probable cause hearing also involve a subsequent referee hearing.[34] This percentage, if accurate, means that only 6 or 7 cases per year would be affected by this proposal. In contrast, we do not know what percentage of probable cause hearings result in a reduction or elimination of the charges against the attorney either by a panel private admonition or a panel dismissal.

It is also important to note that the scope of the probable cause hearing and the referee hearing are not necessarily the same. The live testimony at the probable cause hearing is limited by Rule 9, RLPR, to the Complainants and the Respondent; other witness testimony is presented by affidavit. Similarly, a probable cause hearing does not typically include expert testimony regarding possible mitigation defenses. Hence, a probable cause hearing can be conducted in a single day or even half a day. The Referee hearing is likely to be the lengthier trial.

The subcommittee asserts in a footnote that "the panel hearing adds an estimated three to five months to the process." No data or other authority is provided to support this assertion. Anecdotally, both William Wernz (former Director and Respondents' counsel for over 15 years) and Eric Cooperstein reported to the committee that panel hearings currently add only two to three months to the process. The alternative, probable cause review limited to written submissions by the parties, would require time for a briefing schedule that does not currently exist, the panel would still have to spend time reading the parties' submissions, and the panel would have to coordinate finding a time to discuss their decision. Mr. Wernz also asserts that without a live hearing, Respondents would be forced to take advantage of the discovery provisions in Rule 9, Rules on Lawyers Professional Responsibility, which includes the right to take depositions. Deposing complainants would require additional time for scheduling, time to obtain a transcript, and a delay of up to 30 days for the deponent to have the opportunity to read the deposition and correct any errors, as provided in the Minnesota Rules of Civil Procedure. It is difficult to see what efficiency could be gained by reducing the number of panel hearings but increasing the time spent on other tasks.

The recommendation to reduce the number of probable cause hearings also does not acknowledge that the Advisory Committee spent a significant amount of time and energy considering the reasons for delays in the processing of files by the Director's Office.

[34] It is interesting to note that in response to an e-mail question from the File Aging Subcommittee, the Director listed the various reasons for the delay in concluding files that had been pending for more than one year. This e-mail apparently preceded the Director's response to the probable cause proposal. The need to conduct two live hearings in one case was not amongst his explanations for the delay in processing files.

None of these discussions or the information gathered indicated that panel hearings were one of causes of delay in the discipline system.[35]

Fairness. The subcommittee recommendation asserts that change is necessary "to ensure that the [discipline] system reflects an appropriate balance between the goal of treating the respondent lawyer fairly and the goal of protecting the public." If change is necessary to ensure balance, then there must be a presumption that the system is not fair now. No data or other information was cited by the subcommittee to support its assertion that the discipline system is out of balance or, more specifically, improperly weighted toward the Respondent.

Contrary to the subcommittee's speculations, the current system has worked well for over 20 years precisely because the probable cause hearings bring balance and fairness to the system. This is particularly true in cases that are close to the line between a private admonition and a public reprimand. In a close case, a panel's finding of probable cause is very close to a public discipline finding, because a referee cannot "unring a bell" and impose private discipline when a case has already been publicly filed. The fairness of the probable cause hearing is reflected in these important values:

a. Check on the Director's Discretion. The panel hearing serves as an important safety valve to ensure that the Director does not exceed his authority in seeking public discipline against an attorney. It has been a long time since Minnesota has had an OLPR Director who was accused of abusing the power of the Office, but that does not mean that the Director does not sometimes have preconceived notions of the culpability of an attorney or the impropriety of his or her conduct. The fact that LPRB panels often issue private admonitions on some or all of the charges against an attorney suggests that the Director's view of the severity of an attorney's actions is not immune from question.[36]

   Within 5 to 8 years, both the current Director and the First Assistant will near retirement age. Significant institutional memory of the time when a Director

[35] The subcommittee report incorrectly states that in the past 27 years "the volume of complaints has risen substantially." In fact, the total number of complaints received each year has been constant or fallen since at least 1986.

[36] Statistics are not available regarding the total number of panel hearings regardless of outcome; panel hearings resulting in a probable cause determination are subsumed into the ultimate public disposition in each matter. The Director's Office does have statistics, however, regarding panel admonitions or panel dismissals: from 1986 to 2006 there were 57 panel cases that resulted in a private admonition (47) or dismissal (10). It is not possible to determine from these statistics whether the admonition or dismissal resolved the entire case against the attorney or whether the admonition or dismissal was regarding one of many charges in the proceeding.

was accused of exceeding his authority will be lost, as will significant private practice experience within the Office. It is not clear that the checks and balances in the current system would benefit from the alteration of a process that has worked well for over 20 years.

b. Peer Review. The panel system allows for peer review of a Respondent attorney's conduct, typically by two practicing attorneys and one lay person. In his comments to the Advisory Committee, Marty Cole said that it was difficult for the Director's Office to hire attorneys with experience in private practice. It is a valuable part of the discipline process to have attorneys who are familiar with the realities of law practice assess the attorney's conduct and demeanor in a live hearing setting before allowing the Director to file a public petition against an attorney. The non-lawyer member of the panel also plays an important role in assessing whether an attorney's conduct should result in public discipline; there is no role for the public member in the referee process.

c. Paper Review is Inadequate. Presumably, the Director assesses the credibility of the Respondent and the Complainant after having had the opportunity to interview both parties. In a probable cause determination made solely based on written submissions of the parties, the panel has no opportunity to make its own assessment of the Respondent's and the Complainant's credibility. The common practice of panel members asking questions of the Complainant and the Respondent during panel hearings would be lost as well. This tilts the likelihood of a probable cause finding heavily in the Director's favor. In addition, there is already a procedure in place for bypassing the probable cause hearing, in serious cases, based on a paper review by the LPRB Chair of the Director's charges. Rule 10(d), RLPR.

The subcommittee has also asserted that it is unfair that an additional hearing procedure is available to lawyers when criminal defendants or other licensed professionals or attorneys in other states do not have similar procedures. Judge Broberg, however, dispelled this myth regarding criminal defendants, who have multiple opportunities for evidentiary hearings besides their jury trial. It is poor reasoning to assert that Minnesota's discipline system can be made more "fair" or "efficient" by reducing it to the lowest common denominator of other systems with which we have no experience. In the absence of objective evidence of a need for change, the probable cause hearing system should be left intact.

APPENDIX A: SUPREME COURT ORDERS

STATE OF MINNESOTA

IN SUPREME COURT

ADM07-8001

Order Establishing the Supreme Court
Advisory Committee to Review the
Lawyer Discipline System.

O R D E R

In 1984, this court established the Supreme Court Advisory Committee on Lawyer Discipline "to study the lawyer discipline process, procedures and operations of the Minnesota Lawyers Professional Responsibility Board, to report the results of the study to the Court and Bar, and, if changes are needed, to recommend such changes for the consideration of the Court." The committee reported to the court in April 1985. The report recommended a follow-up study.

After the American Bar Association issued a report recommending changes in the regulation of the legal profession in 1992, we appointed the Supreme Court Advisory Committee on Lawyer Discipline and American Bar Association Recommendations to update the report of the earlier advisory committee and to evaluate the ABA recommendations. The committee submitted its report in October 1993. Among its recommendations was that the attorney discipline system should be reviewed on a regular basis.

Although we did not formally act on the recommendation for regular review, we agree with that recommendation. As a starting point to implement that recommendation, we now create a Supreme Court Advisory Committee to Review the Lawyer Discipline System. The committee will be composed of attorneys and lay members and will be charged to review and assess the process, procedures, and operations of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility

in administering the attorney discipline system in Minnesota and to report its findings and make recommendations for improvements it deems advisable.

IT IS HEREBY ORDERED THAT:

1. A fifteen-member committee designated as the Supreme Court Advisory Committee to Review the Lawyer Discipline System be, and hereby is, established to carry out the responsibilities described above.

2. The committee shall be composed of twelve attorneys admitted to the practice of law in the State of Minnesota, and three nonattorney lay members.

3. The Minnesota State Bar Association and other interested organizations and individuals may make recommendations to this court on or before March 30, 2007, for appointment to the committee of attorney and nonattorney members broadly representative of the profession and the public.

4. Recommendations and resumes of attorney and nonattorney candidates shall be sent to Frederick K. Grittner, Supreme Court Administrator and Clerk of Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, Saint Paul, Minnesota 55155.

