C1-84-2140

REPORT OF THE

ADVISORY COMMITTEE TO REVIEW LAWYER DISCIPLINE IN MINNESOTA AND EVALUATE THE RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION

January 28, 1994

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The Committee was charged with:

1. Evaluating the recommendations made by the American Bar Association (ABA) based on the report of its Commission on Evaluation of Disciplinary Enforcement (commonly referred to as the McKay report). The McKay report proposed major changes in the lawyer discipline system, that, if adopted by the Minnesota Supreme Court, would dramatically alter the current structure and procedures.

2. Updating the 1985 report (commonly referred to as the Dreher Report) issued by the Advisory Committee on Lawyer Discipline appointed by the Minnesota Supreme Court. The Dreher report analyzed the Minnesota Lawyers Professional Review Board (LPRB) and the workings of the Director's office.

MAJOR FINDINGS AND CONCLUSIONS

The Committee found that:

1. **There is no greater user dissatisfaction with the lawyer discipline system in Minnesota than there is likely to be with any discipline system.** The Committee reached this conclusion after reviewing select LPRB disciplinary files, surveying over 300 persons who complained to the LPRB of lawyer performance during a recent three-month time period, conducting a hearing for complainants, lawyers and the public, and taking the testimony of over 30 persons with expertise in various topics involving the legal profession.

2. **The Minnesota discipline system is basically sound and is working well.** The recommendations of the Dreher report have been largely adopted and placed in practice. There is no need for major changes beyond possibly expanding available remedies.

3. **There is a high rate of complaint dismissal.** Complaints are dismissed because they do not rise to a level of professional misconduct or involve issues unrelated to lawyer discipline. New remedies may be needed.

3. **There is a need to try new remedial systems.** As McKay noted, there are dissatisfied consumers of legal services who cannot find a remedy within the discipline system. There is a need to test new remedies, including alternative dispute resolution approaches like mediation and arbitration.

MAJOR RECOMMENDATIONS

The Committee recommends:

1. **The Supreme Court should request that the Minnesota State Bar Association, with assistance from the Director's Office, design and implement pilot programs involving mediation and mandatory fee arbitration.**

2. The District Ethics Committees should continue to investigate discipline complaints.

3. Random audit of lawyer trust accounts is not a cost effective device for uncovering lawyer misconduct.

INTRODUCTION

On September 9, 1992, the Minnesota Supreme Court filed an order establishing the Supreme Court Advisory Committee on Lawyer Discipline and American Bar Association Recommendations.[1] (Hereinafter referred to as the Committee.) This Committee was charged with two tasks:

(1) Evaluating the recommendations made by the American Bar Association (ABA) based on the report of its Commission on Evaluation of Disciplinary Enforcement (commonly referred to as the McKay report).[2] The McKay report proposed major changes in the lawyer discipline system, which, if adopted by the Minnesota Supreme Court, would dramatically alter current structure and procedures.

(2) Updating the 1985 report (commonly referred to as the Dreher Report) issued by the Advisory Committee on Lawyer Discipline appointed by the Minnesota Supreme Court.[3] The Dreher report analyzed the Minnesota lawyer discipline system and, in particular, the workings of the Director's

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[1] See Appendix 1.

[2] The McKay Report was published as Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement. (American Bar Association, Center for Professional Responsibility 1992).

[3] Report of the Supreme Court Advisory Committee on Lawyer Discipline, C1-84-2140, filed April 22, 1985, Office of Appellate Courts. A supplemental report, dated December 2, 1985, was also filed.

Office. The report proposed many changes in the system, including periodic review of the Lawyers Professional Responsibility Board (LPRB).

The Supreme Court appointed Janet Dolan and Robert Henson as co-chairs of the Advisory Committee. The Committee, composed of ten attorneys and six non-lawyer citizens, included members who had served on the LPRB and District Ethics Committees. Members, all of whom have demonstrated a long-standing commitment to public service, were drawn from around the state.[4]

The Committee met biweekly from November 1992 to May 1993, holding additional meetings during June, August, October, and December. Initially, the Committee divided into two subcommittees, one designated as the McKay Subcommittee, and the other the Disciplinary Review Subcommittee. After a few separate meetings, however, all meetings involved the Committee as a whole. Over 30 persons spoke to the Committee, either in person or via telephone, to give their views on the lawyer discipline system and the McKay recommendations. The Committee also surveyed 400 complainants whose LPRB files had recently been closed to measure their satisfaction with the process. Similarly, the attorneys who had the complaints filed against them were also surveyed. Members of the Committee's Disciplinary Review Subcommittee examined many of these case files, which covered a three-month period. The Subcommittee also interviewed all available members of the Director's office staff. The

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[4] See Appendix 1.

current members of the LPRB were also surveyed about the size, structure and workings of the board. Finally, a public hearing was held to take the testimony of 19 complainants and 5 attorneys concerning their experiences with the disciplinary process.[5]

MCKAY REPORT

The 1992 McKay report represents the work of the ABA's Commission on Evaluation of Disciplinary Enforcement. The Commission's charge was to:

(1) study the functioning of professional discipline systems;

(2) examine the recommendations of the earlier ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) and the results of later reforms;

(3) conduct original research, surveys, and regional hearings;

(4) evaluate the state of disciplinary enforcement; and

(5) formulate recommendations for action.

This Commission made 21 recommendations, most of which were approved by the ABA.[6] The recommendations fell into the following broad categories:

(1) expanding regulation to protect the public and assist lawyers;

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[5] See Appendix 1.

[6] See Appendix 2 for a table that lists the McKay recommendations and the Supreme Court Advisory Committee's responses to the recommendations.

(2) direct and exclusive judicial control of lawyer discipline;

(3) increasing public confidence in the disciplinary system;

(4) expediting and facilitating the disciplinary process;

(5) improving the quality of decisions and providing adequate resources; and

(6) prevention and interstate enforcement.

The McKay report is grounded on the premise that there is widespread public dissatisfaction with the lawyer discipline system, in part because it is seen as self-regulation ("lawyers protecting lawyers"). To promote more confidence in the system, McKay recommends more openness in the disciplinary system and less organized bar involvement.

McKay's most significant recommendations would substantially change the discipline system model used in most states. This model frequently results in no disciplinary action. In some jurisdictions up to 90% of the complaints are dismissed. Many of these complaints involve issues such as fee disputes, quality of legal services, incivility and poor communications. Substantial numbers of these complaints, although not warranting professional discipline, merit some remedial action. To address this need for remedial action, McKay recommends the creation of alternative programs. McKay proposes that a central intake office be established to receive all complaints against lawyers. The intake office would review the complaint and either refer it to

the discipline system or to an appropriate alternative program such as mediation, fee arbitration or malpractice arbitration.

In the McKay scheme, there would be a shifting of discipline resources away from investigation and prosecution of minor misconduct toward additional remedies and greater attention to more serious complaints. Under the McKay paradigm, the function of the Minnesota District Ethics Committees (DECs) in discipline investigations would be abolished and all investigation would be conducted by paid personnel in the Director's office. Private admonitions would be eliminated. The energies of local bar associations would be shifted to participation in alternative dispute resolution and lawyer assistance programs.

DREHER REPORT

The 1985 Dreher Report focused on improving the process for lawyer discipline. The report contained over 60 recommendations that touched on virtually every aspect of the system: the administration of the Director's Office, the structure and role of the LPRB, case-processing standards, procedures for the District Ethics Committees, and rule changes. The Dreher Report also recommended that the LPRB undergo periodic review. Almost two-thirds of the recommendations have been fully implemented.[7] Some were not implemented because circumstances had changed and the LPRB had concluded that the recommended changes were

[7] See Appendix 3 for a table that lists the recommendations and their disposition by the Supreme Court or the LPRB.

unnecessary. Clearly, the Dreher Report resulted in significant improvements in lawyer discipline in Minnesota.

FINDINGS AND CONCLUSIONS

The McKay Commission provided many valuable insights concerning the current model of lawyer discipline and recommended changes that have the potential to improve public satisfaction with the discipline system. However, this Supreme Court Advisory Committee believes that the "big picture" painted by the McKay Report, doubtlessly valid in many states, does not fully correspond to the reality of the Minnesota attorney discipline system.

As later sections more fully discuss, Minnesota has already addressed a significant number of the issues McKay found pressing. The Minnesota Supreme Court maintains direct and exclusive control of lawyer discipline and has provided sufficient financial resources for administering the system by periodically increasing the attorney registration fee. Internally, the Director's office, in cooperation with the DECs, has provided timely processing and appropriate resolution of complaints.

Despite the claims of McKay, the Committee concludes that there is no widespread public or professional dissatisfaction with the structure of Minnesota's discipline system. The level of dissatisfaction identified by the Dreher Report has been substantially reduced by the implementation of its

recommendations. That is not, however, to deny that many complainants go away dissatisfied. It is important to note, however, that complainants in cases that were dismissed overwhelmingly regarded their treatment as unfair, while a sanction resulted in a greatly increased perception of fairness by complainants.[8] Although improvements can be made in the way the Director's office communicates with parties, particularly as to the disposition of cases, there was no significant demand for systemic changes from any source, including attorneys who regularly defend clients before the LPRB.

McKay's recommendations were based on very little empirical data. The Minnesota Advisory Committee recognized this shortcoming and made significant efforts to collect such data. Complainants and the attorneys named in the complaints were surveyed, a public hearing was held, and over thirty persons met with the Committee to provide information and insights about both the Minnesota system and approaches used in other states.[9] For example, a key premise of McKay is that delay is a major problem. In Minnesota, there have not been major complaints about timeliness in processing complaints.

The conclusions that there is no great constituency for changing the Minnesota system and that McKay is based on scant empirical data led the Committee to conclude that any ventures

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[8] Appendix 4, "Statistical Analysis of Selected Questions" by Professor Mel Gray, page 1.

[9] See Appendices 1 and 4.

into mediation, fee arbitration, and malpractice arbitration should first be conducted on a pilot basis.[10] Pilot programs would allow participants to evaluate how a system works and determine its costs before going state-wide.

Nevertheless, the Committee generally accepts the principle embodied in McKay that the discipline system should strive to provide greater consumer satisfaction. The desire to give complainants more options is justified, as is the need to place more emphasis on serious disciplinary matters.

McKay recommends mandatory fee arbitration. The Committee is aware that this is a sensitive subject for the private bar. Voluntary fee arbitration has met with bar resistance; one-half of the applications for voluntary fee arbitration in Ramsey County do not go forward because the lawyer refuses to participate. The Committee believes, however, that mandatory fee arbitration should be tried. If run fairly, it can be a quick and easy remedy for clients and need not compromise the rights of attorneys. There should, however, be monetary limits on compelled arbitration.

