

By MARTIN COLE

## Supreme Court Advisory Committee Report

At the request of the Lawyers Professional Responsibility Board, in February 2007, the Minnesota Supreme Court established an advisory committee to review the lawyer discipline system in Minnesota. Minneapolis attorney Allen Sacks was named to chair the committee, which consisted of 19 members: 16 lawyers and three nonlawyers. The committee met 12 times over the next few months, gathered a substantial amount of data, heard presentations from numerous individuals, and has now issued its report.<sup>1</sup>

As anticipated, or certainly as hoped, the report states that the lawyer discipline system in Minnesota is healthy and working well. No major areas were identified for complete overhaul. The advisory committee found that some improvement could be made in respect to file aging and in handling communication with district ethics committee (DEC) members and complainants. Perhaps somewhat controversially, the advisory committee recommended two changes: the expunction of private admonitions after ten years without further discipline, and a change in the manner in which the Lawyers Board panels make probable cause determinations.

### File Aging

One issue that appears to have concerned the committee is the length of time required to resolve complaint files. Twenty-three years ago, targets for the number of open files and year-old files in the disciplinary system were established.<sup>2</sup> Since then, those targets have remained at 500 total open files and 100 open files older than one year.<sup>3</sup> These have always been intended only as guidelines, but they are not unreasonable targets and



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very often have been met. Indeed, the Director's Office had exactly 500 open files at the end of calendar year 2007.

Maintaining the number of year-old files below 100 has proven more difficult, and while there frequently are valid explanations for holding these files open,<sup>4</sup> the bottom line is that this statistic no doubt could improve, as the advisory committee notes. How to "attack" these older files is the issue. The committee recommends, *inter alia*, stricter and earlier case management differentiation and additional accountability. They also see a solution in restricting the number of seminars at which the attorneys in the Director's Office make presentations or limiting the advisory opinion service in some manner. The Lawyers Board believes that these services are highly valued by the bar and the public, and that their reduction should be considered only as a last resort. Adding additional staff in order to maintain present services might be an alternative solution, if necessary.

When making my initial presentation to the advisory committee, I indicated that essentially all issues before the committee could be considered to be allocation-of-resources decisions. This is a clear example. Prompt resolution of complaint files is important to complainants, respondents and the public, and the advisory committee fairly recommends that it be given primary importance in the allocation decisions in the Director's Office. Reaching a correct result is also important; the other services provided by the lawyer discipline system are also valuable. Perhaps a reasonable period of time during which case resolution receives an increased emphasis should be permitted before any decisions concerning the reduction of other valuable services are made.

### Communication

The advisory committee found that while disciplinary authorities communicate regularly with complainants and respondents during investigation of a complaint, more could be done to provide substantive information. Of course, prompt resolution of complaints would help in this regard too, as fewer periods

of inactivity should occur. The committee also urged that clearer, simpler language be employed in explaining results and appeal options to complainants.

As to district ethics committees, the committee urged that greater efforts should be made to explain to volunteer investigators why the Director's Office occasionally departs from their recommendations in a matter. This is especially appropriate when an investigator has recommended discipline against one of their local peers, only to have the Director's Office ultimately dismiss the matter. While such necessary departures are rare,<sup>5</sup> relaying clear rationales could help to avoid any misunderstanding between participants in the system.

In a related recommendation, the committee also urged greater outreach to impaired attorneys. Routinely providing information about legal assistance programs such as Lawyers Concerned for Lawyers (LCL) might help some lawyers with substance or mental health problems to seek assistance.

### Possible Rule Changes

Two recommendations that will generate discussion, and which would require changes to the Rules on Lawyers Professional Responsibility (RLPR), are expunction of private admonitions and elimination of some of the current contested evidentiary hearings before Lawyers Board panels that seek to determine if there is probable cause to pursue discipline. The committee recommends that private admonitions be expunged<sup>6</sup> if the attorney has had no further discipline for ten years. The report did not propose a specific rule setting out how to accomplish this goal or whether any exceptions would be appropriate. If this recommendation is adopted, implementation will take some serious thought and discussion.