Upon receipt of the recommendations and resumes, this court will make such appointments to the committee as it deems appropriate and in the public interest.

Dated: February 14, 2007

BY THE COURT:

/s/

Russell A. Anderson
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

ADM07-8001

Supreme Court Advisory Committee
to Review the Lawyer Discipline System.

O R D E R

By Order filed February 14, 2007, this court established the Supreme Court Advisory Committee to Review the Lawyer Discipline System and invited recommendations and applications for appointment of attorney and non-attorney members.

Having considered the recommendations and applications received,

IT IS HEREBY ORDERED THAT:

1. The following individuals are appointed as members of the committee:

Hon. James E. Broberg
James E. Campbell
Eric T. Cooperstein
Jill I. Frieders
Roger W. Gilmore
Karen Brown Kepler
Geri L. Krueger
Eric D. Larson
John C. Lervick
Charles E. Lundberg
Michael J. McCartney
Judith M. Rush
Allen I. Saeks
Thomas J. Schumacher
Murray Shabsis
Tom Vasaly
James E. Wilkinson
Bruce R. Williams
Todd A. Wind

2. Allen I. Saeks shall serve as chair of the committee.

3. The committee shall make its final report to the court on or before April 30, 2008.

Dated: July 26, 2007

BY THE COURT:

/s/

Russell A. Anderson
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

ADM07-8001

Supreme Court Advisory Committee
to Review the Lawyer Discipline System.

O R D E R

By Order filed February 14, 2007, this court established the Supreme Court Advisory Committee to Review the Lawyer Discipline System and by Order filed July 26, 2007 appointed committee members and directed the filing of a final report by April 30, 2008. The committee has requested that the deadline for the final report be extended to June 30, 2008.

IT IS HEREBY ORDERED THAT the Supreme Court Advisory Committee to Review the Lawyer Discipline System shall make its final report to the court on or before June 30, 2008.

Dated: April 10, 2008

BY THE COURT:

/s/

Russell A. Anderson
Chief Justice

APPENDIX B: LIST OF SUBCOMMITTEES

Access to the Lawyer Discipline System Subcommittee
James E. Wilkinson, Chair

Aging Files—Case Management Subcommittee
Geri L. Krueger, Chair
Eric T. Cooperstein
Thomas Vasaly

Communications Subcommittee
Thomas Vasaly, Chair
Roger W. Gilmore
Murray Shabsis
Bruce Williams
Todd Wind

Disciplinary Options Subcommittee
Judith M. Rush, Chair
Karen Brown Kepler
Eric D. Larson
Thomas Vasaly

Interviews Subcommittee
Bruce R. Williams, Chair
Hon. James Broberg
Todd A. Wind

Lawyer Recidivism Subcommittee
Eric T. Cooperstein, Chair
Eric D. Larson
John C. Lervick
Michael J. McCartney

Panel Manual Subcommittee
Charles E. Lundberg, Chair

APPENDIX C: PROPOSED AMENDMENTS OF RLPR

RULE 9. PANEL PROCEEDINGS

(a) Charges~~; Setting Pre-Hearing Meeting~~. If the matter is to be submitted to a Panel, the matter shall proceed as follows:

(1) T~~t~~he Director shall prepare charges of unprofessional conduct, assign them to a Panel by rotation, notify the lawyer of the Charges, the name, address, and telephone number of the Panel Chair, and the provisions of this Rule. ~~schedule a pre-hearing meeting, and notify the lawyer of:~~

Within 14 days after the lawyer is notified of the Charges, the lawyer shall submit an answer to the charges to the Panel Chair and the Director and may submit a request that the Panel conduct a hearing. Within ten days after the lawyer submits an answer, the Director and the lawyer may submit affidavits and other documents in support of their positions.

~~(1) The charges;~~

(2) ~~The name, address, and telephone number of the Panel Chair and Vice-Chair;~~ The Panel shall make a determination in accordance with paragraph (j) within 40 days after the lawyer is notified of the Charges based on the documents submitted by the Director and the lawyer, except in its discretion, the Panel may hear oral argument or conduct a hearing. If the Panel orders a hearing, the matter shall proceed in accordance with subdivisions (b) through (i). If the Panel does not order a hearing, subdivisions (b) through (i) do not apply.

(3) The Panel Chair may extend the time periods provided in this subdivision for good cause.

(b) Setting Pre-Hearing Meeting. If the Panel orders a hearing, the Director shall notify the lawyer of:

(1~~3~~) The time and place of the pre-hearing meeting; and

(2~~4~~) The lawyer's obligation to appear at the time set unless the meeting is rescheduled by agreement of the parties or by order of the Panel Chair or Vice-Chair.

~~**(b) Answer to Charges.** Not less than seven days before the pre-hearing meeting, the lawyer shall serve on the Director an answer to the charges. The answer may deny or admit any accusations or state any defense or privilege.~~

(c) Request for Admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Civil Procedure for the District Courts applicable to requests for admissions govern, except that the time for answers or objections is ten days and the Panel Chair or Vice-Chair shall rule upon any objections. If a party fails to admit, the Panel may award expenses as permitted by the Rules of Civil Procedure for District Courts.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by number or randomly selected initials in any District Court proceedings.

(e) Pre-hearing Meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Civil Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission.~~; and~~

~~(3) The parties shall prepare a pre-hearing statement.~~

(f) Setting Panel Hearing. Promptly after the pre-hearing meeting, the Director shall schedule a hearing by the Panel on the charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel Chair or Vice-Chair. The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, and of the prehearing statement. Each party shall provide to each Panel member in advance of the Panel hearing, copies of all documentary exhibits marked by that party at the pre-hearing meeting, unless the parties agree otherwise or the Panel Chair or Vice-Chair orders to the contrary.

(g) Referee Probable Cause Hearing. Upon the certification of the Panel Chair and the Board Chair to the Court that extraordinary circumstances indicate that a matter is not suitable for submission to a Panel under this Rule, because of exceptional complexity or other reasons, the Court may appoint a referee with directions to conduct a probable cause hearing acting as a Panel would under this Rule, or the Court may remand the matter to a Panel under this Rule with instructions, or the Court may direct the Director to file with this Court a petition for disciplinary action under Rule 12(a). If a referee is appointed to substitute for a Panel, the referee shall have the powers of a district court judge and Ramsey County District Court shall not exercise such powers in such case. If the referee so appointed determines there is probable cause as to any charge and a petition for disciplinary action is filed in this Court, the Court may appoint the same referee to conduct a hearing on the petition for disciplinary action under Rule 14. If a referee appointed under Rule 14 considers all of the evidence presented at the probable cause hearing, a transcript of that hearing shall be made part of the public record.

(h) Form of Evidence at Panel Hearing. The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel Chair or Vice-Chair authorized for good cause. If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to

compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by number or randomly selected initials in any district court proceedings.

(i) Procedure at Panel Hearing. Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

(1) The Chair shall explain that the hearing's purpose is to determine:

(i) whether there is probable cause to believe that public discipline is warranted ~~on each charge~~, and that the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause;

(ii) if an admonition has been issued under Rule 8(d)(2) or 8(e), that the hearing's purpose is to determine whether the panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court; or

(iii) whether there is probable cause to believe that a conditional admission agreement has been violated, thereby warranting revocation of the conditional admission to practice law, and that the Panel will terminate the hearing whenever it is satisfied there is or is not such probable cause.

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which the Director proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments;

(6) The complainant may be present for all parts of the hearing related to the complainant’s complaint except when excluded for good cause; and

(7) The Panel shall either recess to deliberate or take the matter under advisement.

(j) Disposition. ~~After the hearing,~~ T~~t~~he Panel shall make one of the following determinations:

(1) In~~If~~ the case of ~~hearing was held on~~ charges of unprofessional conduct, the Panel shall:

(i) determine that there is not probable cause to believe that public discipline is warranted, or that there is not probable cause to believe that revocation of a conditional admission is warranted;

(ii) if it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition;

(iii) if it concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition; If the Panel issues an admonition based on the parties' submissions without a hearing, the lawyer shall have the right to a hearing de novo before a different Panel. If the Panel issues an admonition following a hearing, the lawyer shall have the right to appeal in accordance with Rule 9(m); or

(iv) if it finds probable cause to revoke a conditional admission agreement, instruct the Director to file in this Court a petition for revocation of conditional admission.