The Committee agrees with McKay that alternative dispute resolution programs have value. Certain needs that are unmet at the current time in the discipline system can be addressed through mediation. Mediation is less confrontational and less

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[10] Complainants whose complaints were dismissed wanted another alternative. None of the cases resulting in sanctions yielded an interest in mediation. Few complainants showed an interest in participating in mediation. See Appendix 4, "Statistical Analysis of Selected Survey Questions," page 2.

adversarial than disciplinary investigation and may be a better way to resolve disputes between attorneys and clients. It must be pointed out, however, that mediation is not a cure-all for the discipline system. It may lack feasibility in instances where positions are hardened. To make mediation work, cases must be screened to insure that only those likely to yield results in mediation are referred. If mediation becomes a dumping ground for all cases that do not merit discipline, the results will probably be disappointing.

The Committee notes that nearly 50% of all complaints in Minnesota are filed by non-clients and that 51% of the dismissed complaints reviewed during the study period were filed by non-clients.[11] McKay's commitment to mediation seems to be based on the mistaken assumption that all complaints are filed by clients. Clearly, mediation will not resolve most non-client complaints. McKay does not address the issue of how much of the disciplinary system resources should be allocated to non-client complaints.

The Committee concluded that it would not recommend adoption of two McKay proposals. In light of the Supreme Court's recent rejection of a Minnesota State Bar Association (MSBA) petition that requested the establishment of a court-funded assistance program for lawyers suffering with chemical dependency and/or emotional problems, the Committee did not recommend the creation

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[11] See Appendix 4, "Statistics Compiled by the Office of Lawyers Professional Responsibility Concerning Dismissed Complaints and the identity of Complainants from 10/20/92 to 4/15/93."

of such a program.[12]

Second, for practical reasons, the Committee declined to recommend adoption of McKay's Lawyer Practice Assistance programs. Although McKay recommended such programs, and the Committee found them to be potentially valuable and interesting, the Committee lacked the time and resources that it believed would be necessary to develop a program of Lawyer Practice Assistance.

Lawyer Practice Assistance is, in fact, part of a larger problem: the competency of the bar. Although the Committee dislikes referring recommendations to others, it is very clear that a significant component of client dissatisfaction is incompetency. This problem was beyond the Committee's grasp. The MSBA, working through one or more bar committees, law schools, and continuing legal education providers, should seek ways to raise the skill level of the bar. This may increase the quality of services and reduce discipline complaints. Ultimately, as McKay recommends, a Supreme Court appointed Committee may be necessary, but not until a resource evaluation is made and a source of funding is identified by the MSBA.

The Committee also considered whether Minnesota should adopt McKay's implicit recommendation to stop issuing admonitions. McKay argues that time spent by the Director's office on relatively minor disciplinary matters could be better applied to

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[12] The Committee did, however, hear the views of MSBA Executive Director Tim Groshens and attorney Patricia Burke about the "Lawyers Concerned for Lawyers" program.

more serious misconduct that could result in suspension or disbarment. The Committee concluded, however, that admonitions have a place in the discipline system. They serve as early warnings to attorneys, putting them on notice that continued misconduct can lead to more severe consequences.

Concerns were expressed that the Committee might feel compelled to recommend changes solely because the ABA had proposed them. Persons appearing before the Committee strongly endorsed the continued use of the DECs for investigation of complaints. The Committee reaffirmed the continued use of the DECs and concluded that there is no need to establish an intake office, separate from the Director's office, for all lawyer complaints. The Committee saw no reason why the Director's Office could not effectively screen out cases for the types of alternative programs recommended by McKay. In the process, the Director's office can monitor any emerging trends.

The Committee also concluded that no major changes in the management of the system are warranted at this time. The implementation of the Dreher Report recommendations between 1985 and 1992 by Director William Wernz provided a strong foundation for the discipline system. But the system is currently undergoing a change in personnel. In the past year a new Director has been hired, a new LPRB Chair has taken office and the liaison Supreme Court Justice has changed. The focus must now be on all parties working together to insure that the discipline system maintains its high standing. The Committee

believes, as did the Dreher Committee, that reviews of the system should be undertaken every five years.

The Committee also has concluded that the nature and volume of work for the members of the LPRB has reduced significantly since the Dreher Report. Rule changes have sharply decreased panel hearings. The size of the LPRB should be reduced to meet the tasks at hand and to insure that members feel connected to the organization and engaged in its activities.

McKay expressed the legitimate concern that the public perceives the attorney discipline system as "the fox guarding the henhouse." McKay urges removing the bar from any role in the disciplinary process to correct this perception. There is, however, strong sentiment in Minnesota for retention of the DECs. Moreover, the Committee did not find the self-serving relationship between the bar and the Minnesota disciplinary system that McKay found elsewhere. Critics of elements of the system in Minnesota did not make this argument. The survey of complainants revealed that those whose complaints led to attorney discipline believed the system was fair. Not surprisingly, those whose complaints were dismissed often thought that the system was unfair and favored lawyers.[13]

Finally, the Committee concludes that some considerable amount of dissatisfaction with the lawyer discipline system will always be present, no matter how many alternatives are provided.

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[13] Appendix 4, "Statistical Analysis of Selected Survey Questions."

As the surveys and public hearings revealed, many complainants are upset that they did not prevail on the merits of their case and wish to find another avenue to express their displeasure at the outcome or at the legal system. A pilot study should provide the opportunity to measure the effectiveness of alternative programs.

RECOMMENDATIONS

A. REGARDING DISCIPLINARY PROCESS AND PROCEDURES

1. The Director's office should continue to be the central intake office for the receipt of all complaints against lawyers.

COMMENT: The ABA recommendation that there be established a central intake office separate from the office of disciplinary counsel was rejected by the Committee as excessive bureaucracy. A separate office would increase costs. In the survey data, 56% of the complainants thought their complaints were handled promptly, 62% thought they were treated courteously, and almost half (46%) would recommend to others that they file an ethics complaint if they were upset with the way an attorney handled their case.[14] There is no reason to assume that screening of

[14] See Appendix 4, Total Complaints Surveyed, questions 4, 5, and 7.

cases by the Director's office, rather than by a separate central intake office, will result in any fewer referrals to alternative programs.

2. **Upon receipt of a complaint, the Director's Office should either:**

(a) dismiss it if it is determined that discipline is not warranted,

(b) refer it to the appropriate District Ethics Committee for investigation if it alleges misconduct of sufficient gravity to warrant discipline,

(c) investigate it through professional staff if warranted by the severity of the charges, or

(d) in districts where such procedures are established, refer it for procedures in lieu of discipline even though the complaint may allege minor misconduct.

COMMENT: The Committee recommends the implementation of the ABA proposal for procedures in lieu of discipline but initially on a pilot basis in selected districts. See Section B, "Regarding Alternative Programs."

4. **The Ethics Committees of the district bar associations should continue to investigate on references from the Director's office complaints of lawyer misconduct, but in the interests of uniformity and avoidance of excessive process, District Ethics Committees should not ordinarily**

hold hearings on complaints under investigation.

COMMENT: Central to the McKay Report is the premise that the organized bar should have no role in lawyer discipline other than to provide administrative services. The Committee was highly sensitive to this issue. It is imperative that the Court regulate the process and that the public have confidence that the Court, not the Bar, is running the system. However, if the Bar plays a valuable role it should not be abandoned just for the sake of consistency with McKay or with other jurisdictions. Minnesota is unique in the role that the DECs play. DECs investigate, makes recommendations, and educate attorneys on issues of lawyer discipline.

In sharp contrast with many other states, the role of the organized bar in Minnesota is limited to selecting for court appointment six members of the LPRB and designating members (other than the chair) of DECs. While there could be some public perception of excessive bar influence in the disciplinary process, this does not appear to be a major problem. All of those testifying before the Committee reported not only their satisfaction with the use of the DECS, but their support for the continued use of these committees. The Court, however, should continue to monitor this issue, through periodic review of the system and should make changes if this part of the system loses its

effectiveness.

On the positive side, the Minnesota system both promotes lawyer involvement in the disciplinary process and provides good investigative services as a contribution by individual DEC members. This is an overall benefit to the profession.

Currently, the Hennepin County DEC conducts panel hearings as part of the investigation of ethical complaints against lawyers in the county. The Hennepin County DEC is the only DEC in the state which conducts panel hearings. Although the Supreme Court Advisory Committee recognizes the good quality of the work of the Hennepin DEC, it believes that panel hearings are an inefficient use of resources. An important issue in the 1990's is the effective use of resources. Since there is much to be done in mediation, arbitration, and lawyer practice assistance, the Hennepin County Bar Association should not engage in efforts duplicated at later stages in the system. Nevertheless, the Advisory Committee does not propose to absolutely bar DEC panel hearings. If the Hennepin County DEC wants to hold hearings in selected cases, it should not be prohibited from doing so. The Committee does, however, strongly suggest that all DECs attempt to maximize their investigatory resources and seek ways to provide support to alternative programs.

5. **The Director's office should continue its current practice of providing advisory ethics opinions.**

COMMENT: The Committee rejects ABA recommendation 6.1(e) that would prohibit disciplinary counsel from providing advisory ethics opinions. An underlying premise of McKay is that we should work toward preventing further disciplinary violations. Education and thoughtful discourse on ethical issues is supportive of that goal. There has been no claim made that the giving of advisory opinions undermines the prosecutorial function of the Director's office. Again, the LPRB should monitor this aspect of the system, since it is counter to the McKay recommendations.

During a period in its history when its resources were more limited, the Director's office eliminated advisory opinions. Responding to pressure from lawyers, the Director's office restored the availability of advisory opinions. While this service consumes some resources, the Director's office has not recommended eliminating it. It seems only reasonable to assist inquiring lawyers on how to stay out of trouble.

6. **a. The Committee approves the McKay recommendation on openness of records after a finding of probable cause. If probable cause is found, the Committee recommends that all disciplinary records, except for work product, be open to public examination. The Director's office should continue**

to treat its files as confidential until and unless a finding of probable cause is made against a lawyer. This recommendation extends the current practice of allowing public examination of the files of the Supreme Court and those of Court-appointed referees in disciplinary proceedings to include the Director's files.

COMMENT: The Committee recognizes the concerns of lawyers who fear they will be subjected to unfair publicity arising out of groundless complaints. Nevertheless, the Committee believes that the probable cause requirement will filter out baseless claims.

b. The Rules on Lawyers Professional Responsibility should be changed to allow the Director, with the affected lawyer's consent, to disclose publicly that a complaint has been dismissed. In any event, the complaint or parts of the records should not be disclosed.

COMMENT: The present flat prohibition against disclosing that a complaint has been dismissed is seen as an anomaly that should be corrected. In dealing with the news media and others, the current rule puts the Director's office in an untenable situation, preventing the office from informing the public that a complaint has been dismissed.

c. Those parts of the meetings of the LPRB that deal with policy, rule making and general administrative issues should

be open to the public.

COMMENT: The Committee believes that meetings of the LPRB should be open to the public except for those matters governed by Rule 20 or for other good cause.[15] The public has a right to know what "big picture" issues are being discussed by the board. Open meetings will help build public confidence in the rule-making process, allowing the public to know the why as well as the what in rules that affect the attorney-client relationship.

Those agenda items that deal with individual cases should not be open to the public. Placing policy, rule making and general administrative issues on the agenda separately from case issues is feasible and will allow the public to hear matters of legitimate interest to them.

