

ABA COMMISSION RECOMMENDS CHANGES

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Should all discipline records be public?

Should fee arbitration be mandatory?

Should all ethics complaints be investigated by professional staff (rather than volunteer district committees)?

Should "minor" misconduct be dealt with "administratively," through programs such as arbitration, mediation, and education?

Should the Director have sole discretion to make public charges of misconduct against attorneys?
Should the Director be subject to removal only "for cause"?

"Yes" is the answer from the ABA Commission on Evaluation of Disciplinary Enforcement to each of these policy questions. Only a few states have any of these policies and none exist in Minnesota. The commission's recommendations will be considered by the ABA next February.

The 1970 report of the last ABA commission to study discipline systems nationwide was enormously influential. Establishment of the Lawyers Board, and similar offices in other states, resulted from the first ABA report.

Before 1970 attorney discipline systems ranged generally from the nonexistent to the rudimentary. Problems noted in the 1970 report included:

No statewide registration of attorneys.

No requirement for trust account record keeping and dismissing complaints because the attorney made restitution.

Absence of subpoena power in the discipline system.

Local and fragmented nature of disciplinary structure.

The Commission reports that many of the problems resulting in a "scandalous situation" in professional responsibility matters in 1970 have been resolved. Indeed the report characterizes the changes of the last 20 years as "revolutionary." Nonetheless, further, sweeping changes are recommended.

The endeavors of the ABA Commission in formulating its report were prodigious. The commission

held five public hearings: in Los Angeles, New York, New Orleans, Chicago, and Portland. More than 200 persons, from a wide variety of backgrounds, supportive and critical, submitted comment. The commission surveyed the opinion of the state supreme court justices; chief discipline counsel; and nonlawyer, minority, and women volunteers in discipline systems.

The commission was responsive to the demands of consumer groups. Groups such as HALT (originally an acronym for "Help Abolish Legal Tyranny") and CAL-Justice have been active, even militant, in some states in trying to change attorney discipline systems. Their agenda includes: making discipline systems fully public; placing control of the systems in the hands of nonlawyers; and recasting the systems to enhance remedies available to aggrieved clients. Such groups can be influential, particularly if a state discipline system is less than vigorous.

A fundamental point of debate with the consumer groups has been: "Shall the profession remain self-policing?" In California some control has been taken by the Legislature and by an outside "monitor." In Minnesota the question is not perfectly framed, for three reasons. First, "policing" of attorneys is already done by several groups: nonlawyers comprise 40 percent of the Lawyers Board and a significant portion of district ethics committees; the Supreme Court is ultimately responsible for attorney discipline, and trial judges are involved by acting as the Court's referees; and the full-time professional staff of the Director's Office is a step removed from the practicing bar. Second, lawyers will always be involved in "policing" every profession because the proceedings involve legal rights and rules. Finally, the most important "self-policing" will always go on outside the formal discipline system, in lawyers' dealing with each other, in court, and in their sense of what it is to be a professional.

Many of the policies recommended by the commission have long been employed in Minnesota but would involve great change in some other states:

Responsibility for the discipline system ultimately lodged in the state supreme court and its appointees.

Complainants' rights to immunity from suit, to timely reports on the status of their complaints, and to appeal dismissal of complaints.

Increasing nonlawyer membership on discipline boards to one-third or more.

Expediting the disciplinary process and providing for interim suspension without a showing of irreparable harm.

Some of the other commission recommendations have been studied in Minnesota and rejected. For example, the commission recommends a trust account random audit program, while two MSBA committees in recent years have found that the considerable expenses of such a program would not demonstrably produce corresponding benefits. (New Jersey spent \$320,000 on random audits in 1990, primarily for their educational benefits.) Minnesota has made its discipline system increasingly more open to the public, but has not adopted a fully public system.

In 1985, a Minnesota Supreme Court advisory committee (chaired by Nancy Dreher) studied the Minnesota system and made many recommendations for change. Generally, the Dreher recommendations were more detailed than the ABA Commission's. Also, the Dreher recommendations were not made against a background of public demonstrations and pressures from consumer groups. One series of sharp contrasts

between the ABA and Dreher recommendations centers on the relative roles of a professional responsibility board and a director. The ABA Report recommends a very independent director whose prosecutorial discretion is unfettered and who may be removed only for cause. The Dreher model for the director emphasized instead a strong board which controlled the director at certain key points. Another sharp contrast is in the role of the volunteer discipline groups (district ethics committees), which the ABA report would remove from the discipline system. They would be reincarnated in the roles of educator, arbitrator, and mediator.

The Dreher Committee recommended that after several years the Minnesota discipline system again be studied with a view to possible further improvements. Consideration of the ABA Commission report may provide the occasion for that review.

The ABA report will be considered formally by the ABA in 1992. The Lawyers Board will be responding to the commission's invitation to submit comments in October 1991. Everyone interested in lawyers professional responsibility and disciplinary enforcement should take the time to study the ABA report and join the debate over whether the commission's sweeping recommendations should be adopted.