(2) If the Panel held a hearing ~~was~~ on a lawyer's appeal of an admonition that was issued under Rule 8(d)(2), or issued by another panel without a hearing, the Panel shall affirm or reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, instruct the Director to file a petition for disciplinary action in this Court.

(k) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. The notification to the complainant, if any, shall inform the complainant of the right to

petition for review under subdivision (l). If the Panel affirmed the Director's admonition, the notification to the lawyer shall inform the lawyer of the right to appeal to the Supreme Court under subdivision (m).

(l) Complainant's Petition for Review. If not satisfied with the Panel's disposition, the complainant may within 14 days file with the Clerk of the Appellate Courts a petition for review. The clerk shall notify the respondent and the Board Chair of the petition. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court will grant review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action or a petition for revocation of conditional admission, or take any other action as the interest of justice may require.

(m) Respondent's Appeal to Supreme Court. The lawyer may appeal a Panel's affirmance of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal and seven copies thereof with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the decision or make such other disposition as it deems appropriate.

(n) Manner of Recording. The Director shall arrange for a court reporter to make a record of the proceedings as in civil cases.

(o) Panel Chair Authority. Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel Chair or Vice-Chair. For good cause shown, the Panel Chair or Vice-Chair may shorten or enlarge time periods for discovery under this Rule.

****

RULE 10. DISPENSING WITH PANEL PROCEEDINGS

(d) Other Serious Matters. In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the Court has suspended or disbarred lawyers in the past,

such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to submit an answer or failure to attend a pre-hearing meeting as required by Rule 9, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel Chair, file the petition under Rule 12.

****

RULE 15. DISPOSITION; PROTECTION OF CLIENTS

(a) Disposition. Upon conclusion of the proceedings, this Court may:

(1) Disbar the lawyer;

(2) Suspend the lawyer indefinitely or for a stated period of time;

(3) Order the lawyer to pay costs;

(4) Place the lawyer on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;

(5) Reprimand the lawyer;

(6) Order the lawyer to successfully complete within a specified period such written examination as may be required of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;

(7) Make such other disposition as this Court deems appropriate;

(8) Require the lawyer to pay costs and disbursements; in addition, in those contested cases where the lawyer has acted in the proceedings in bad faith, vexatiously, or for oppressive reasons, order the lawyer to pay reasonable attorney fees;

(9) Dismiss the petition for disciplinary action or petition for revocation of conditional admission, in which case the Court's order may denominate the lawyer by number or randomly selected initials and may direct that the remainder of the record be sealed; or

(10) Revoke, modify or extend a conditional admission agreement.

****

APPENDIX D: CASE MANAGEMENT—AGING FILES

TABLES

TABLE 1

Table II from the 2007 Annual Report shows:

	Lawyers Board Goal	12/02	12/03	12/04	12/05	12/06	4/30/07
Total Open Files	500	463	487	525	527	578	592
Cases at Least One Year Old	100	106	97	134	147	128	152
Complaints Received YTD		1,165	1,168	1,147	1,150	1,222	448
Files Closed YTD		1,226	1,143	1,109	1,148	1,171	434

TABLE 2

Resp.	No. of files	Date of oldest complaint	Date last contact with Resp / counsel	Longest period of inactivity (months)	No. of staff attorneys on file / atty ID	Last work on file / reason for delay
A	1	10/05	12/07	4	1 – I	12/07 pending malpractice trial 05/08
B	1	12/05	07/06	21	1 – I	3/08 Additional information required
C	1	10/05	07/07	10	1 – I	03/08 Research rules – draft admonition
D	1	09/05	07/07	9	1 – I	03/08 Admonition drafted for review
E	3	12/04	12/07	9	1 – I	12/05/07 charges of unprofessional conduct 03/20/08 panel hearing
F	10	05/05	02/08	3	1 - I	12/07 7 complaints charged go to panel 05/08 03/08 3 complaints remain under investigation
G	Reinst.	10/06	03/08	3	1 – II	08/07 Petitioner requested hold 11/07 Petitioner proceed w/reinstatement 03/08 Petitioner meet w/Director
H	1	10/05	12/06	5	1 - III	11/07 obtained court file information 03/08 final determination will soon be sent to Director for approval
I	1	12/04		3	2 – III	1/08 Respondent's criminal trial continued 3/24/08
J	1	08/05	03/08	18	1 – III	3/08 convicted in 2007 – request documentation Respondent completed terms of probation
K	1	07/06	02/08	2	2 – IV	3/14/08 Pre-hearing scheduled
L	4	12/04	02/08	8	1 - V	12/07 1 complaint wait on criminal case 02/08 Meeting set course of action on 3 complaints

M	4	09/05	12/07	6	1 – V	11/07 charges issued panel hearing set 04/04/08
N	Reinst.	02/07	03/08	2	2 – V	03/08 Pending results of medical evaluation
O	6	04/05	03/08	3	1 – VI	02/08 proposed private probation on 2 complaints, 03/08 more information/conferences 4 complaints
						13 attorneys–34 complaints, 2 attorneys - reinstatement

- "Inactivity" does not include computer-generated status report letters sent every 3 months to Complainants
- Staff Attorneys assigned to these cases: Staff Attorney I = 6 cases, Staff Attorney II = 1 case, Staff Attorney III = 3 cases, Staff Attorney IV = 1 case, Staff Attorney V = 3 cases, Staff Attorney VI = 1 case

APPENDIX E: LAWYER RECIDIVISM

TABLES

The number in parentheses at the top of each column is the number of individual lawyers in that category:

TABLE 1

Type of Discipline	1 Discipline (1269)	2 Disciplines (414)	3 Disciplines (179)	4 Disciplines (85)	5 Disciplines (56)	6 Disciplines (38)	7 + (51)	**Totals (2,092)**
An Admonition	903	518	354	184	155	120	273	**2507**
Private Probation	111	60	52	39	34	22	29	**347**
Public Reprimand/Probation	51	44	21	28	19	19	31	**213**
Suspension	73	93	43	45	36	33	51	**374**
Disbarment	67	25	13	8	7	4	10	**134**
Totals	**1203**	**740**	**483**	**302**	**251**	**198**	**394**	**3571**
Reinstatement	8	45	24	19	15	9	29	**149**

The total in each column of disciplines does not equal the number of lawyers multiplied by the number of administered disciplines (*e.g.* there are 1,269 lawyers with only one discipline but only 1,203 "total" disciplines; 414 lawyers with two disciplines but less than 828 total disciplines). This is due to the existence of other discipline record categories that were excluded from this chart (*e.g.* trusteeships, death, failed reinstatement petitions, etc).

TABLE 2

	1 Discipline (1269)	2 Discipline (414)	3 Discipline (179)	4 Discipline (85)	5 Discipline (56)	6 Discipline (38)	7 + (51)
Years experience	16.75	16.10	15.62	13.62	14.23	13.11	14.45
Time from 1st to 2nd (in years)		4.43	3.55	2.66	2.54	2.81	2.42
Time from 2nd to 3rd (in years)			4.03	2.70	2.44	1.59	1.83
Time from 3rd to 4th (in years)				3.10	2.28	2.68	1.33
Time from 4th to 5th (in years)					2.41	2.46	2.44
Time from 5th to 6th (in years)						2.22	1.70
Time from 6th to 7th (in years)							1.85

Judith M. Rush
Attorney at Law, P.C.

September 12, 2008

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Order for Hearing to Consider Proposed Amendments to the Rules on Lawyers Professional Responsibility

Dear Mr. Grittner:

As a member of the Supreme Court Advisory Committee to Review the Lawyer Discipline System (hereinafter "the Advisory Committee"), I hereby request the opportunity to speak and respond to questions at the September 23, 2008, hearing in relation to the proposed amendment to Rule 9. The proposed amendment, which enjoys the support of a majority of the Advisory Committee, would eliminate duplicative evidentiary hearings.

The Supreme Court established the Advisory Committee, consisting of lawyers, judges, and public members from around the state to review the lawyer discipline system and make improvements it deemed advisable. One improvement the Advisory Committee recommended was to streamline the current disciplinary system by eliminating a formal probable cause hearing before a Panel of the Lawyers Board except where the Panel Chair orders otherwise. Normally, the determination of probable cause would be made on the basis of written submissions by the Director and the respondent. If probable cause is found, the respondent lawyer would receive a hearing before a referee appointed by this Court, as is the case now.