7. **Minnesota should retain Rule 21 (a) of the Minnesota Rules on Lawyers Professional Responsibility (MRLPR), paralleling Rule 12A of the ABA Models Rules for Lawyer Discipline Enforcement (MRLDE), that complainants should be absolutely immune from civil suit for all communications within the disciplinary proceeding. Minnesota should also retain Rule 21 (b) of the MRLPR, paralleling ABA recommendation 5.4, that disciplinary staff be absolutely immune from civil**

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[15] The LPRB, in its meeting on September 17, 1993, voted to open its meetings to public attendance. It requested that its Executive Committee consider and make recommendations regarding logistical aspects of opening the meetings.

liability for all actions performed within the scope of their duties.

COMMENT: Regarding immunity, Minnesota is already where the ABA proposes to go. Absolute immunity provides assurance to complainants that they will not be subject to libel suits if they file a complaint. Without absolute immunity, the "chilling effect" of libel suits could discourage the filing of some complaints. In Florida, where there is no absolute immunity, a handful of libel cases have been filed since 1990. In one case, a law firm was sued by another law firm against which it had complained. The number of complaints in the Florida disciplinary system have declined slightly since 1990, suggesting the possibility that the lack of absolute immunity may have had an impact on filings.[16]

8. **Minnesota should retain its present rules requiring, with prescribed exceptions, an adversarial hearing before a panel of the LPRB for the purpose of determining whether or not there is probable cause to believe that discipline is warranted on each charge made by the Director.**

COMMENT: The ABA MRLDE provide for an ex parte determination by a board member of probable cause to believe that discipline is warranted. Although this rule is not the subject matter of the McKay Report, the recommendations

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[16] Information provided by Tony Boggs, Director of Lawyer Regulation, State of Florida, phone conference with the Committee, August 10, 1993.

contained in that Report are premised on the MRLDE. While resources would be saved by the adoption of the ABA approach, the witnesses who appeared before the Committee were virtually unanimous in their preference for the Minnesota system, and the Director's office was not opposed to the retention of the present system. Because Rule 10 of the Minnesota Rules on Professional Responsibility allows for bypassing of the panel in some circumstances, it does not appear that it is unduly burdensome to the staff or the board to maintain the current system of probable cause panel hearings. The current panel hearing system does not cause burdensome delay.

9. **McKay's recommendation regarding complainant's rights should be adopted, even though it would make little change in existing Minnesota procedure. The only significant change would provide complainants with an opportunity, except in cases of summary dismissal, to be present for all parts of the hearing related to the complainant's complaint, except for good cause.**

COMMENT: The adoption of the McKay recommendation regarding complainant's rights is not a significant change from existing Minnesota procedures. The recommendation requires that a complainant be kept fully informed of the status of proceedings, be told of the reasons for dismissal of any complaint, be given an opportunity to be present at those

parts of any hearing that are related to the complainant's complaint, and be afforded a right of review. A proposed amendment to Rule 6 of the Minnesota Rules on Lawyers Professional Responsibility sets out the proposed change.[17]

10. **The ABA recommendation for expedited procedures for minor misconduct would involve substantial changes in existing Minnesota procedure. The Committee concludes that these recommendations should be rejected.**

COMMENT: The Committee shares the same goal as McKay on this issue. Current Minnesota procedure, which was supported by those testifying before the Committee, accomplishes the goal of timeliness that McKay endorses. Adoption of the ABA recommendation would involve members of the LPRB becoming adjudicators, a function not presently performed by the LPRB. The Committee believes that any advantage from adopting this ABA recommendation would be outweighed by the structural changes it would require.

11. **Minnesota should change its present rule regarding temporary suspension of accused lawyers pending disciplinary proceedings to parallel ABA recommendations, even though the present Minnesota rule is arguably more flexible than the ABA proposal. A lawyer should be subject to suspension when**

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[17] See Appendix 5.

there is a substantial threat of serious harm to the public.

COMMENT: Although the practice in Minnesota largely coincides with ABA recommendation 12, the Committee recommends that Rule 16 of the Minnesota Rules on Lawyers Professional Responsibility be amended to specify that a lawyer may be temporarily suspended when continuation of the lawyer's authority to practice pending disciplinary proceedings poses a substantial threat of serious harm to the public.[18]

12. **The ABA recommendation regarding the random audit of trust accounts should not be adopted.**

COMMENT: While the random audit of lawyer trust accounts might occasionally result in the discovery of defalcations and other violations of trust account rules, the Committee was persuaded by the report of MSBA's Client Protection Committee that the cost of such an undertaking outweighs its potential benefits.[19]

The detailed audit procedures required to uncover fraud are cost prohibitive. The Client Protection Committee observed that some matters of lawyer defalcation involve claims where trust accounts are not involved, thus making

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[18] See proposed amendment to Rule 16 in Appendix 5.

[19] Report of the Client Protection Committee, January 29, 1993, Merritt Marquardt, Chair. Mr. Marquardt appeared before the Committee and summarized the report's recommendations.

random audits of no value in such cases. General audits are too limited to uncover sophisticated trust account defalcations. The Client Protection Committee noted that the Iowa Client Security Board, which started random audits in 1974, does not conduct a full scale audit of a lawyer's records. Even so, the Iowa board spends $40,000 a year to conduct audits, with each lawyer being audited every five years. Because Minnesota has three times as many attorneys as Iowa, the costs of a random audit program would be substantially higher. In light of these facts and the Committee's skepticism that random audits would uncover misconduct, the Committee rejected random audits.

13. **The Court should not adopt at this time the McKay-proposed rule promoting fee agreements. This rule provides that, except where the fee agreement otherwise has been established in a continuing relationship, if there is no written agreement between the lawyer and the client, the lawyer should bear the burden of proof of all facts, and the lawyer should be entitled to no more than the reasonable value of services for the work completed or, if the failure to complete the work was caused by the client, for the work performed.**

Recommendation 17 below proposes that a pilot program for mandatory fee arbitration be adopted, and, if successful, expanded state-wide. If the pilot is successful, the Court

should adopt the ABA proposal on fee agreements to include an additional requirement that any such written agreement contain a provision for mandatory arbitration of fee disputes within certain limits and making known the availability to the client of mediation procedures.

COMMENT: The desirability of written engagement agreements between lawyer and client is widely recognized. Because the Committee is proposing, on a pilot-project basis, programs of mediation and mandatory fee arbitration, it seems prudent to refrain from changing the relevant Rules of Professional Conduct at this time.

14. **Although the ABA recommendations regarding a National Discipline Data Bank and the nationwide assignment of identification numbers were approved by the Committee, the implementation of these recommendations will require a national effort.**

COMMENT: The recommendations of the ABA designed to promote better interstate communication seem basically sound.

15. **The Minnesota Supreme Court should not seal otherwise public disciplinary records in cases filed with it.**

COMMENT: In a few cases, the Court has sealed the records of disciplinary cases. While the Committee recognizes that the Court retains the power to seal records, it recommends that the Court desist from doing so.

B. **REGARDING ALTERNATIVE PROGRAMS**

16. **On a pilot project basis, the Court should give the Director discretion to send minor complaints to volunteer professional mediators or to participating district bar associations for mediation.**

COMMENT: McKay correctly points out that the discipline system currently dismisses the overwhelming number of cases because they do not warrant discipline. Many of these complaints are dismissed without investigation because there is no remedy available for disputes arising from incivility and the breakdown of the attorney-client relationship. McKay strongly urges the creation of additional remedies to provide greater consumer satisfaction with the process and to allow disciplinary counsel more time to work on serious cases of misconduct. The Committee agrees. The high rate of dismissal suggests that the disciplinary system is not the most appropriate remedy for the vast number of complaints filed. These complaints start in the disciplinary process because it is presently the only process available to resolve disputes between attorneys and clients. McKay suggests that if other remedies were available, these matters could be put into such alternative programs. Mediation may be an appropriate vehicle for many of these types of complaints.

The Committee believes a pilot project should be authorized by the Supreme Court and conducted by District

Bar Associations to test the use of mediation for disputes involving a client and his or her attorney. The greatest benefit of using mediation might be to allow the complainant to participate in the process, rather than being an observer. Mediation may allow the discussion to focus on repairing the attorney-client relationship, rather than trying to fix blame. It is also important to assess how much additional time disciplinary counsel would have to investigate serious misconduct if minor matters were diverted.

A concern about establishing a mediation program is that less than half (41%) of the complainants in the survey indicated they were willing to mediate,[20] and an examination of these complainants' files revealed that only a fraction of these cases were appropriate for mediation. It is likely, however, that most people are not familiar with the mediation process and that education and explanation by the Director's office of the mediation process would help complainants to see mediation as an appropriate remedy.

The Committee is concerned about the impact of mediation on district bar association volunteer resources.[21]

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[20] See Appendix 4, Total Complaints Surveyed, Question 11(15).

[21] In light of the fact, however, that 50% of all dismissed complaints involve non-clients, the number of dismissed complaints that may lend themselves to mediation may be limited. See Appendix 4, "Statistics Compiled by the Office of Lawyers Professional Responsibility Concerning Dismissed Complaints and the identity of Complainants from 10.20/92 to 4/15/93."

Current DEC volunteers may neither be interested in nor qualified to provide mediation services. Volunteers would need to receive training in mediation techniques. In addition, a projected time commitment of 10-15 hours per case is more than current case investigation typically takes.

One alternative is to employ professional mediators. At this time the cost factor would appear to preclude this option. The Committee would encourage, however, professional mediators to volunteer their services during the pilot program. This would enable an evaluation Committee to judge whether a professional system is more effective than one relying on lawyer volunteers.

Finally, additional administrative support will be needed, since it may not be possible for volunteers to coordinate and schedule mediation. Therefore, as Recommendation 18 indicates, mediation should be conducted on a pilot project basis. A pilot project will reveal the effectiveness of mediation and what impact it has on volunteer resources. In addition, a pilot project will identify how many cases are amenable to alternative dispute resolution.

17. **The Court should establish a pilot project wherein a complaint involving a fee dispute not warranting discipline would be sent to the local bar association for binding fee**

arbitration. Arbitration would be mandatory for the lawyer unless the fee exceeds the statutory limit for conciliation court.

COMMENT: At present, the Director's office does not investigate fee disputes. These complaints are referred to the District Fee Arbitration Committee for voluntary arbitration by a panel of one lawyer and two non-lawyers. Up to 50% of these complaints do not go forward because the attorney refuses to participate.

The Committee believes mandatory fee arbitration is appropriate for disputes that are within the statutory limits for conciliation court ($6,000, rising to $7,500 in 1994). Lawyers may legitimately question why they should be treated differently than other creditors. However, this concern must be balanced against the value of providing this service to clients. Further, attorneys' concerns can be minimized by a quick and fair process. Mandatory fee arbitration, like mediation, should be tested in a pilot project to determine its effectiveness and its impact on the local bar association.[22] The MSBA's ADR committee has drafted Rules for Fee Dispute Resolution that should be considered for structuring the pilot project.