The more controversial recommendation of the advisory committee, and the only one to generate a minority report, is to limit the use of contested evidentiary hearings to determine probable cause, as currently available in all matters in which the director issues charges of unprofessional conduct and seeks public discipline. The committee's majority recommends

that most probable cause determinations be accomplished by a Lawyers Board panel making a “paper” review of the matter, and that live testimony be taken only in rare instances at the discretion of the panel, not accorded by right to the respondent attorney in every matter.

This proposal was initially put forward in response to concern for how long proceedings take, but ultimately all sides seemed to acknowledge that such a change would be unlikely to result in substantial time savings in most instances. The committee majority nevertheless determined that other state’s disciplinary systems no longer use such a two-hearing system, and found that “there did not exist a convincing rationale for giving the respondent a right to two separate evidentiary hearings.”

The Lawyers Board has considered these two proposals and to date has not supported them. As to both proposals, the board seems to take an “it ain’t broke ...” approach—the system is working so even if our procedures are unique, there is no compelling reason to change them. Thus, while personally I find the probable cause proposal intriguing, its time may not be here yet. No doubt this aspect of the report will generate considerable discussion.

Other recommendations of the committee include proposed revisions to the board’s Panel Manual and its publication on the board’s website, continued use of probation as a disciplinary option, clarifi-

cation of the terms “isolated and nonserious” as the standard for issuing admonitions, and regular periodic reviews of the discipline system.

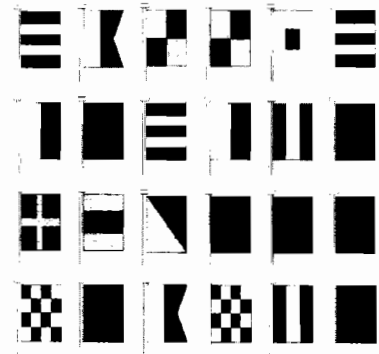
### What Happens Next?

The board, through its executive committee, will study the recommendations and respond formally. In response to past studies, the board accepted the vast majority of recommendations, offered helpful “friendly amendments” to some, and opposed only a few. Many of the report’s oversight suggestions can be implemented directly by the board’s executive committee. The Supreme Court has already issued an order offering interested parties the opportunity to submit by September 12, 2008, written comments to the court as well as a request to make oral presentations at the court’s hearing scheduled for September 23, 2008.

The board initiated the call for the creation of this advisory committee and truly appreciates the time and effort expended by the volunteers who participated in the process. The report affirms that our disciplinary system overall is working well and providing value to the bench and bar of Minnesota and to the public. The discussion that likely will result as to some of the recommendations should not be seen as a sign of weakness or disharmony. Rather, it reflects the healthy interest that exists in maintaining a fair lawyer discipline system in Minnesota. Stay tuned! ▲

### Notes

- <sup>1</sup> A copy of the advisory committee report may be located at [www.mncourts.gov/lprb/AdvisoryReport.pdf](http://www.mncourts.gov/lprb/AdvisoryReport.pdf). An executive summary of the report is reproduced in this issue of *Bench & Bar* at page 36.
- <sup>2</sup> These targets were established as part of an earlier advisory committee report in 1985, commonly referred to as the Dreher Report; the committee was chaired by [now Federal Bankruptcy Judge] Nancy Dreher.
- <sup>3</sup> File-aging statistics in the lawyer discipline system commence on the day a complaint is filed with the Director’s Office.
- <sup>4</sup> For example, contested public discipline matters routinely require more than one year in order to complete the available hearing processes. Another example is that files may remain open in which the director is awaiting a determination in some related criminal or civil action.
- <sup>5</sup> From 2004-07, the Director’s Office followed the DEC recommendation approximately 92 percent of the time.
- <sup>6</sup> Currently, only dismissed complaints are expunged after three years, pursuant to Rule 20(e), RLPR. Files resulting in any level of discipline are not expunged.



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