This change is long overdue. In 1981, the ABA Standing Committee on Discipline recommended that Minnesota's system of dual adversary hearings be streamlined.[1] The Advisory Committee was aware that this issue is controversial and gave the matter considerable study before submitting this recommendation to the Court.

[1] See Evaluation of the Lawyer Discipline System in the State of Minnesota, Final Report (June, 1981) at 20, attached.

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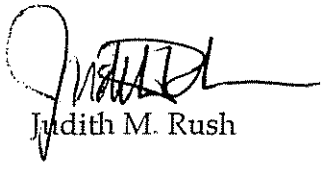
The Advisory Committee did not make a determination that the system was broken and needed repair. That was not its charge. It was asked to, and did, recommend *improvements* to the system. It viewed the elimination of this duplicative double formal hearing process as an improvement that would bring the Minnesota system in line with ABA recommendations and the process used in other states, would reduce the length of the disciplinary process, reduce the resources expended in the process, and provide a fair process that protects the interests of both lawyers and the public.

As a self-regulated profession, it is incumbent upon us to scrutinize the double due process which is currently afforded to Minnesota lawyers. The majority of the Advisory Committee saw an opportunity to make a change that would instill confidence in the system, while protecting the rights of lawyers in our disciplinary system.

Not surprisingly, lawyers and their counsel would prefer more process rather than less. Naturally, the Board would seek to protect its current role in the probable cause process. Change isn't easy. However, the Committee's recommendation preserves the Board's necessary role as a check on the Director's prosecutorial discretion, gives the Panel Chair discretion to order an in person-hearing, and allows the Board to expand its responsibilities for meaningful oversight of the OLPR, governance, and development of standards for the discipline system. Ultimately, the Committee believes that the Board should spend less time conducting unnecessary hearings and more time addressing delays in case processing, issuing opinions on subjects of concern to Minnesota lawyers, and studying other ways to improve lawyer regulation.

If the Court does not believe that the time is right to adopt the Committee's recommendations, the Court may wish to direct further study of the disciplinary process. In that regard, the Court should consider directing the OLPR to monitor the number and length of probable cause hearings, the nature of the issues presented, and results, together with the hours spent by OLPR staff and board members in the process, to allow for consideration in a subsequent review of the system.

Respectfully submitted.



Judith M. Rush

EVALUATION OF THE LAWYER DISCIPLINE SYSTEM IN THE STATE OF MINNESOTA

FINAL REPORT

JUNE, 1981

SPONSORED BY THE

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

The following is specifically recommended for consideration:

(11.1) Develop a brochure describing the disciplinary process for distribution to the public upon inquiry.

(11.2) Issue press releases to publicize the appointment of public members to the Board and the District Ethics Committees to enhance the credibility of the disciplinary process.

(11.3) Offer press releases on public discipline imposed and assistance in drafting feature articles about the disciplinary system (explaining its operation and the location of its office) to the Minnesota newspapers. Monthly articles published by the Director in the bar journal could be utilized for this purpose.

(11.4) Solicit speaking engagements in which nonlawyer members of the agency address citizen groups on the structure and operation of the discipline system.

II. PRACTICE AND PROCEDURES

Hearing Process

Our examination of the disciplinary proceedings revealed a multiple stage hearing process providing dual hearings at which the Director and the respondent may introduce evidence and witnesses in an adversary proceeding. Pursuant to Rule 9, one of these hearings is a probable cause proceeding by a panel of the Board. Upon a finding of probable cause to file formal

charges with the Court, the matter is referred for formal proceedings before a referee, who submits findings of fact and recommendations to the Court for final disposition. This duplication of the adjudicative function, which in practice provides two adversary hearings prior to the final disposition of public discipline, is burdensome for the complainant, an expense for the discipline system, and a substantial drain on limited counsel resources. Although some individuals expressed the view that these procedures are needed to provide a check on prosecutorial authority and to assure due process to the respondent, the team concludes that the multiple stages encompassed in the hearing process are a major factor contributing to the delay in dispositions and exceed the requirements of due process. We note that an individual charged with a capital offense is entitled to only indictment by a grand jury and one trial.

The Lawyer Standards contemplate a hearing process which provides a probable cause review of the recommendation of counsel for disposition by the chairman of a hearing committee and formal disciplinary proceedings before a hearing committee, rather than a referee. While we recognize that a restructuring of the discipline system may not be feasible, we believe that the proceedings would be streamlined and delay would be minimized by the adoption of a hearing process consistent with the Lawyer Standards.

(12.1) Recommendation: The team recommends the adoption of a rule in accordance with Lawyer Standard 8.11 which provides that the recommendation of counsel for disposition of a matter should be reviewed by the chairman of a hearing committee designated by the board, who may approve, modify, or disapprove the recommendation, or direct that the matter be investigated further. In addition, the team recommends the adoption of a rule in accordance

with Lawyer Standard 8.26 which provides that upon the filing of formal charges, the Board should assign the matter to a hearing committee for formal proceedings.

If it is not possible to restructure the system at this time, then as a minimal alternative the team makes the following recommendations.

(12.2) Recommendation: The team strongly recommends that the "probable cause" proceeding be limited to the submission of written evidence supplemented by oral arguments and briefs, but precluding the adversary presentation and cross-examination of witnesses. This streamlined procedure preserves the adjudicative review of prosecutorial authority by the Board while reducing duplication and delay in the disciplinary process. This procedure is consistent with Lawyer Standard 8.11 which provides a probable cause review of counsel's recommendation for formal charges by the chairman of a hearing committee.

In support of its recommendations to limit panel proceedings to a probable cause determination, the team recommends amendment of Rule 9(e) which authorizes the panel after hearing to dismiss, impose a warning, issue a private reprimand, or recommend a petition for disciplinary action which may include a recommendation as to the ultimate disposition. The team believes that the jurisdiction of the panel to issue a private reprimand from which there is no right of appeal by the respondent and to make a recommendation as to the ultimate disposition have contributed to an expansion of the "probable cause" proceeding by encouraging the submission of substantial evidence by the Director and the respondent to achieve the desired disposition.

(12.3) Recommendation: The team recommends that Rule 9(e)(3) be amended to eliminate the sanction of private reprimand in order to reduce the need for an adversary panel proceeding. This also alleviates the potential due process challenge to the imposition of discipline which denies a respondent the right to a judicial determination of the misconduct. The retention of a warning provides a sufficient sanction for minor misconduct which is consistent with Lawyer Standard 6.10.

(12.4) Recommendation: The team strongly recommends that Rule 9(e)(4) be amended to divest panels of the authority to make recommendations as to ultimate disposition. The panel adjudicative function should be limited to a probable cause finding to file formal charges. By eliminating the authority of a panel to recommend ultimate disposition, the need to engage in an adversary proceeding at the probable cause stage is reduced.

The duplication problem is further exacerbated by evidentiary hearings conducted by some of the District Ethics Committees charged with investigative responsibilities. Appearances by the complainant and the respondent are often required thereby increasing the burden for those individuals and creating delay in reporting Committee findings and recommendations to the Director. The team believes that investigations conducted by the Committees should be limited to written and telephonic communication and personal interviews. The team notes that a review and investigation by the Director and District Ethics Committee, a limited "probable cause" proceeding before a panel of the Board, and a de novo hearing before a referee of the Court afford significant due process protection to the respondent.

STATE OF MINNESOTA
IN SUPREME COURT

ADM07-8001

HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

STATEMENT OF ADVISORY COMMITTEE MEMBER ERIC T. COOPERSTEIN AND REQUEST FOR ORAL PRESENTATION

I. Introduction

Pursuant to the Court's May 28, 2008, Order, the undersigned submits this written statement to comment on the report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System (Advisory Committee). Specifically, this statement further elaborates on the minority report in opposition to the proposal to eliminate contested probable cause hearings and offers comments in support of the proposal to expunge records of private admonitions for attorneys who have no additional discipline in the ten years following such discipline.

With this statement, the undersigned also requests the opportunity to address the Court at its September 23, 2008 hearing.

The undersigned served on the Advisory Committee this past year. In addition to that experience, the undersigned is a former staff attorney of the Office of Lawyers Professional Responsibility (1995 to 2001), a former member of the Hennepin County District Ethics Committee (2003 to 2007), a member of the MSBA Rules of Professional Conduct Committee (2006 to present), and since late 2006 has operated a private law practice substantially devoted to legal ethics, including representing respondent attorneys in disciplinary investigations.