18. The Court should establish a pilot project of sufficient length to test the implementation and effectiveness of

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[22] See Recommendation 14.

alternative programs (mediation and mandatory fee arbitration). The design should include an urban district, a mid-size district, and a greater Minnesota district. The pilot project should be used to determine factors such as client satisfaction, impact on the professional performance of the bar, the total cost of the program, the impact on timeliness of disciplinary proceedings, and the administrative convenience of the program.

COMMENT: One of McKay's premises is that more options will produce better results for complainants. The pilot projects will provide the opportunity to measure satisfaction with alternative programs. The pilot projects will also show what does and does not work, and may reveal unanticipated issues. During the pilot period (24-36 months) the number of complaints suitable for the process can be measured and the costs of the programs assessed. It is important that disciplinary proceedings on serious issues move promptly. The assumption is that the alternative programs will not place an undue administrative burden on the Director's office. Pilot projects will reveal whether this is the case. Finally, the pilots will show how the district bar associations manage the administrative and procedural requirements presented by the alternative programs. A proposed amendment, temporarily adding a new provision to Rule 6X to the Minnesota Rules on Lawyer Professional Responsibility sets out the procedures to be followed in the

pilot projects, but the Committee intentionally refrained from designing the projects. It is important that the LPRB, the Director's Office, and the local Bar Associations work out the details.[23] The MSBA's ADR Committee has already drafted Rules for Fee Dispute Resolution.

19. **To insure the prompt and effective implementation of the pilot programs, the Court should request the MSBA, with the assistance of the Director's office, to design, initiate, and develop criteria for the evaluation of the pilot programs.**

Comment: The pilot programs will not succeed without the support of the bar association. McKay says, and the Committee agrees, that this is an area where the Bar has a significant contribution to make. Using models similar to those currently used for fee arbitration, the MSBA, in consultation with the Director's Office, should design and implement the pilot programs. The development of evaluation criteria prior to the start of the programs will clarify program design and simplify the evaluation process.

20. **All records of matters referred to mediation and fee arbitration shall be deemed "dismissed complaints" and shall not be regarded as discipline files for the purposes of any rules relating to the disclosure of disciplinary records.**

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[23] See Appendix 5.

COMMENT: This recommendation reflects current practice for dismissed complaints. It is important, however, to separate in the minds of the public and the bar the alternative programs from the disciplinary process.

21. **Complaints of minor misconduct initially assigned for disciplinary investigation should be referred to mediation or fee arbitration if, after investigation, it is determined that the matter could be resolved through mediation or fee arbitration. Matters initially assigned to mediation or fee arbitration may be investigated if additional allegations concerning the lawyer come to the Director's attention, but no communication or document made or used in the course of a mediation may be used against the lawyer in any disciplinary proceeding.**

COMMENT: The Committee does not wish to tie the hands of either the discipline system or the alternative programs system. Substance should drive the system, not form. For a matter referred back into the disciplinary system, however, the Committee relied on Minn. Stat. § 595.02, subd. 1(l), which prevents the use of any communication or document made or used in mediation to be used in another proceeding.[24]

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[24] M.S. § 595.02, Subd. 1(l)states "A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not

22. **In exercising his or her discretion to assign a complaint into either discipline or alternative program, the Director should consider the gravity of the alleged conduct, the likely outcome of disciplinary proceedings, and the likely efficacy of the alternative program.**

COMMENT: McKay recognized that the discipline system must make effective use of its resources and that the Director of the disciplinary office must be independent. In light of these concerns, the Director ought to exercise his or her discretion, based on the three factors above, in deciding where a complaint should be referred.

The Committee recognized that even with the option of referral of complaints to alternative programs, the disciplinary system will continue to receive a large number of complaints that do not state a reason for either discipline or alternative programs. Complaints made against an attorney by someone other than a client are not generally amenable to mediation. The comments from persons appearing at the public hearing and contained in complainant surveys demonstrate that complainants, upset about the outcome of their legal dispute, often look to the disciplinary system as an avenue to change the unfavorable outcome. One of the major purposes of McKay was to provide more opportunities

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become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law."

for persons to be heard. It is apparent to the Committee, however, that even with more opportunities, many complainants will not find a satisfying remedy.

23. **The MSBA should appoint a task force or task forces to study and report on the need for programs such as malpractice arbitration and mandatory malpractice insurance. If such a program is established, the intake screener may assign complaints to a malpractice arbitration program when appropriate.**

COMMENT: In analyzing the issues that confront the discipline system, the Committee concluded that the issues of mandatory malpractice insurance and malpractice arbitration are too complex to be dealt with in the discipline context. Furthermore, in exploring the Washington, D.C. malpractice arbitration program, the Committee learned that the program has generated only a handful of cases, all of which were won by the attorneys. Currently, conciliation court provides an avenue for small malpractice claims.

Concerns were expressed about the role of malpractice insurance carriers in an arbitration scheme. At least one carrier believes malpractice arbitration has merit, but there remain unexplored areas, including acceptance by the insurance industry, the development of a fair, low-cost procedure, and the role of experts in the process. This

topic would require bar sponsorship.

In addition, a bar task force could investigate whether malpractice insurance should be mandatory for all attorneys in private practice. This may be an issue whose time has come. In the past legislative session, the Senate passed a bill requiring mandatory legal malpractice insurance.

24. **The sweeping ABA recommendation regarding lawyer practice assistance, although meritorious, requires further study before it can be made practicable. The MSBA should appoint a Committee to consider ABA recommendation 4 and other means of enhancing lawyer performance.**

COMMENT: Several of those testifying before the Committee indicated that one of the most serious issues in lawyer discipline is the competence of those practicing. If the Court could do something to significantly improve lawyer competence, it would perform a great public service and reduce the number of complaints filed. However, before the Court establishes a Lawyer Practice Assistance Committee, as recommended by McKay, the function of the proposed Committee should be more carefully delineated and the source or sources of funding should be identified. The MSBA would be the appropriate organization to conduct a study of practice assistance.

Different types of approaches to improve the practice of law, including internships, peer review and law office

management were discussed by the Committee. A brief description of several avenues follows.

Peer Review

Other professions evaluate their members on a regular basis. For example, accounting firms undergo peer review. The paid peer accountant reviewers (paid by the accounting firm being reviewed) come into the offices and analyze the work of the firm. Though cost might be a negative factor, this type of approach should be explored.

Education

Continuing legal education providers could be expanded.

Internships

Other professions, such as medicine, have used internships as a way to ensure that all graduates of medical schools have practical experience before practicing on their own.

Mentoring

Another approach is mentoring. A lawyer would work one-on-one with another lawyer to improve his or her skills in a particular area. The wisdom and experience of the seasoned practitioner could be made available during a concentrated mentoring period, with periodic consultations after that.

Law Office Management

Finally, the MSBA could explore the hiring of a law office manager advisor. This person could serve as a mentor

and troubleshooter for attorneys who are experiencing difficulties in managing their practice.

The real issue is what can be done and how much does it cost. This is why practice assistance belongs in the Bar Association. The Bar has to address the policy question of "how much responsibility do I have to improve the skills of the other members of the Bar?"

25. **The MSBA may want to consider a task force to study and report on the need for a chemical dependency assistance program. If such a program is established, the central intake screener could assign complaints to a chemical dependency program when appropriate.**

COMMENT: The Committee received testimony from the MSBA and Lawyers Concerned For Lawyers (LCL) regarding assistance programs. In 1992, the Supreme Court denied a petition by the Minnesota State Bar Association requesting the establishment of a Lawyers Assistance Board. In its order denying the petition, the Supreme Court encouraged the MSBA to continue to explore this topic. The Committee recommends further study by the MSBA but in light of the recent petition does not recommend establishment of a state-funded program.

C. ADMINISTRATIVE RECOMMENDATIONS

26. a. **The Supreme Court and the MSBA should continue to seek out the best qualified persons, both lawyers and others, to serve on the LPRB, while ensuring a commitment to diversity.**

COMMENT: The history of the LPRB has been marked by extremely committed board members willing to give their time and talents to the discipline system. It is critical that the Court and the MSBA recruit the best qualified people, both non-lawyer, public-spirited citizens and lawyers as board members. Board members with weak records of participation should not be reappointed.

b. The Court should ensure that attorneys in private practice are adequately represented at all times on the LPRB.

COMMENT: At one time there may have been a legitimate concern that the LPRB was the exclusive province of attorneys in private practice. The pendulum, however, has now swung in the other direction, leaving the board with fewer members in private practice. Since almost all complaints involve private attorneys, it is crucial that the board have a number of members experienced in various areas of private practice.

27. **a. The size of the LPRB should be gradually reduced from 23 to 18 members to promote greater engagement of board members and to facilitate recruitment.**

COMMENT: The quantity of work has declined for board members, caused in part by motion procedures and stipulated petitions that bypass panel hearings. With the reduction in panel hearings, which promoted collegiality, and the increase in the size of the board following the Dreher Report recommendation, the board may have lost some of its cohesiveness. The board should be reduced to 18 members to ensure that members have enough to do to make them feel a part of the system.[25] The Committee, however, does not wish the recommendation to come in conflict with the goal of diversity.

b. The Executive Committee of the LPRB should be reduced from 5 to 3 members.

Comment: The proposed reduction in size of the Executive Committee parallels the recommendation to reduce the size of the LPRB. If the LPRB is reduced to 18 and the size of the Executive Committee remained at 5, the board would lose two hearing panels. Therefore, the reduction to 3 will mean the loss of only one panel.[26]

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[25] See Appendix 5, Rule 4, Proposed Amendments to the Minnesota Rules on Lawyers Professional Responsibility.

[26] See Appendix 5, Rule 4, Proposed Amendments to the Minnesota Rules on Lawyers Professional Responsibility.

c. The Executive Committee of the LPRB should meet with the Director at least bimonthly to monitor operations and advise the Director.

COMMENT: The need for an active and engaged Executive Committee was first cited by the Dreher Report. An Executive Committee is needed to ensure that the board and the Director's office have a clear understanding of policy and its implementation. The Executive Committee should meet frequently with the Director, particularly with a new Director.

28. **a. The Supreme Court should continue to appoint members of the LPRB with the assistance of the MSBA and others.**

COMMENT: The Court needs the assistance of the Bar to identify suitable appointees. Even though the MSBA does not represent all lawyers, the Committee heard no complaints about this. Of course, Bar membership is not a prerequisite for Board membership.

b. The Court should continue to appoint the chairperson for each District Ethics Committee.

COMMENT: The Court has authority to manage the discipline system and should continue to appoint DEC chairs because they play a decisive role in the system at the local level.

29. **a. The chairperson of the LPRB should prepare an annual performance review for the Director.**

COMMENT: All court employees are to receive an annual performance review but it is especially important for the Director's position. The Court looks to the LPRB for input on the Director's performance. Such input assures the Court and the public that the Director is meeting the requirements of the position.

b. The Chairperson of the LPRB should discuss the review with the Director, the Executive Committee, the Supreme Court liaison justice, and the Supreme Court personnel director.

