We have an effective lawyer discipline and client security system here in Minnesota. As part of that healthy process, there are in place several programs that assist in regulating the practice of law. Several committees in Minnesota have studied the possibility of instituting a random audit program and consistently recommended against it, usually based on the considerable expense of hiring professional auditors to conduct such a program as compared to the anticipated benefits. In addition, major attorney misappropriation often occurs outside of a trust account. Thus, the actual numbers of lawyer-thieves detected may not be significant. Another perceived limitation on the effectiveness of a random audit is that it is in fact "random," unlike the overdraft notification program, which is triggered only upon an actual "for cause" basis.

Central Intake
A group of programs that several states have in some combination involve what are known as central intake offices, diversion programs, and early mediation programs. Central intake is an idea with a long history dating back to the 1960s. The idea is that all complaints are submitted to a central intake office, a sort of clearinghouse, which reviews a complaint and determines to whom or to what agency it should be referred. In the ABA model, there would be lawyer discipline, fee arbitration, attorney-client mediation, and separate entities each with their own rules to which clients might be referred. The central intake office itself would act in an ombudsman capacity and handle such "minor" misconduct allegations such as noncommunication by simply contacting the lawyer and requesting that they contact their client. Some offices accept complaints by telephone.

The support of such a program believe it is especially consumer-friendly and that, if properly implemented, includes the alternatives methods of resolution. Several states have created central intake programs to assist in the regulation of the practice of law. Overdraft notification was a relatively new concept, introduced in New York and now exists in a small number of states. Whenever an insurance company settles a claim, it is required to notify the attorney of the settlement in writing and to have the attorney check for any possible claims of malpractice. The notification requirement was established in response to several instances of lawyers failing to do so the attorney, who was then released from the duty to report the claim. While an insurance notification rule may have caught a small number of Minnesota lawyer-thieves, there have been concerns about and opposition to such a program in many states. First, it appears to single out a particular group of lawyers and one industry for additional regulation. In Minnesota, it also would require action beyond a court rule to implement, such as legislative action or new insurance regulations. Liability concerns for insurers have also been raised should a lawyer be missed.

Random Audits
Several states have a random audit program by which attorney trust accounts are selected and audited by professional auditors to determine whether the attorney has kept proper records and that the account is properly invested. States that maintain such a program have been convinced that it, much like the overdraft notification program, both detects misconduct and helps educate attorneys on their recordkeeping duties. Iowa is a nearby state that has such a program.

We have an effective lawyer discipline and client security system here in Minnesota. As part of that healthy process, there are in place several programs that assist in regulating the practice of law.
One area of conduct that some other states regulate to a far greater degree than does Minnesota is lawyer advertising.

In the past few years, New Jersey ethics opinions have prohibited New Jersey lawyers from advertising that they have been named “Super Lawyers” by "publication because it was considered inherently misleading." The opinion went on to further prohibit lawyers from participating in any surveys or polls that produce the basis for such designations. The opinion has been stayed and is under consideration by the New Jersey Supreme Court. Lawyers may continue to truthfully advertise their designation as a "Super Lawyer" if it is factually true and the publication is identified.

Mandatory Malpractice

Finally, one state, Oregon, and several Canadian provinces require lawyers to maintain malpractice insurance. Minnesota, like almost all states, has not followed suit, and it does not appear likely that statutory malpractice insurance is on the horizon in the foreseeable future. Minnesota has not joined a growing number of states adopting one malpractice program, however. The idea of a malpractice disclosure requirement has existed for several years, but was slow to catch on. It was raised by the ABA initially and rejected by most states. Slowly the national trend has shifted, however, and such a requirement is now in force in several states, including Minnesota. Since August 2006, Minnesota lawyers who represent private clients must indicate whether they maintain malpractice insurance, with what company, and whether they intend to continue to maintain insurance in the upcoming year. The information will be available to the public through the Attorney Registration Office. Again, insurance is not required, merely disclosure of whether there is insurance is mandated.

One possible aspect of such a rule was not adopted. South Dakota’s malpractice disclosure rule centers an affirmative duty on attorneys to inform clients at the commencement of representation whether or not they maintain insurance. Such an obligation was not included in Minnesota’s new rule.

There is no perfect set of programs that every state disciplinary system must or should follow. Variation between states is healthy in allowing new programs to be tested to determine their value. Some programs, such as random audits, will improve and work in some states, but not in others. The Director's Office, the Lawyer's Board, and the Client Security Board regularly review alternatives that are available, and we will recommend some if they appear that protection of the public can be improved.

For some other programs, they'll remain something that we don't do.

Notes

1 See Shane, "Oversized Notification," Bench & Bar of Minnesota (April 2006). Copies of all articles written by members of the Director’s Office are available on the LPR/OLR website at www.lmpr.org/statements.html. The MSBA website offers a guide to using QuickBooks for lawyer management accounting, which is not available on the LPR/OLR website.

2 Minnesota Rules for Attorney Registration.

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