II. Proposal Regarding Probable Cause Hearings

The "Minority Report – Preserve Probable Cause Hearings," attached to the Advisory Committee Report at page 45, amply sets out the objections to the majority's narrative proposal to eliminate contested probable cause hearings in favor

of written submissions to a panel of the Lawyers Professional Responsibility Board (LPRB). The proposed amendments to Rule 9, Rules on Lawyers Professional Responsibility (RLPR), were not made available to the Advisory Committee until its final meeting to approve the entire Report. As a result, there was no opportunity to incorporate into the Minority Report additional concerns raised by the proposed changes to Rule 9. Those concerns are the focus of this statement.

A. The Time Limits Contemplated by the Proposed Rule are Inadequate.

Section 9(a)(2) of the proposed rule sets a presumptive limit of 40 days for an LPRB panel to make a probable cause determination after the Director notifies the respondent attorney of the charges. (Advisory Committee Report, App. C, at p 55) The rule also provides, however, that the respondent has fourteen days from the issuance of the charges to submit an answer and that both parties have ten days from the submission of the answer to submit "affidavits and other documents in support of their positions." Proposed Rule 9(a)(1). Hence, of the 40 days allotted to the panel to make its decision, 24 days are taken up by the time for answering and submitting additional documents, leaving the panel only 14 days to receive, review, and confer regarding the charges.

In addition, the proposed time line makes no specific provision allowing parties to brief the panel on the issues in the case, other than the ten-day period for submitting affidavits and other documents. This contradicts the Advisory Committee Report, which states that "The legitimate right of Respondents to a fair process can be protected by providing for probable cause determinations based on the parties'

written submissions without a hearing." Report, at 24. Indeed, the Director's charges may raise questions of law that cannot be adequately addressed by the pleadings, there may be financial documents that require narrative interpretation, or there may be inconsistencies in the factual allegations that are best addressed through written briefs. Under the current system, such explanations and arguments are made to the panel through oral presentations, which the proposed rule discourages. The lack of a briefing schedule may burden the Director more than the respondent, because the respondent has 24 days to assemble a brief in response to the Director's charges but the Director only has ten days following the submission of the answer to prepare and submit a brief.

It seems likely, given that the panel members are volunteers and themselves have either law practices or other affairs to attend to, that the panel chair will be forced in most cases "to extend the time periods provided in this subdivision for good cause." Proposed Rule 9(a)(3). The proposed rule sets no limits, however, on how long the panel chair can extend these time periods. Setting a time line so constricted that it will not likely be followed seems to defeat the majority's intended purpose of bringing increased efficiency to the probable cause process. Adopting a timeline that will be swallowed by its exceptions may also encourage noncompliance with the rules in general.

B. The Elimination of Discovery Will Prejudice Both Parties

Under the current rules, the issuance of charges triggers discovery rights for both parties in the form of requests for admission and depositions. *See* RLPR,

Rule 9(c), (d). The proposed rule eliminates discovery in all cases in which no hearing will be conducted. *See* Proposed Rule 9 (a)(2) ("If the Panel does not order a hearing, subdivisions (b) through (i) do not apply.").

Under the current rules, depositions are not frequently used during the probable cause phase of the discipline process because, with the permission of the panel chair, key witnesses may be subpoenaed to appear at the probable cause hearing. Although the current probable cause procedure contemplates that testimony of witnesses other than the complainant or the respondent will be submitted by affidavit, *see* RLPR, Rule 9(h), a party is effectively prevented from submitting affidavits that are incomplete or refer only to facts favorable to that party by the prospect that the opposing party will either take the witness' deposition or ask permission to call the person as a witness at trial.

By removing discovery rights along with contested probable cause hearings, the proposed rule presages "dueling affidavits" from the same witness, the credibility of which the panel will be unable to judge. Alternatively, if one party cannot obtain the cooperation of the complainant or other witness, the proposed rule allows the submission of incomplete affidavits that cannot be rebutted by the opposing party. This change may prejudice either the Director or the respondent attorney. Complainants, for example, sometimes maintain their dissatisfaction with a respondent throughout a disciplinary proceeding (which would favor the Director) but in other cases recant their complaints or provide inconsistent accounts of their experience with the respondent (which would favor the respondent). Other

witnesses may be similarly reluctant to cooperate with the opposing party. An LPRB hearing panel should not be called upon to make a probable cause determination without a complete understanding of the witnesses' testimony, including whatever cross-examination is appropriate in the matter.

The deficits in the proposed amendments to Rule 9, RLPR, are themselves reflective of the flaws in the proposal to substitute a paper process for the live hearing process that has worked effectively for over twenty years. This Court should reject both the Advisory Committee's recommendation and the proposed amendments to Rule 9.

III. Expungement of Admonitions

The Advisory Committee also recommended that the Supreme Court should consider adopting a rule expunging private admonitions if the lawyer has had no discipline for ten years after the last admonition. Advisory Committee Report, at p. 42. This recommendation also came late in the Committee's deliberations and the rationale for the recommendation was not fully explored in the Advisory Committee Report.

The data collected and analyzed by the Advisory Committee (summarized at pages 39 to 42 and in tables attached to the Report as Appendix E) showed that of all lawyers receiving any type of discipline over the 21 years from 1986 through 2006, over 70 percent received a private admonition. The data does not foretell which of those lawyers will receive additional discipline in the future but it does show that on

average, when lawyers receive discipline more than once, the time between disciplines is less than five years. In addition, only about ten percent of lawyers received their second discipline more than ten years after the first. An even lower percentage of lawyers who had more that two disciplines received those dispositions more than ten years apart.

The data suggests that lawyers who have difficulty conforming their practices to the Minnesota Rules of Professional Conduct tend to reveal that tendency within a relatively short time span. In contrast, many lawyers who receive a private admonition –defined by RLPR Rule 8(d)(2) as an "isolated and non-serious" violation of the ethics rules– are able to subsequently correct their conduct or become more mindful of the Rules, avoiding future discipline. Many private admonitions arise from rule violations that are technical in nature and say little about a lawyer's commitment to the ethical practice of law. *See In re M.D.K.*, 534 N.W.2d 271 (Minn. 1995) (affirming private admonition issued to attorney for "technical" violation of advertising rule). For this latter category of lawyers, the stain of a private admonition on an otherwise unblemished record serves only as a source of embarrassment, not as a deterrent against future misconduct.

The goals of the lawyer discipline system are "guard the administration of justice and to protect the courts, the legal profession and the public." *In re Serstock*, 316 N.W.2d 559, 561 (Minn. 1982). Maintaining old records of private admonitions does not advance any of these goals, yet they may have an impact on an attorney's application for employment or seeking public office. Elsewhere in our legal system,

expungement of records is available for criminal records, Minn. Stat. §609A.03, and juvenile petty offenses, Minn. Stat. §206B.235. If criminal records may be expunged, then seems reasonable that private admonitions may be expunged as well.

The Rules on Lawyers Professional Responsibility already provide that the Director must expunge "all records or other evidence of a dismissed complaint . . . three years after the dismissal." Rule 20(e)(1), RLPR. That rule also provides an avenue for the Director to request, upon good cause shown, that the records of a dismissal be retained for an additional three years, presumably to allow the Director time to use information from the dismissal as part of an ongoing investigation. *See* Rule 20(e)(2), RLPR. A provision could be added to Rule 20(e) to allow the expungement of private admonitions for lawyers who have had no other discipline in the succeeding ten years, with the same good cause exception if the Director had reason to believe that a private admonition that was about to be expunged had relevance to a pending disciplinary investigation.

IV. Conclusion

For the reasons described above, the undersigned requests that the Court reject the Advisory Committee's proposal to amend the probable cause hearing process and adopt the Advisory Committee's proposal regarding the expunction of private admonitions.

Dated: Sept. 10, 2008

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FILE NO. ADM 07-8001

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments
to the Rules on Lawyers
Professional Responsibility

STATEMENT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Lawyers Professional Responsibility Board, hereinafter the LPRB, files this statement in response to the report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System and pursuant to this Court's Order of May 27, 2008. The LPRB wishes to express its gratitude to the members of the Supreme Court Advisory Committee for their efforts and recommendations.