COMMENT: With a new Director, a new LPRB Chair, and a new Supreme Court liaison justice, good management requires effective communication between these positions. Much of the success of the LPRB depends on an effective Director.

30. **The Director should have the authority to select the first assistant director. The first assistant director should be treated, for purposes of Supreme Court personnel policy, as a confidential employee.**

COMMENT: It is not the intention of the Committee to micro-manage the Director's office but the Committee concludes that, in the future, the Director should be given the opportunity to either select her or his first assistant

director from existing members of the Director's Office or wait until there is a vacant attorney position to fill. The first assistant director selected by the former Director would have the opportunity to accept a senior assistant position in the office. Staff members have long tenure and there is little turnover. Appointing a permanent first assistant director hinders the ability of succeeding Directors to set in place a new management team.

31. **The Director's office should upgrade its data processing facilities to ensure it has the capabilities to adequately track and otherwise manage case load information to evaluate processes and analyze client satisfaction data.**

COMMENT: Statistical data the Committee needed and thought should be available was not always easily retrievable. The Director's office needs to upgrade its use of computerized case management and statistical data. It also needs to collect and analyze complainant satisfaction data on an ongoing basis.

32. **The Minnesota discipline system should be reviewed on a regular basis.**

Comment: The Committee believes the discipline system should be reviewed regularly. The public and the Bar must have confidence in the system. Periodic review is useful for assessing the structure, rules and day-to-day workings of the discipline system.

CONCLUSION

There are clearly opportunities to improve elements of the Minnesota attorney discipline system. Pilot projects involving mediation and mandatory fee arbitration may provide ways to increase public satisfaction with the legal profession. Further study of lawyer practice assistance and the many avenues that such efforts may take could result in better-trained attorneys.

More public openness, both in LPRB meetings and in access to records, may promote better understanding of the discipline system and what it can and cannot provide complainants. The McKay report recommendations and the review of the LPRB provided this Committee with windows through which the members saw competing visions and realities.

The McKay report's emphasis on developing alternative programs for minor complaints should not obscure the reason for proposing these new remedial actions. Shifting minor misconduct out of the discipline system will allow more time and resources for the prosecution of serious cases of lawyer misconduct. The Director's office regards prosecution of these serious cases as its chief priority. Changes that will enhance this mission deserve exploration.

The Committee, while acknowledging the important work of McKay and the recommendations it brought forth, wishes to reiterate that the Minnesota lawyer discipline system is in good shape and in good hands. The cooperation between the Supreme Court, the District Bar Associations, and the LPRB has resulted in a system that protects the public from members of the

profession who violate the rules of conduct. The hard work by the Director's Office in implementing the major recommendations of the Dreher Report have paid off for the public and the profession.

In conclusion, the Committee believes that new ideas must be tried and evaluated. The results of the pilot projects will reveal whether alternative programs are the missing link in the chain.

APPENDIX 1

1. Supreme Court Orders

2. Meetings of the Committee
   List of Persons who spoke to the committee
   Public Hearing

STATE OF MINNESOTA
IN SUPREME COURT

C1-84-2140

ADVISORY COMMITTEE TO REVIEW LAWYER DISCIPLINE IN MINNESOTA AND EVALUATE THE RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION

ORDER

WHEREAS, the Advisory Committee on Lawyer Discipline, created by this Court by an Order dated August 31, 1984 to study the lawyer discipline process and the procedures and operations of the Minnesota Lawyers Professional Responsibility Board, to report the results of the study to this Court and the Bar, and to recommend such changes in the Rules on Lawyers Professional Responsibility as the Committee deemed necessary, made a formal report dated April 15, 1985, supplemented on December 1, 1985, in which the Committee, among many recommendations, proposed a follow-up study in three to five years;

WHEREAS, after receiving written comments and holding a public hearing, by an Order dated June 18, 1986, this Court adopted revised Rules on Lawyers Professional Responsibility based primarily on the reports and recommendations of the Advisory Committee on Lawyers Discipline;

WHEREAS, the American Bar Association adopted on February 4, 1992 certain recommendations to the highest courts of the several states proposing changes in the regulation of the legal profession; and

WHEREAS, this Court has concluded that the creation of an advisory committee is necessary and appropriate to update the earlier report of the Advisory Committee on Lawyer Discipline and to evaluate the American Bar Association recommendations.

NOW, THEREFORE IT IS ORDERED that:

1. A fifteen member committee designated as the Supreme Court Advisory Committee on Lawyer Discipline and American Bar Association Recommendations be, and hereby is, established to carry out the responsibilities described above and to evaluate the recommendations of the American Bar Association.

2. The Committee shall be composed of nine attorneys admitted to the practice of law in the State of Minnesota, including the co-chairpersons designated below, and six nonlawyer citizens of Minnesota.

3. Janet Dolan and Robert F. Henson are appointed co-chairpersons of the Advisory Committee.

4. The Minnesota State Bar Association, other interested organizations and persons, and the co-chairpersons shall make such recommendations to this Court on or before October 5, 1992 for appointment to the Committee of attorneys and citizens broadly representative of the profession and the public.

5. Recommendations and resumes of the attorney and citizen candidates shall be addressed to Frederick K. Grittner, Supreme Court Administrator and Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, MN 55155.

Upon receipt of such recommendations, this Court shall make such appointments to the Committee as it shall deem appropriate and in the public interest.

DATED: September 9, 1992

BY THE COURT

A.M. Keith
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

C1-84-2140

APPOINTMENTS TO THE ADVISORY COMMITTEE TO REVIEW LAWYER DISCIPLINE IN MINNESOTA AND EVALUATE THE RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION

ORDER

WHEREAS, this Court established, by an Order dated September 9, 1992, the Advisory Committee on Lawyer Discipline and American Bar Association Recommendations and appointed Janet Dolan and Robert F. Henson co-chairpersons of the committee; and

WHEREAS, this Court asked for recommendations for appointment of attorneys and nonlawyer citizens to the committee.

NOW, THEREFORE IT IS ORDERED that:

1. The committee is expanded to include ten attorneys.

2. The following attorneys are appointed to the Advisory Committee:

Honorable Nancy C. Dreher
330 Second Avenue South #600
Minneapolis, MN 55401

Honorable Marianne D. Short
25 Constitution Avenue
St. Paul, MN 55155-6102

James P. Shannon
429 Rice Street
Wayzata, MN 55391

Professor Kenneth F. Kirwin
875 Summit Avenue
St. Paul, MN 55105

Penny Herrickhoff
Route 1
Garden City, MN 56034

Keith F. Hughes
P.O. Box 1187
St. Cloud, MN 56302

Richard C. Taylor
P.O. Box 605
Crookston, MN 56716

David Knutson
317 2nd Ave S. Suite 200
Minneapolis, MN 55401

3. The following public members are appointed to the Advisory Committee:

Martha Zachary
6921 Arkansas Avenue W.
Inver Grove Heights, MN 55075

Jean Keffler
3033 Excelsior Blvd., #300
Minneapolis, MN 55416

Howard M. Guthmann
1300 Norwest Center
St. Paul, MN 55101

Professor Mel Gray
2114 Summit Avenue
St. Paul, MN 55105

Dennis Lazenberry
107 Transportation Building
395 John Ireland Blvd.
St. Paul, MN 55155

Mimi Villaume
4706 Golf Terrace
Edina, MN 55424

4. Frederick K. Grittner, Supreme Court Administrator and Clerk of Appellate Courts, shall serve as staff to the Advisory Committee.

5. The Advisory Committee shall make its final report to this Court on or before May 1, 1993.

DATED: October 21, 1992

BY THE COURT:

A.M. Keith
Chief Justice

OCT [illegible] 1992

FILE NO. C1-84-2140

STATE OF MINNESOTA

IN SUPREME COURT

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Advisory Committee to Review Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association

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ORDER

WHEREAS, this Court established, by an order dated September 9, 1992, the Advisory Committee on Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association; and

WHEREAS, a review of the files in the Director's Office is required for a thorough assessment of the lawyer discipline system and the American Bar Association recommendations.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Rule 20(a)(5), Rules on Lawyers Professional Responsibility, the members of the Supreme Court Advisory Committee to Review Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association, including Janet Dolan, Robert F. Henson, Honorable Nancy C. Dreher, Honorable Marianne D. Short, James P. Shannon, Kenneth F. Kirwin, Penny Herrickhoff, Keith F. Hughes, Richard C. Taylor, David Knutson, Martha Zachary, Jean Keffler, Howard M. Guthmann, Mel Gray, Dennis Lazenberry, and Mimi Villaume, and the Advisory Committee's staff, including Frederick K. Grittner, Supreme Court Administrator and Clerk of Appellate Courts, may have access to information in the Office of the Director of Lawyers Professional Responsibility, including files, records, and proceedings for the purpose of assessing the

effectiveness of the disciplinary process and evaluating the American Bar Association recommendations.

IT IS FURTHER ORDERED that, all persons to whom access is granted shall be required to maintain the information concerning the files, records, and proceedings under the requirements of confidentiality set forth in Rule 20(a), Rules on Lawyers Professional Responsibility. Access to the files, records and proceedings shall remain open until the presentation of the report of the Advisory Committee which is expected in May 1993.

Dated: Nov. 11, 1992.

BY THE COURT:

A. M. Keith
Chief Justice

MEETINGS OF THE COMMITTEE

The Committee met 17 times between November 1992 and October 1993. Meetings were held on November 6, November 20, December 4, and December 18, 1992; and on January 8, January 22, February 5, February 19, March 5, March 19, April 16, April 30, May 7, May 21, June 18, August 10, October 8, and December 10, 1993. The following persons appeared before the Committee, either in person or by telephone conference call:

- Justice John Simonett, Minnesota Supreme Court
- Marcia Johnson, Director, Office of Lawyers Professional Responsibility (OLPR)
- Kenneth Jorgensen, OLPR
- William Wernz, Former Director, OLPR
- Tom Vasaly, OLPR
- Michael Hoover, Esq.
- Charlotte Stretch, Special Counsel to McKay Commission
- Raymond Trombadore, Chair of McKay Commission, member of New Jersey Supreme Court Committee
- Nancy Greenlee, Staff Bar Counsel, Arizona State Bar
- Hal Lieberman, New York Bar Mediation Project
- Reggie Govan, Washington (D.C.) Malpractice Arbitration Program
- Thomas Lyons, Esq.
- Jane Harens, Secretary, Ramsey County Bar
- Patrick McGuigan, Chair, Ramsey County District Ethics Committee (DEC)
- Doreen Roeglin, administrator, Hennepin County Bar
- Rebecca Egge Moos, Chair, Hennepin County DEC
- Thomas Wolf, Chair, Third District DEC
- Nicholas Ostapenko, Chair, Eleventh District DEC
- Paul Nelson, Chair, Twelfth District DEC
- Charles Kennedy, Esq.
- John Degnan, Esq.
- Greg Bistram, Chair, Lawyers Professional Responsibility Board
- Ted Collins, Esq.
- Merritt Marquardt, Chair, MSBA Client Protection Committee
- Ronald Snell, former public member, Hennepin County DEC
- William Kennedy, Hennepin County Public Defender
- Steve Erickson, Executive Director, Erickson Mediation Institute
- Kurt Erickson, Co-Chair, MSBA Public Law Section, Ethics Committee
- Joe Bixler, President, Minnesota Lawyers Mutual
- Tim Gephart, Vice President of Claims, Minnesota Lawyers Mutual
- Tim Groshens, Executive Director, MSBA
- Patricia Burke, Esq. Lawyers Concerned for Lawyers
- Tony Boggs, Director of Lawyer Regulation, State of Florida
- George Riemer, Disciplinary Counsel, State of Oregon

PUBLIC HEARING

A questionnaire was sent to nearly 400 complainants whose files had recently been closed. Another questionnaire was sent to the attorneys who had been involved in these complaints. Those surveyed were notified that they could speak at a public hearing.