PROPOSAL TO CHANGE METHOD FOR DETERMINATION OF PROBABLE CAUSE FOR PUBLIC DISCIPLINE

The Advisory Committee recommended that Rule 9, Rules on Lawyers Professional Responsibility (RLPR), be amended to change the manner in which Panels of the LPRB determine the existence of probable cause for public discipline. The LPRB opposes this recommendation.

Under the current rule, respondents in disciplinary proceedings are entitled, with some exceptions, to a live hearing before a three-member Panel of the LPRB in matters where the Director of the Office of Lawyers Professional Responsibility (Director) believes public discipline is warranted. Testimony at

the Panel hearings is typically limited to that of the complainant and respondent, with affidavits or deposition transcripts utilized for the testimony of other witnesses. After hearing the testimony and arguments of counsel and reviewing the documentary exhibits received, Panels then may find probable cause for public discipline, direct the issuance of a private admonition, or dismiss the matter. If probable cause is found, a second hearing may be held by a referee, Rule 14, RLPR.

The amendments to Rule 9, RLPR, recommended by the Advisory Committee would substitute for the current Panel hearing a probable cause determination made by a LPRB Panel based upon written submissions of the Director and respondent. The Advisory Committee's proposal would, however, leave the Panel with the discretion to conduct an adversarial hearing if it determined that special circumstances so required.

The Advisory Committee found "that there did not exist a convincing rationale for giving the Respondent a right to two separate evidentiary hearings when that right is not required by due process, is not necessary to ensure the fairness of the proceeding, is not available to other citizens of this state in criminal legal proceedings, and is not available to lawyer Respondents in other states." They concluded that "the procedure [as presently structured] inappropriately compromises the goal of protecting the public by giving the Respondent an unnecessary procedural right that also results in inefficiency and delay."

As to the concern that the present system leads to inefficiency and delay, it must be noted that it is only in a small number of matters where there is both a contested probable cause hearing and a contested evidentiary hearing before a referee appointed by the Court. The probable cause hearing is often waived by respondents. Further, it is estimated that only approximately 45 percent of the

cases that go to a contested probable cause hearing are subsequently tried to a referee. Although the statistics do not correlate exactly because a probable cause determination in one year may not result in public discipline until the next year, a comparison of the number of contested probable cause hearings to the number of public disciplines in each year from 2003 through 2007 is instructive.

There are relatively few contested Panel hearings each year. Any reduction in delay or inefficiency would be only nominal as a result of the proposed amendment.

YEAR	CONTESTED PROBABLE CAUSE HEARINGS	PUBLIC DISCIPLINES
2003	7	43
2004	7	28
2005	12	35
2006	6	52
2007	15	31

It is also possible that the recommended change would have the unintended consequence of causing delay in some cases. First, some respondents who would otherwise waive a hearing might insist upon a Panel determination. Second, a respondent might request a hearing, which would require another Panel decision. Third, a respondent might request time to obtain and submit additional information to the Panel. Finally, the Panel would need to circulate information and confer, which could take as much time as a hearing.

If the Committee's recommendation was implemented, the level of efficiency of the overall process is more likely to decrease rather than increase. The volume of paperwork Panel members would be required to read,

comprehend and analyze would likely increase. Importantly, given thicker files to read, and the time necessary to do so, the Director and the Panel members may end up investing more time in the aggregate on probable cause files than they currently spend. Moreover, Panel members may wind up improvidently opting not to avail themselves of the opportunity to assess the personal demeanor and credibility of the complainant and respondent in the courtroom in situations where it is important to do so.

The Advisory Committee reasoned that the probable cause hearing is an unnecessary right granted to respondents giving them due process unwarranted in light of the other opportunities for hearing. The Committee noted that the probable cause hearing is not found in other types of proceedings or in the process of attorney disciplinary proceedings in other jurisdictions. The LPRB does not view this as a fault in the process as a whole. The probable cause hearing as presently constituted gives both the respondent and the complainant the right to be heard by a Panel of practicing lawyers and at least one non-lawyer. This review serves as an important check on the Director's discretion to seek public discipline – a check tempered by the perspectives of the Panel members. Further, to the extent that a Panel hearing results in dismissal or the issuance of a private admonition, the complainant by virtue of having been present at the hearing and having had an opportunity to participate, will likely have a better understanding and greater acceptance of the disposition.

The elimination of live probable cause hearings also runs the risk of diminishing the role played by the non-lawyer members of the LPRB. Their judgment is often better—or at least oriented differently in important ways—than the lawyer members' judgment when it comes to analyzing the human factors, the common sense factors, and the societal factors, not to mention

credibility issues. These are all areas in which the face-to-face Panel hearings give them their best opportunity to bring those skills to bear.

Like most non-lawyers, other than spouses, LPRB lay members often have not seen lawyers at work or disgruntled clients or the interaction between the two. The Panel hearings let them literally see how the attorney-client relationship plays out in a wide variety of settings. Each hearing gives them a better feel for how things really work in a law practice. It is doubtful they would get the same important feel for how things work by looking at documents any more than a lawyer gets the feel for the courtroom by watching others do it or (worse) reading about it.

The personal interaction involved in a live hearing not only permits the lay members of the Panel to make better educated decisions, but also is a better forum for utilizing their unique perspectives. A "paper only" review would likely put the lay members at a disadvantage and discount the value of their role in the lawyer disciplinary process. Discussions about objections, about evidentiary questions, and so on occur with frequency and spontaneity during hearings. They are helpful to everyone's feel for the issue before them. They would not occur in isolated review. Credibility issues are not nearly as easy to spot when one is confronted only with the printed record. Even mental health issues sometimes are much more visible when the hearing is in person and not on the record.

Finally, while the LPRB commends the Advisory Committee for its sincere desire to improve the efficiency of the process, it must be noted that there has been little, if any, criticism of the present probable cause system.

It is the sense of the LPRB, after having studied the Advisory Committee's recommendations, that the elimination of the current system of probable cause hearings is not likely to make the process more fair or more efficient.

PROPOSAL TO ELIMINATE REQUIREMENT THAT PROBABLE CAUSE BE FOUND ON EACH CHARGE

The Advisory Committee has recommended that Rule 9(i), RLPR, be amended to eliminate the requirement that probable cause be found on each charge. The Committee contemplates that a determination of probable cause would be made on the charges as a whole, rather than making an individual determination as to each separate charge. Individual charges presumably could still be dismissed, but thereafter probable cause would be determined on the remaining provable charges as a whole. The LPRB understands that there has been a disparity amongst its Panels over the years as to what, exactly, is meant by the requirement that probable cause be found on each charge. Nevertheless the LPRB believes that there remains value in a Panels' ability to exercise independent discretion as to probable cause determinations where there are multiple charges of misconduct. Accordingly, the LPRB opposes this recommendation. The LPRB Rules Committee instead has recommended that the LPRB reach a common understanding as to what is meant by the term "on each charge" and apply that understanding uniformly.

The requirement of a finding of probable cause on each charge, coupled with the authority of the Panel to direct the issuance of a private admonition on a charge, has resulted in lawyers being disciplined twice for matters that were initially charged as a single disciplinary action. In other words, in exercising the discretion afforded to review each charge, Panels have declined to find probable cause as to one of several matters charged, instead directing the issuance of an admonition, and then found probable cause for public discipline on the remaining charges. This decision resulted in the attorney receiving both a private admonition and public discipline where the Director initially sought only

a single discipline.[1] Further, some Panels have interpreted the language "on each charge" to strike discrete factual allegations and/or rule violations contained within a single matter charged by the Director. This has left the Director in the position of going forward with a public prosecution that, at times, has been substantially different from what was originally contemplated.

Despite these difficulties, the LPRB, still sees value in permitting the Panels to serve as a check on the Director's discretion. The filing of a public petition for disciplinary action can result in adverse publicity that may be as damaging to the attorney as an actual finding of misconduct. A Panel review of each charge brought to determine probable cause provides additional assurance that public charges of misconduct have merit.

PROPOSAL TO EXPUNGE PRIVATE ADMONITIONS

The Advisory Committee has further proposed a change to the RLPR to provide for the expungement of private admonitions if the lawyer has had no discipline for ten years from the last admonition. The LPRB opposes this proposal.

The LPRB has previously considered and rejected this proposal. The primary reason for rejecting the proposal is that it is of only limited, if any, benefit to the lawyer involved. Most applications calling for disclosure of prior discipline either explicitly or implicitly require that prior discipline be disclosed, even if it was subsequently expunged. Certainly a lawyer who is asked, "Have you ever been disciplined as an attorney" or some similar question, must answer

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[1] Ironically, the Dreher Committee, in it's 1985 report recommended the adoption of the requirement that there be a finding of probable cause on each charge, in part, to avoid serial prosecutions. They stated at page 57 of their report, "The Committee perceives the need to establish an early and comprehensive check on the prosecutor's charging authority, while continuing to avoid the problems of serial prosecution. To accomplish this, the Committee recommends that the Panels be required to determine probable cause on all charges filed. "

that question truthfully. If the lawyer had been previously admonished, the truthful answer would be "yes." The Minnesota Bar Admission Application, for example, requires disclosure of criminal charges or arrests even if the charge or arrest has been expunged. The question calling for disclosure of prior attorney discipline reads, "Have you ever been disciplined, suspended, reprimanded, censured, or disbarred as an attorney . . . ?" (underlining in original). Thus, disclosure of prior discipline is likely to be required despite the expungement.

As to the utility of an expungement in disciplinary proceedings that might arise after the ten year interval, again, the utility to the attorney involved is limited. It is unlikely that the Director would even cite to an isolated private discipline of that age, let alone be able to make a convincing argument that it ought to be considered as an aggravating factor.

ADVISORY COMMITTEE'S ADMINISTRATIVE RECOMMENDATIONS

The Advisory Committee has also made a number of recommendations for changes within the Director's Office to facilitate access to the discipline system, enhance case tracking reports, update the Panel Manual, publish summaries of private discipline, enhance outreach to impaired lawyers, improve communication with complainants, and further educate respondent attorneys. No court action is required to implement these recommendations.

The Director's Office and the LPRB Executive Committee have given careful consideration to these recommendations and intend to implement many of the recommended changes. A draft Limited English Proficiency Policy is under consideration. The Executive Committee is reviewing case management procedures and reports and will be suggesting methods for enhancing efficiency and monitoring more case progress. The language used in complaint dismissal forms will be changed to improve communication with complainants.

References to office management resources, chemical dependency and mental health resources, and resources for assistance with professional responsibility questions will be added to forms sent to attorneys.

Dated: Sept. 12, 2008.

Respectfully submitted,

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FILE NO. ADM 07-8001

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments
to the Rules on Lawyers
Professional Responsibility

REQUEST TO MAKE ORAL PRESENTATION

The Lawyers Professional Responsibility Board requests leave for Kent Gernander, Chair of the Lawyers Professional Responsibility Board, and Martin A. Cole, Director of the Office of Lawyers Professional Responsibility, to address the Court concerning the amendments to the Rules on Lawyers Professional Responsibility proposed by the Supreme Court Advisory Committee to Review the Lawyer Discipline System.

Dated: Sept. 12, 2008

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT

ADM07-8001

STATEMENT OF FORMER DIRECTORS HON. EDWARD J. CLEARY, HON. KENNETH L. JORGENSEN, AND WILLIAM J. WERNZ IN OPPOSITION TO SUPREME COURT ADVISORY COMMITTEE RECOMMENDATIONS FOR PROBABLE CAUSE HEARING AND RELATED RULE AMENDMENTS

I. INTRODUCTION AND OVERVIEW

This statement is filed, pursuant to the Court's May 28, 2008, Order, allowing written comment on the Report of the Supreme Court Advisory Committee (Committee). The undersigned do not request leave to make oral presentations, but are available for that purpose, should the Court desire.

This statement is made in opposition to the recommendations of the Committee regarding probable cause hearings and two related matters. *See* Committee Report at 21 – 25. The undersigned former Directors of the Office of Lawyers Professional Responsibility (OLPR) believe that these recommendations are inadvisable because they are based on incorrect and unsupported findings and on a failure to understand the history and nature of probable cause determinations. The undersigned also join in the statement of the Lawyers Professional Responsibility Board (LPRB) and in the April 30, 2008, Memorandum "Minority Position – Preserve Probable Cause Hearings," opposing these same recommendations. Report at 45-8.

For over twenty years, most Petitions for Disciplinary Action have been filed in the Minnesota Supreme Court without prior probable cause hearings. In 1986, on LPRB recommendation, with the concurrence of the Dreher Supreme Court Advisory Committee, the Rules on Lawyers Professional Responsibility (RLPR) were amended to provide for bypass of LPRB Panel probable cause hearings in several circumstances, whether by agreement, by admission, or upon approval of the Board or Panel Chair. Rule 10, RLPR. These circumstances were identified both specifically and generically. Rule 10(d), RLPR, "Other serious matters." In addition, Court discipline or suspension orders

may also be sought without probable cause determinations in other circumstances, e.g. pursuant to Court orders for probation, reciprocal discipline, or on findings of arrears for maintenance or child support. Rules 12(d), 30, RLPR.[1]

Because Panel bypass procedures have become so numerous, and so well-accepted, the few remaining probable cause hearings tend to be close cases. In our judgment based on long experience, the Committee is mistaken in asserting that "most" such cases can be well determined without regard to the credibility or personal appearance of the respondent, complainant or other witnesses. Report at 5, 21.

The Report recommendation is based in part on a mistaken understanding of facts. After the Committee Report was filed, OLPR more carefully reviewed records to determine how many probable cause hearings had actually been held in the period 2003 – 2007. The total was 47, just over nine per year. The Committee had apparently been given to understand – mistakenly, because only 2007 records were used -- that there were "about 15 panel hearings each year." Report at 45.[2] OLPR estimated that in about 40% to 45% of probable cause proceedings, there were "double hearings," i.e. panel hearings followed by referee hearings. *Id.* at 45-6. Avoiding "double hearings" is the chief rationale cited by the Report for its probable cause recommendations. Substituting paper

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[1]The Report does not mention these alternatives to probable cause hearings, but instead states, inaccurately, "a panel must conduct an evidentiary hearing before a case is filed, . . ." Report at 21.

[2]Panel hearings are conducted for admonition appeals and reinstatement petitions, as well as for probable cause proceedings (for those possibly serious matters that are not filed in the Court pursuant to stipulation or the panel bypass rules), and it is unclear whether the "15 panel hearings" estimate included all panel hearings.

proceedings in "most" cases is the chief solution. The annual number of "double hearings" in which paper proceedings would be substituted for live hearings would, apparently, be about three.[3] As discussed below, we believe that substitution of paper proceedings would not save time or resources, but even if the Committee correctly believes there would be savings, the total savings would be extremely small, because only a few "double hearings" would be avoided.

Although the Committee has cited delay and burden as the reasons for its probable cause recommendations, the Committee has entirely ignored the most time-consuming burdensome aspect of discipline proceedings -- Supreme Court proceedings. The time and resources devoted to a single Supreme Court proceeding after filing of a petition exceed the resources that are devoted to many Panel hearings. Accordingly, the gateway to Court proceedings should not be monitored in summary fashion, except in clear cases. The clear cases have, however, already been identified in the RLPR as eligible for panel bypass. Close cases deserve close threshold scrutiny, both because public charges irreparably affect an attorney's reputation and because unnecessary adjudication by the Court and its referee severely tax the resources of OLPR, the public, the respondent, and the Court.

Although the Committee's proposed amendments center on whether probable cause proceedings should be presumptively made solely on documents, the Committee

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[3]This bottom line estimate is made by assuming nine probable cause hearings per year, multiplied by 40-45% (the "double hearing" percentage), reduced because "most" but not all proceedings would be on paper.

also recommends -- without any supporting findings or reasoning -- two other amendments, viz. that determination of probable cause need be made only as to charges "generally," not as to each charge and that, unless there was a live evidentiary hearing, respondent be stripped of rights to make a request for admission or take a deposition before a probable cause determinations. *See* proposed amendments to Rules 9(a)(2)and 9(i)(1)(i). In our view, eliminating procedural rights and protections without explanation is not in keeping with Minnesota's tradition of open and reasoned debate regarding the lawyer discipline system.

II. RESPONSE TO FINDINGS

A. The Committee's Findings That in "Most Cases" Probable Cause Determinations Can be Made Well on Documentary Submissions and Only "Special Circumstances" Make Evidentiary Hearings Desirable are Unsupported and Mistaken.