The public hearing was held at the University of St. Thomas in downtown Minneapolis on Friday, April 2, 1993, from 1:30 to 4:30 p.m. Five attorneys and 19 members of the public testified at this hearing. The hearing was videotaped for use by members of the Committee who were unable to attend.

APPENDIX 2

TABLE:

McKAY RECOMMENDATIONS AND ADVISORY COMMITTEE'S RESPONSES

McKAY RECOMMENDATIONS AND ADVISORY COMMITTEE'S RESPONSES

The McKay report made 21 recommendations that were adopted by the ABA House of Delegates. Set out below in table form is a list of the recommendations and the Advisory Committee's response to these recommendations.

McKay Recommendation	Advisory Committee Response
1. The judiciary rather than the legislature should continue to regulate the legal profession.	Adopted this recommendation.
2. The ABA should continue to place the highest priority on enhancing judicial regulation of the legal profession and professional responsibility.	No response necessary.
3. The Court should expand the scope of public protection by establishing the following component agencies:	
(a) Lawyer discipline	(a) Already exists.
(b) Client protection fund	(b) Already exists.
(c) Mandatory fee arbitration	(c) Pilot program recommended.
(d) Voluntary malpractice arbitration	(d) Further study recommended.
(e) Mediation	(e) Pilot program recommended.
(f) Lawyer practice assistance	(f) Further study recommended.
(g) Lawyer substance abuse counseling	(g) Not recommended.
A central intake office should be created to receive all complaints and make appropriate referral to discipline or non-discipline proceedings.	Adopted this recommendation.
The central intake office should be separate from the disciplinary office.	Did not adopt this recommendation.

4. The Court should establish a Lawyer Practice Assistance Committee, with at least one-third of its members being non-lawyers.	Not adopted.
5. To maintain the independence of disciplinary officials, bar associations and their memberships should be restricted to providing only administrative services to the disciplinary system. Disciplinary counsel should be absolutely immune from civil suits.	Not adopted. The committee recommended continued use of District Ethics Committees for investigations of complaints. No recommendation necessary. Reflects current practice in Minnesota.
6. The Court alone should appoint and remove disciplinary counsel. The Court should promulgate rules that provide the disciplinary counsel with administrative authority over staff and the disposition of minor disciplinary matters. The rules should prohibit advisory opinions and ex parte communications.	Recommendation not necessary. McKay recommendations reflect current state of Minnesota disciplinary system. Prohibition of advisory opinions not adopted.
7. All records of the disciplinary agency except work product of disciplinary counsel should be available to the public after a determination that probable cause exists to believe professional misconduct has occurred.	Adopted.
8. Complainants should be fully informed of the proceedings, be told of the reasons for the dismissal of the complaint, be given an opportunity to appear at any hearing and afforded the right of review of an adverse decision. Complainants should be permitted the opportunity to rebut statements from the accused lawyer before dismissal of the complaint.	Adopted. Adopted.

9. Disciplinary counsel should have the authority in cases involving minor misconduct, minor incompetence, or minor neglect to submit the matter for resolution by nondisciplinary proceedings. If the lawyer does not comply with the terms of the agreement, disciplinary proceedings may be resumed.	Adopted, by recommendation of pilot program for mediation and arbitration. Adopted.
10. The Court should adopt simplified, expedited procedures to adjudicate cases in which minor misconduct is charged, involving a hearing before a single adjudicator, written findings and conclusions imposing permissible sanctions, the right of appeal to a second adjudicator, a limited review by the Court, and publication of the written findings.	Not adopted.
11. The disciplinary board should not review a determination of a hearing panel except upon request of disciplinary counsel or respondent or upon the vote of a majority of the board. The Court should not review a matter except when requested by the parties. The Court should exercise appellate review and publish full written opinions of its decisions.	No recommendation necessary.
12. The immediate interim suspension of a lawyer should be ordered upon a finding that a lawyer poses a substantial threat of serious harm to the public. Complainants should be absolutely immune from all civil suits for all communications within the disciplinary proceeding.	Adopted. Minnesota currently follows this practice.
13. The Court should insure adequate funding and staffing for the disciplinary agency.	No recommendation necessary.
14. Each jurisdiction should keep case load and time statistics to assist in determining the need for additional staff and resources.	Already implemented.

15. Disciplinary counsel should have the exclusive responsibility to investigate complaints.	Not adopted. DECs should continue to investigate complaints.
16. The Court should adopt a rule that provides random audits of lawyer trust accounts.	Not adopted.
17. The Court should adopt a rule for fee arbitration disputes that provides that in the absence of a written fee agreement between the lawyer and client, the lawyer shall bear the burden of proof of all facts.	Recommend pilot program.
18. The ABA should continue to study the need for a model program and rule creating mandatory malpractice insurance coverage for all lawyers who have clients.	No recommendation necessary.
19. The Court should adopt a rule providing that orders of disbarment and suspension shall be effective 15 days after the date of the order except where the Court finds that immediate disbarment or suspension is necessary to protect the public.	A petition for rehearing may be filed under Rule 140 of the Rules of Civil Appellate Procedure, but the petition shall not stay the Court's order. RLPR 15 (c).
20. The ABA should provide or seek adequate funding to automate the dissemination of reciprocal discipline information by means of electronic data processing and telecommunications.	Adopted.
21. The ABA and the appropriate officials in each jurisdiction should establish a system of assigning a universal identification number to each lawyer licensed to practice law.	Adopted.

APPENDIX 3

TABLE: IMPLEMENTATION OF DREHER COMMITTEE REPORT RECOMMENDATIONS

IMPLEMENTATION OF DREHER COMMITTEE RECOMMENDATIONS

The Dreher Committee made 66 recommendations to the Supreme Court concerning the internal workings of the LPRB. Of these, 39 have been fully implemented, 11 partially implemented, 15 not implemented, with one recommendation withdrawn by the Dreher Committee. Set out below is a table containing the recommendation and its current status.

RECOMMENDATION	DISPOSITION
1. Prioritize staff resources through a specific formula.	Partially implemented. Other means found within the office to accomplish this allocation.
2. Set specific time parameters for work on each case.	Partially implemented. The Director monitors and redirects time allocations in monthly meetings with each attorney.
3. Require time keeping by the staff attorneys.	Not implemented. Legal assistants are now required to maintain time sheets.
4. Develop a formal policy for litigating complex cases.	Implemented. Planning was done for several complex cases but no formal policy has been implemented.
5. Require summary dismissal of complaints which can be deferred to other forums.	Implemented by the Board.
6. Dismiss fee disputes and malpractice claims.	Implemented.
7. Transfer professional corporations registration function to Supreme Court.	Not implemented because time expenditures are modest.
8. Conduct exit interviews for departing employees.	Partially implemented. Personnel Policy and Procedure No. 10 provides that Executive Committee and S.Ct. Personnel Director conduct exit interviews.
9. Determine how many Attorney I and Attorney II positions are required in the Director's office.	Partially implemented. Though not formally implemented, the complaint of lack of experienced staff has been addressed.

RECOMMENDATION	DISPOSITION
28. Have the Ex. Comm. consider reviewing files every two years.	Not implemented.
29. Require Ex. Comm. approval of Director-initiated investigations.	Implemented.
30. Invite Supreme Court Liaison to attend Ex. Comm. and Board Meetings.	Not implemented.
31. Report to Ex. Comm. when DEC recommendation is not adopted.	Implemented.
32. Require DEC Chair to review investigation reports.	Adopted. Implemented by most DECs.
33. Standardize investigation reports.	Implemented.
34. Report to Ex. Comm. upon significant re-investigation of DEC files.	Partially implemented Policy adopted defining "significant" as exceeding 8 hours. No reports have been made.
35. Require investigator to draft memo for DEC\DNWs.	Implemented by most but not all investigators.
36. Enforce 45-day deadline for DEC investigations.	Implemented.
37. Require DECs to submit annual report to Board and Supreme Court.	Implemented but reports go only to the Board.
38. Allow panels to direct private probation or admonition.	Implemented. Rules 9(j)(1)(iii), RLPR. Effective 3-1-91.
39. Allow respondent to appeal private panel discipline.	Implemented.
40. Allow expanded dispositional options upon complainant appeal.	Implemented. Rule 9(e), RLPR. Effective 3-1-91.
41. Have board panels determine probable cause on every charge.	Implemented.
42. Have Director dismiss charges if panel fails to find probable cause.	Implemented.
43. Prohibit additional charges following panel hearing if matter known to Director at hearing.	Implemented through a Board-Dreher comm. compromise. Requires the Panel Chair to approve any additional charges.
44. Have the Ex. Comm. balance panel workloads.	Implemented.

RECOMMENDATION	DISPOSITION
45. Request MSBA to provide advisory opinion service.	Not implemented. MSBA declined to offer this service.
46. Enhance Board representation through geographic diversity and diversity in areas of practice.	Implemented.
47. Request the Supreme Court to consider an open appointment system for board candidates.	Not implemented.
48. Insure that DECs have diversity of areas of practice.	Implemented.
49. Establish open appointment system for DEC Chairs.	Not implemented.
50. Have CLE Board monitor and report to court on compliance with requirement that CLE courses include professional responsibility component.	Not implemented.
51. Request MSBA to encourage free ethics-related educational programs.	Not implemented.
52. Include fairness as an articulated purpose of the system.	Implemented.
53. Specify to respondents the disciplinary rule believed violated.	Not implemented.
54. Require discovery requests to be proportionate to the gravity of the alleged violation.	Implemented.
55. Require Director to furnish investigator's report to respondent upon request.	Implemented.
56. Promptly return original documents to respondents.	Implemented.
57. Expunge records after 3 years.	Implemented.
58. Make no disclosure of dismissed complaints.	Implemented.
59. Re-charging of past matters not permitted except to show pattern.	Implemented.
60. Conduct formal training for new DEC and Board members.	Partially implemented. Office conducts annual DEC seminar.