Because panel probable cause hearings typically involve close cases, credibility and demeanor are often decisive or at least important. If an OLPR witness cannot testify credibly under cross-examination, it is best to learn that at Panel. If the respondent demonstrates true recognition and contrition, a close case may be resolved privately.[4]

The Report does not cite any former or current Director, Board Chair, or Board member, or any other evidence, to support its characterization that personal appearances

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[4]Wayne Pokorny, almost by his demeanor alone, escalated an admonition into a suspension. In re Pokorny, 453 N.W.2d 345 (Minn. 1990). On the other side of the ledger, contrition was found both by a panel and by the Court to warrant an admonition, although the Court also found that the violation was inherently serious. In re 98-26, 597 N.W.2d 563 (Minn. 1999). A young attorney, guilty of plagiarism, was privately disciplined when she demonstrated contrition. Martin A. Cole, "I Wrote This Myself," *Bench & Bar* (July 1993).

should be regarded as "special," rather than regular, circumstance. The experience of the present LPRB is contrary to the Report's characterization. The experience of the undersigned, who collectively have over fifty years' involvement in lawyer discipline cases, is that personal appearances are regularly of great use to making well-founded probable cause determinations.

B. The ABA's 1981 Recommendation and the ABA Model Rules for Disciplinary Enforcement are Not Persuasive.

The Report Findings cited in support of probable cause recommendations consist largely of a modification to an alternate recommendation made in 1981 by an ABA study committee and to the ABA Model Rules for Disciplinary Enforcement. Report at 21-23. Reliance on these ABA sources is misplaced.

The 1981 ABA study was based on the 1981 Minnesota lawyer discipline system. In 1981 the great majority of the panel bypass procedures described above (most of which were adopted in 1986) did not exist. The 1981 system studied by the ABA was far different from the current system. For example, William J. Wernz recalls a lengthy evidentiary panel hearing in or about 1982 on whether probable cause should be found where respondent, with the advice of counsel, had already stipulated to the filing of a petition for disciplinary action.[5]

The 1981 system studied by the ABA required panel hearings where they were not needed, as well as in close cases. The ABA recommended abolishing probable cause proceedings or, alternatively, requiring "written submissions supplemented by oral

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[5]Since 1982 or 1986 such matters have bypassed panel hearing under Rule 10(a).

argument, ..." Report at 22. The Committee recommends a modification (deleting oral argument) of the 1981 alternative recommendation. This recommendation should stand or fall on its merits, rather than for whatever authority a somewhat different 1981 ABA alternative recommendation may be supposed to have.

The Report also cites the ABA Model Rules for Lawyer Disciplinary Enforcement as instructive. Report at 22-3. These Rules have not, however, enjoyed the acceptance and stature of the Model Rules on Professional Conduct. We understand that Louisiana is the only jurisdiction to have adopted them.

Moreover, the overall philosophy of the Model Rules clearly conflicts with Minnesota's "primary" rule, RLPR 2, which *requires* "fairness." For example, the Model Rules do not provide respondent a right to access any documents, even the complaint, until after a public charge and the answer to the charge. Rules 15A, 16. In contrast, RLPR 20(a)(4) provides respondent access to the entire file, except work product. The Model Rules – again, in stark contrast to Minnesota -- do not even require that respondent be promptly notified of a complaint and investigation, because, "In some instances, early notice would be harmful to the investigation." Rule 11, Comment. In short, the Model Rules for Disciplinary Enforcement have not been a model in Minnesota or elsewhere, and piecemeal citation to those Rules is unpersuasive.

C. Summary Judgment Motions – A Less Radical Alternative.

Under current Rule 9(i)(iii), RLPR, "the Panel will terminate the hearing whenever it is satisfied there is or is not such probable cause." This rule appears to allow probable cause to be determined before any testimony is given. The LPRB Panel Manual

could clarify that this Rule authorizes the equivalent of pre-hearing summary judgment motions by OLPR or respondent. Putting the initial burden on the parties, rather than the panel, to determine whether probable cause is determinable without live testimony, would expedite proceedings much more effectively than providing for the panel to make such determinations routinely.

III. RESPONSE TO RECOMMENDATIONS

A. Probable Cause Determinations on Written Submissions Will Not Reduce Delay, Serve the Public's Interest or Otherwise Improve Discipline Proceedings.

Panel hearings typically "last between a half day and a day." Panel Manual at 29. As noted above, on average there are nine panel probable cause hearings annually, approximately four of which are followed by referee hearings. The LPRB has six hearing panels and the OLPR has ten attorneys. LPRB members average one and a fraction probable cause hearing a year and OLPR attorneys average less than one such hearing a year.[6] The opportunity for time-saving is not great, because the total time devoted to probable cause hearings, after the 1986 Panel bypass amendments, has been very limited.

Time will not be saved by making probable cause determinations on documentary submissions the regular procedure. Proposed Rule 9(a)(1) Provides, "the Director and the lawyer may submit affidavits *and other documents* in support of their positions."

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[6]The Report's rationale includes, "The present double hearing structure unduly . . .consumes LPRB resources." Report at 24. There is no finding that the LPRB is, in general, over-burdened and LPRB does not believe its time is unduly consumed by present procedures. In any event, the potential time-savings of converting less than a handful of hearings each year to documentary review is insignificant at best.

Emphasis added. "Other documents" would often include briefs and could include voluminous exhibits. Preparation and review of these documents would often be more time-consuming than live hearing, particularly where, as now, the Panel Chair has broad discretion over what may be submitted at hearing and briefs have *not* often been authorized. Panel Manual, "Panel Hearing Procedures." Some panel document reviews will be followed by live hearings, resulting in the very delay and duplication that the Committee seeks to avoid.

The Report finds that "The present double hearing structure unduly burdens Complainants. . .." Report at 24. This finding is, apparently, not based on any actual complainant's report, but instead on the 1981 ABA report. *Id.* at 21. The Committee does not consider that some complainants may feel deprived of their "day in court," if a panel finds on documentary review, without hearing, that there is not probable cause. Moreover, Kenneth L. Jorgensen, who served in the OLPR for approximately twenty-five years, does not recall a single instance of a complainant reporting that he or she found hearings before both a Panel and a referee to be burdensome.

B. The Committee's Proposed Abolition of Respondent's Discovery Rights is Unsupported and Inadvisable.

The Report does not even mention that the Committee's recommended rule amendments include abolition of pre-hearing discovery rights. Proposed Rule 9(a)(2) provides, however, "If the Panel does not order a hearing, subdivisions (b) through (i) do not apply." Current Rule 9(c) provides for Request for Admission and Rule 9(d) provides that "Either party may take a deposition." Because Rule 25, RLPR, already

provides the Director with broad rights of investigation, the practical effect of the Committee recommendation would be to strip respondent of the discovery rights that have been available for many years.

If the Committee recommendation were adopted, respondent would have no right to compel anyone to answer a question, or to compel anyone besides OLPR to produce a document, before a petition for disciplinary action was publicly filed, following probable cause determination. This consequence bears emphasis because a respondent who cannot effectively ask questions often cannot adequately defend.

C. The Committee's Proposal That Probable Cause Determinations be Made Only as to One Charge is Unsupported and Inadvisable.

The Report states, without supporting finding or explanation, "In any event, the panel would determine whether or not there was probable cause with respect to the Director's charges generally; the panel would not go through the individual charges to determine whether or not there was probable cause for each charge." Report at 23-4. The Committee proposes deletion of the words "on each charge," words that were added to Rule 9(i)(1)(i) in 1986 on the recommendation of the Dreher Committee, with the concurrence of LPRB. How the merits of charges "generally" are to be determined without determining the merits of individual charges is not explained.

We do not believe it is advisable for the Court to (1) in 1986, adopt a proposal, made with careful explanation, of its first Advisory Committee, then (2) twenty-two years later rescind the adoption, when another Advisory Committee so recommends, but without any explanation. The apparent reasoning seems to be that probable cause

determination procedures as to "each charge," whether on paper or after hearing, take too much time. However, the Committee Report does not mention any observer of actual proceedings who has made such a judgment, and the average time of a half day to a day each for nine panel hearings a year is not excessive.

IV. CONCLUSION

For these reasons, the undersigned believe that the Advisory Committee's findings and recommendations for amendment to probable cause hearing procedures and related matters should not be adopted.

Dated: September 10, 2008

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Dated: Sept. 10, 2008

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