RECOMMENDATION	DISPOSITION
61. Have Board members exchange information at meetings to promote consistency.	Not implemented.
62. Adopt disqualification of investigators standard.	Implemented. Rule 6(a), RLPR.
63. Prohibit ex parte communications.	Implemented.
64. Have Ex. Comm. review media communications.	Implemented.
65. Redraft DNW notice to include thanks for the respondent's cooperation.	Not implemented.
66. Have Ex. Comm. report to the Supreme Court on implementation of these recommendations.	Implemented.

APPENDIX 4

1. Complainant\Attorney Survey Results
2. Statistical Analysis of Selected Survey Questions
3. Statistical Compilation of Dismissed Complaints: 10/20/92 to 4/15/92

COMPLAINANT SURVEY RESULTS

189 responses

Question 1: Was the decision that was made regarding the lawyer against whom you complained:

a. Too lenient 65%
b. Too harsh 0%
c. About right 12%
d. Uncertain 7%

Question 2: Were you given an adequate explanation for the decision?

a. Yes 30%
b. No 50%
c. Uncertain 12%

Question 3: Do you think your complaint was taken seriously?

a. Yes 31%
b. No 55%
c. Uncertain 5%

Question 4: Was your complaint handled promptly?

a. Yes 56%
b. No 24%
c. Uncertain 13%

Question 5: Did the lawyer discipline system treat you courteously?

a. Yes 62%
b. No 13%
c. Uncertain 15%

Question 6: Do you think you were treated fairly?

a. Yes 30%
b. No 55%
c. Uncertain 8%

Question 7: If a close friend or relative were upset with the way an attorney handled a case, would you recommend that they file an ethics complaint?

a. Yes 46%
b. No 32%
c. Uncertain 12%

Total Complaints Surveyed

Question 8(12): Do you think the discipline system was:

a. Pro-lawyer 57%
b. Anti-lawyer 0%
c. Neutral 20%
d. Uncertain 13%

Question 10(14): Did you participate in a fee arbitration proceeding:

a. Yes 4%
b. No 73%
c, Uncertain 4%

If no, what is the reason?

a. Did not have fee dispute. 28%
b. Not worth the trouble. 5%
c. Did not know about fee arb. 17%
d. Atty. refused to participate. 4%

Question 11(15): Would you have been interested in participating with the lawyer against whom you complained in a MEDIATION program?

a. Yes 41%
b. No 29%
c. Uncertain 12%

Question 12(16): Would you have preferred participating in this MEDIATION program rather than seeing the lawyer disciplined?

a. Yes 15%
b. No 50%
c. Uncertain 13%

Question 13(17): Would you have been interested in participating with the lawyer against whom you complained in a MALPRACTICE ARBITRATION?

a. Yes 39%
b. No 24%
c. Uncertain 13%

Question 14(18): Would you have preferred participating in such a MALPRACTICE ARBITRATION program rather than seeing the lawyer disciplined?

a. Yes 20%
b. No 32%
c. Uncertain 18%

Total Complaints Surveyed

Question 15(19): Do you think that the lawyer against whom you complained should have been referred to an EDUCATIONAL OR COUNSELING program?

a. Yes 46%
b. No 23%
c. Uncertain 12%

Question 16(20): Would you have preferred seeing the lawyer against whom you complained participate in such an EDUCATIONAL OR COUNSELING program rather than seeing the lawyer disciplined?

a. Yes 16%
b. No 46%
c. Uncertain 14%

RESPONDENT ATTORNEY SURVEY RESULTS

A.Total Respondent Survey Results: 172 Responses

Part I - Feedback on DECs

Question 2: Was your complaint investigated by a DEC?

a. Yes 48% (83 responses)
b. No 36%
c. Uncertain 13%

If YES:

(a) Did the DEC handle the complaint promptly?

a. Yes 84%
b. No 13%
c. Uncertain 3%

(b) Did the DEC treat you courteously?

a. Yes 97%
b. No 3%
c. Uncertain 0%

(c) Do you think the DEC treated you fairly?

a. Yes 80%
b. No 14%
c. Uncertain 6%

(d) Did you attend a Hennepin County DEC Panel hearing?

a. Yes 16% (13 responses)
b. No 83%
c. Uncertain 1%

(e) Did you think the DEC was:

a. Pro-lawyer 1%
b. Anti-lawyer 12%
c. Neutral 77%
d. Uncertain 10%

Part II - Feedback on OLPR (Director's Office)

Question 3: Did you have any significant contact with the OLPR?

a. Yes 24%
b. No 63%
c. Uncertain 8%

(a) Did the OLPR handle the complaint promptly?

a. Yes 78%
b. No 14%
c. Uncertain 8%

(b) Did the OLPR treat you courteously?

a. Yes 90%
b. No 4%
c. Uncertain 6%

(c) Do you think the OLPR treated you fairly?

a. Yes 78%
b. No 18%
c. Uncertain 4%

Part III - Other Feedback

Question 4: Were you asked to participate in a fee arbitration proceeding:

a. Yes 6% (11 responses)
b. No 87%
c. Uncertain 3%

If yes, did you agree to participate?

a. Yes 54%
b. No 46%

Question 5: Would you have been interested in participating in a mediation program with the complainant even if you were not required to do so?

a. Yes 46%
b. No 34%
c. Uncertain 11%

Question 6: If the complainant had accused you of malpractice, would you have been interested in

participating in binding malpractice arbitration even if you were not required to do so?

a. Yes 23%
b. No 31%
c. Uncertain 14%

Question 7: Would you have been interested in participating in an assistance program?

a. Yes 20%
b. No 47%
c. Uncertain 12%

Question 8: If a complaint against you could reasonably be expected to result in admonition, which would you prefer:

a. Receiving the admonition 25%

b. Entering into an agreement with the OLPR admitting the misconduct and agreeing to participate in either mediation, malpractice arbitration, or assistance program with record of the agreement preserved at the OLPR for a stated period of time for use in the event of future proceedings. 54%

Question 9: If an ethics complaint against you alleged minor misconduct, which would you prefer?

a. that the matter be referred to mediation, malpractice arbitration, or an assistance program. 41%

b. that the complaint be investigated. 45%

STATISTICAL ANALYSIS OF SELECTED SURVEY QUESTIONS
by Professor Mel Gray

Cell entries are response percentages and (numbers)

I. Complainant Surveys

The contingency tables indicate responses according to whether complaints were dismissed, resulted in admonitions, or resulted in a suspension or probation or in the case of a District Ethics Committee, probation, reprimand, or disbarment. A Chi-square statistic marked with an asterisk indicates a significant difference in response patterns among groups.

A. Complaints investigated by Director's Office

Question 1: Was the decision that was made regarding the lawyer against whom you complained:

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Too lenient	65% (60)	37% (3)	33% (1)
All other[1]	8 % (7)	62% (5)	67% (2)

ChiSq = 18.176*, df = 2

The result indicates that in those cases where the complaint was dismissed, the complainants regarded the process or outcome as too lenient. Such was not the case when a complaint resulted in a sanction.

Question 6: Do you think you were treated fairly?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	8% (7)	100% (8)	100% (3)
All other	80% (74)	0% (0)	0% (0)

ChiSq = 51.364*, df = 2

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[1] The category "all other" combines the three other responses in the survey question: (1) too harsh, (2) about right, and (3) uncertain. Depending on the question, the "all other" category will contain different responses. Please refer to the survey data in Appendix 4 for the exact response categories.

This question yields a difference in responses. Complainants in cases involving dismissals overwhelmingly regarded treatment as unfair, while a sanction resulted in unanimous perception of fairness.

Question 11: Would you have been interested in participating with the lawyer against whom you complained in a mediation program?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	46% (42)	0% (0)	0% (0)
All other	35% (32)	87% (7)	100% (3)

ChiSq = 11.351*, df = 2

Not surprisingly, complainants whose complaints were dismissed, very likely being unsatisfied, wanted another alternative. None of the cases resulting in sanctions yielded an interest in mediation.

Question 12: Would you have preferred participating in a mediation program rather than seeing the lawyer disciplined?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	16% (15)	0% (0)	33% (1)
All other	59% (54)	87% (7)	67% (2)

ChiSq = 2.190, df = 2

There was no significant difference in the response patterns; few complainants showed interest in participating in mediation.

Question 13: Would you have been interested in participating with the lawyer against whom you complained in a malpractice arbitration?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	49% (45)	0% (0)	0% (0)
All other	31% (29)	74% (6)	100% (3)

ChiSq = 11.954*, df = 2

This response is very similar to question 11 in that those whose complaints were dismissed seem interested in further recourse, while those whose complaints resulted in sanctions have no further interest.

Question 14: Would you have preferred participating in such a malpractice arbitration program rather than seeing the lawyer disciplined?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	24% (22)	0% (0)	0% (0)
All other	49% (45)	87% (7)	100% (3)

ChiSq = 4.597, df = 2

Malpractice arbitration was not an attractive alternative. There is no significant difference in response patterns.

Question 15: Do you think the lawyer against whom you complained should have been referred to an educational or counseling program?

	Dismissals (92)	Admonitions (8)	Suspension/Prob (3)
Yes	46% (42)	38% (3)	67% (2)
All other	33% (30)	62% (5)	33% (1)

ChiSq = 1.400, df = 2

Complainants showed some interest in education and/or counseling. Response differences are not statistically significant.

B. Complaints investigated by District Ethics Committees

Question 1: Was the decision that was made regarding the lawyer against whom you complained:

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Too lenient	69% (34)	24% (8)	33% (1)
All other	20 % (10)	29% (10)	67% (2)

ChiSq = 7.662*, df = 2

Complainants with dismissed complaints regarded the outcome as too lenient, while others generally did not. The differences are statistically significant.

Question 6: Do you think you were treated fairly?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	22% (11)	65% (22)	67% (2)
All other	71% (35)	33% (11)	33% (1)

ChiSq = 15.089*, df = 2

Those whose complaints were dismissed did not regard themselves as having been treated fairly. while a substantial majority of other complainants did regard the process and/or outcome as fair. The differences are statistically significant.

Question 11: Would you have been interested in participating with the lawyer against whom you complained in a mediation program?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	41% (20)	44% (15)	0% (0)
All other	32% (16)	47% (16)	100% (3)

ChiSq = 3.477, df = 2

Although interest in a mediation program was strongest among those whose complaints resulted in an admonition, the interest seems moderate. The differences are not statistically significant.

Question 12: Would you have preferred participating in this mediation program rather than seeing the lawyer disciplined?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	14% (7)	18% (6)	0% (0)
All other	55% (30)	76% (26)	100% (3)

ChiSq = 0.690, df = 2

These results confirm the general lack of interest in mediation across all groups of complainants.

Question 13: Would you have been interested in participating with the lawyer against whom you complained in a malpractice arbitration?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	26% (13)	41% (14)	33% (1)
All other	36% (18)	36% (12)	67% (2)

ChiSq = 1.032, df = 2

These results indicate no great interest in malpractice arbitration. Indeed, some responses are counterintuitive. One would expect, for example, that those whose complaints were dismissed would be attracted to another alternative, but that seems not to be the case among a plurality of these complainants.

Question 14: Would you have preferred participating in such a malpractice arbitration program rather than seeing the lawyer disciplined?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	18% (9)	18% (6)	33% (1)
All other	38% (19)	55% (19)	67% (2)

ChiSq = 0.464, df = 2

The response is fairly unequivocal: no, for all groups of complainants.

Question 15: Do you think the lawyer against whom you complained should have been referred to an educational or counseling program?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	41% (20)	62% (21)	0% (0)
All other	30% (15)	33% (11)	100% (3)

ChiSq = 4.927*, df = 2

Education and counseling had some interest among the first two groups of complainants but not the last.

Question 16: Would you have preferred seeing the lawyer against whom you complained participate in such an educational or counseling program rather than seeing the lawyer disciplined?

	Dismissals (49)	Admonitions (34)	Prob/Rep/Dis (3)
Yes	18% (9)	23% (8)	0% (0)
All other	45% (22)	71% (24)	100% (3)

ChiSq = 1.224, df = 2

These results indicate weak interest in referral to educational or counseling across all groups with no significant differences.

II. Respondent Survey

Question 3c: Do you think the Office of Lawyers Professional Responsibility treated you fairly?

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Yes	77% (47)	84% (60)	61% (24)
All others	23% (14)	16% (11)	39% (16)

ChiSq = 8.505*, df = 2

Although a majority of all respondents felt they were treated fairly, this sentiment was strongest among those whose cases were dismissed. The differences are statistically significant.

Question 5: Would you have been interested in participating in a mediation program with the complainant even if you were not required to do so?

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Yes	38% (23)	46% (33)	57% (23)
All others	52% (32)	44% (31)	35% (14)

ChiSq = 3.699, df = 2

A majority of respondents who were disciplined were interested in mediation, but other groups showed only moderate interest. Differences were not statistically significant.

Question 6: If the complainant had accused you of malpractice, would you have been interested in participating in binding malpractice arbitration even if you were not required to do so?

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Yes	8% (5)	27% (19)	37% (15)
All others	42% (26)	49% (35)	40% (16)

ChiSq = 7.338*, df = 2

Although a majority of all groups expressed disinterest, such response was relatively strongest among those whose cases were dismissed. Differences are statistically significant.

Question 7: Would you have been interested in participating in an assistance program?

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Yes	20% (12)	14% (10)	30% (12)
All others	58% (35)	66% (47)	44% (18)

ChiSq = 5.235*, df = 2

Substantial pluralities or majorities were not interested, the greatest relative disinterest among those whose cases were dismissed.

Question 8: If a complaint against you could reasonably be expected to result in admonition, which would you prefer:

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Admonition	20% (12)	20% (14)	42% (17)
Other program	54% (33)	66% (47)	47% (19)

ChiSq = 6.725*, df = 2

All respondent groups seemed to find program participation preferable to admonition.

Question 9: If an ethics complaint against you alleged minor misconduct, which would you prefer:

	Dismissed, no investigation (61)	Dismissed with investigation (71)	Disciplined (40)
Program referral	36% (22)	34% (24)	62% (25)
Investigation	44% (27)	56% (40)	27% (11)

ChiSq = 9.647*, df = 2

Those whose cases were dismissed (and therefore perhaps more confident of exoneration) preferred investigation, while disciplined respondents preferred referral. Differences are statistically significant.

Statistics Compiled by Minnesota Office of Lawyers Professional Responsibility Concerning Dismissed Complaints and the Identity of Complainants from 10/20/92 to 4/15/93

Identity of Complainants

273 Client
158 Adverse Party
27 Opposing lawyer
6 Another lawyer
8 Judge
13 Creditor
5 Witness
3 Governmental Agency
62 Other

555 Total Dismissed Complaints (includes dismissals with and without investigation)

Percentage Comparison

Complaints filed by clients:	49%
Complaints filed by non-clients:	51%
Total	100%

APPENDIX 5

DRAFT MODEL AMENDMENTS TO

MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

APPENDIX 5

DRAFT MODEL AMENDMENTS TO MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD.

(a) Composition. The Board shall consist of:

(1) A Chair appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chair; and

(2) Ten ~~Thirteen~~ lawyers having their principal office in this state, five ~~six~~ of whom the Minnesota State Bar Association may nominate, and seven ~~nine~~ nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as Chair. To the extent possible, members shall be geographically representative of the state and lawyer members shall reflect a broad cross section of areas of practice.

. . . .

(c) Duties. The Board shall have general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and these Rules, and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chair and specify the Vice-Chair's duties. Board meetings are open to the public, except the Board may go into closed session not open to the public to discuss matters protected by Rule 20 or for other good cause.

(d) Executive Committee. The Executive Committee, consisting of the Chair, and one lawyer and one nonlawyer ~~two lawyers and two nonlawyers~~ designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules ~~and for the general supervision of the Office of Lawyers Professional Responsibility~~. The Executive Committee shall meet with the Director at least once every two months to oversee policy implementation, monitor operations, and advise the Director. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, it shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. Members shall have served at least one year as a member of the Board prior to appointment to the Executive Committee. Members shall not be assigned to Panels during their terms on the Executive Committee.

. . . .

RULE 6. COMPLAINTS

. . . .

[NEW:]

(d) Opportunity to respond to statements. The District Committee or the Director's Office shall afford the complainant an opportunity to reply to the lawyer's response to the complaint.

[NEW:]

RULE 6X. PILOT PROGRAM FOR COMPLAINTS AGAINST LAWYERS IN _____, _____, AND _____ BAR ASSOCIATION DISTRICTS

(a) Scope of pilot program. This rule, rather than Rule 6(b), shall apply from _____ through _____ to the handling of any complaint against a lawyer whose principal office is located in the _____ Bar Association District (_____ County), the _____ Bar Association District (_____ County), or the _____ Bar Association District (_____, _____, or _____ County).

(b) Submission; Referral. If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chair promptly shall forward it to the Director. If a complaint is submitted or forwarded to the Director, the Director shall either:

(1) Refer it to the District Committee of the district where the lawyer's principal office is located or in exceptional circumstances to such other District Committee as the Director reasonably selects with a direction that it be investigated;

(2) Refer it to the District Committee, or to a volunteer professional mediator, with a direction that it be mediated;

(3) Investigate it without referral; or

(4) Determine that neither discipline nor mediation is warranted.

(c) District Committee Investigation. If the Director refers the complaint to a District Committee with a direction that it be investigated, the complaint shall be investigated as provided in Rule 7. However, if the investigator and the District Chair or District Chair's designee determine that the complaint should be mediated, they shall promptly submit a report to the Director explaining the reasons for the determination. If the Director agrees with the determination, the complaint may be mediated under paragraph (d). If the Director does not agree, the Director shall again refer the complaint for investigation or investigate it without referral.

(d) Mediation. If the Director refers the complaint to a District Committee for mediation, the District Chair may mediate or assign mediation of the complaint to one or more of the Committee's members. If a mediator determines that the complaint should be investigated, the mediator shall promptly submit a report to the Director explaining the reasons for the determination. Thereupon the Director shall decide whether to

refer the complaint for investigation, investigate it without referral, or again refer it for mediation. If the complaint is mediated:

(1) The mediation shall be governed by the Minnesota Civil Mediation Act;

(2) A mediated settlement agreement may provide for any resolution including participation in or attendance at continuing legal education or other courses, activities, or programs;

(3) If a mediated settlement agreement is reached, the mediator shall promptly forward a copy to the Director;

(4) If no mediated settlement agreement is reached, the mediator at the conclusion of the mediation shall promptly forward to the Director a report on why no mediated settlement agreement was reached;

(5) The mediation shall be completed and the settlement agreement or report forwarded promptly and, in any event within 45 days after the mediator received the complaint, unless good cause exists. If the settlement agreement or report is not forwarded within 45 days, the mediator within that time shall notify the Director of the reasons for the delay;

(6) If the complainant and the lawyer complete the mediation and the facts do not warrant public discipline, the Director shall determine that discipline is not warranted and, after the applicable time period, expunge the records of the matter under Rule 20(d). If additional allegations concerning the lawyer come to the Director's attention before the file is expunged, the Director may reopen the file and investigate the complaint. If either the complainant or the lawyer does not participate in or complete the mediation, the Director shall determine whether to investigate or dismiss the complaint; and

(7) No communication or document, including worknotes, made or used in the course of or because of mediation may be used against the lawyer in any disciplinary proceeding. A communication or document otherwise not privileged does not become privileged because of this rule.

(e) District Fee Arbitration. Regardless of whether a complaint is investigated or mediated, the Director may advise the complainant and the lawyer of the availability of fee arbitration and may send a copy of the complaint to the District Fee Arbitration Committee. Upon receipt of a complaint, either from the Director's Office or directly from a complainant, the District Fee Arbitration Committee shall contact the complainant to determine if the complainant desires to have the fee arbitrated. If the complainant desires to have the fee arbitrated, it shall be arbitrated, except that the lawyer may decline arbitration if the fee claimed exceeds the maximum amount specified by law for conciliation court jurisdiction.

(f) Report on Pilot Program. On or before _____, 19__, the Director shall report to the Court on the operation of this pilot program and shall make appropriate recommendations.

RULE 7. DISTRICT COMMITTEE INVESTIGATION

. . . .

(d) Disposition.

(1) Determination Discipline Not Warranted. If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted, the Director shall so notify the lawyer involved, the complainant, and the Chair of the District Committee, if any, that has considered the complaint. The notification shall:

(i) ~~May~~ Set forth ~~an~~ a brief explanation of the Director's conclusion;

(ii) ~~Shall~~ Set forth the complainant's identity and the complaint's substance; and

(iii) ~~Shall~~ Inform the complainant of the right to appeal under subdivision (e).

. . . .

(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:

(1) approve the Director's disposition; or

(2) direct that further investigation be undertaken; or

(3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

(4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

RULE 9. PANEL 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 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 (or, 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);

(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; ~~and~~

(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.

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

(a) Petition for Temporary Suspension. In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm ~~may result in risk of injury~~ to the public, the Director may file with this Court an original and seven copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

. . . .

(d) Hearing; Disposition. If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm ~~may result in risk of injury~~ to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

. . . .

RULE 20. CONFIDENTIALITY; EXPUNCTION

(a) **General Rule.** The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

(1) As between the Committees, Board and Director in furtherance of their duties;

(2) ~~In~~ After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;

(4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected.

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted.

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules.

(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

(b) **Special Matters.** The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;

~~(2)~~ (3) The fact that the Director has issued an admonition;

~~(3)~~ (4) The Panel's disposition under these Rules;

~~(4)~~ (5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e).

~~(5)~~ (6) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director,

Referee or this Court in furtherance of their duties under these Rules.

(c) **Records after Determination of Probable Cause of Commencement of Referee or Court Proceedings.** Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

~~(c)~~ (d) **Referee or Court Proceedings.** Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.

~~(d)~~ (e) **Expunction of Records.** The Director shall expunge records relating to dismissed complaints as follows:

(1) Destruction Schedule. All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) Retention of Records. Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.