

MEDIATION, ARBITRATIONS, AND CONSUMER SATISFACTION

By

Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

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Commencing July 1, 1995, the Minnesota disciplinary system will begin two pilot projects — mediation of minor disciplinary complaints and mandatory fee arbitration. The pilot projects are an attempt to increase consumer satisfaction with the lawyer discipline system, and to provide additional and alternative remedies to resolve disputes between attorneys and clients. These new projects are the result of many, many hours of fact gathering, debate and decision making. These efforts have been made primarily by volunteers — both lawyers and non-lawyers — who have toiled to help keep the Minnesota disciplinary system among the best in the nation.

CHANGING TIMES

The genesis for the new pilot projects lay in the recommendations of the ABA Commission on Evaluation of Disciplinary Enforcement, contained in the 1992 McKay Report.[Ftn 1](#) The Commission's primary mission was to study and evaluate the functioning of lawyer discipline systems around the country and to formulate recommendations for action. The McKay Commission noted the tremendous improvements in lawyer discipline that had occurred across the country since 1970.[Ftn 2](#) The commission's recommendations reflect the inevitable conclusion, however, that more can and should be done to accommodate the changing times and expectations of the public with respect to lawyers.

The McKay Report accurately points out that existing lawyer regulatory systems are, for the most part, narrowly focused on violations of professional ethics as set out in the applicable state professional rules, e.g. the Minnesota Rules of Professional Conduct (MRPC). Existing systems currently provide few mechanisms to handle other types of client complaints, which are generally dismissed with little or no investigation.

In October 1992, the Minnesota Supreme Court appointed a 16-person advisory committee to review the recommendations contained in the McKay Report, and to review the status of the Minnesota disciplinary system generally. The committee was cochaired by Robert Henson and Janet Dolan and was composed of 10 lawyers and six nonlawyers. The committee heard over 30 persons give their views on the lawyer discipline system and the McKay recommendations. It surveyed 400 complainants whose disciplinary complaints about lawyers had recently been closed, as well as the 400 lawyers complained about, to measure satisfaction with the disciplinary process. The committee reviewed disciplinary files, interviewed the staff of the Director's Office, and concluded its fact-finding with a public hearing, after which it filed its final report and recommendations in January 1994.

The major recommendation for change to the Minnesota discipline system made by the Henson/Dolan Committee was to try new remedial systems, including alternative dispute resolution

approaches like mediation and arbitration. The report envisioned a system whereby these alternative remedies would be diverted from the disciplinary system to the extent possible, in order to allow the Director's Office more time to devote to serious cases of misconduct. The committee recommended pilot projects in mediation of disciplinary complaints and binding fee arbitration to be run by the district bar associations, with the assistance of the Director's Office in implementation of the programs.

Rules 6X and 6Y, Rules on Lawyers Professional Responsibility, go into effect July 1, 1995. Rule 6X governs the mediation pilot project, which will run until July 1, 1998. The mediation pilot project will be conducted in the 3rd, 4th, and 12th bar association districts.[Ftn 3](#) Rule 6Y governs the mandatory fee arbitration pilot project, which will terminate July 1, 1997. Mandatory fee arbitration will occur in the 2nd, 6th and 14th bar association districts.[Ftn 4](#)

MEDIATION OF COMPLAINTS

Mediation of disciplinary complaints under Rule 6X is intended to help repair the attorney-client relationship. The complainant will have an active role in the process, rather than being consigned to the role of a passive observer waiting to see what will happen. As mediation is potentially less adversarial than a disciplinary investigation, it may be a better way in certain instances to resolve disputes arising out of the attorney-client relationship, particularly if the relationship is ongoing. Disciplinary complaints referred for mediation will be conducted by trained volunteer mediators on the Neutral Roster maintained by the State Court Administrator's Office.[Ftn 5](#) Three panels totaling approximately 80 volunteer mediators have been selected to serve in the three bar association districts during the three-year pilot project.

While mediation of a disciplinary complaint is a diversion from the disciplinary system, it will not operate entirely outside the strictures of that system. Participation in the mediation process is not voluntary for the lawyer complained against. A lawyer's failure to cooperate with the mediation process will be treated as a separate grounds for discipline. Rule 6X(d)(4). A complainant, of course, cannot be forced to participate in mediation. A successful mediation will result in a finding of discipline not warranted, which will be expunged from the lawyer's permanent disciplinary record after three years pursuant to Rule 20(e). Rule 6X(d)(7). An unsuccessful mediation may either be referred for disciplinary investigation or summarily dismissed.

There is no "right" to have a complaint mediated. The decision to refer a complaint for mediation is within the discretion of the Director, and is not subject to appeal. Mediation of disciplinary complaints is intended to address two broad categories of complaints: those which, while they may state a legitimate basis for client dissatisfaction, do not violate the MRPC, and some complaints in which it appears there may have been a minor violation of the MRPC but which likely would result in the lowest form of discipline, i.e. a private admonition.

Complaints which appear to be amenable to mediation include: complaints of noncommunication, short-term neglect, rude and insensitive behavior, and failure to return client files or other property. Not every complaint which falls into one of the listed categories will be sent to mediation. If it appears that the relationship between complainant and the complained against lawyer is irretrievably damaged, that the conduct is severe, or that the parties would otherwise not be amenable to mediation, the matter will not be referred for mediation.

Nor will certain other broad categories of complaints be referred for mediation. Rule 6X(d)(6) specifically excepts from the mediation process claims of malpractice. Complaints involving serious

misconduct, trust account or financial misconduct, conflicts of interest, and complaints against lawyers with extensive disciplinary histories will not be mediated.^{Ftn 6} Finally, complaints by opposing counsel or opposing parties will not be mediated.

MANDATORY FEE ARBITRATION

Rule 6Y will govern the pilot project for mandatory fee arbitration. Under the current disciplinary system, the Director's Office does not investigate fee disputes. Complaints related to fee disputes have been summarily dismissed, with notice to the complainant of the availability of fee arbitration. The Henson/Dolan Committee recommended that the fee arbitration system be conducted on a mandatory basis, due to the large percentage of arbitrations that did not go forward because the lawyer refused to participate. Clients, of course, must consent to fee arbitration. If the amount of the fee claimed by the lawyer is greater than the jurisdictional limit of the conciliation courts under Minnesota Statutes Chapter 491A (currently \$7500), the lawyer may decline to arbitrate. Matters referred for mandatory fee arbitration will continue to be dismissed with a determination discipline not warranted.

Rule 6Y specifically provides that each district fee arbitration committee shall adopt rules of procedure to implement the rule. The three districts subject to the fee arbitration pilot project currently have very different procedures in place. The 14th District Bar Association has binding arbitration, with virtually unanimous participation by lawyers. The 6th District Bar Association has successfully utilized a very informal nonbinding mediation approach. The 2nd District Bar Association has used binding arbitration, but with approximately 50 percent of the arbitrations failing to go forward because of the refusal of the lawyer to participate. Each district in the pilot project is free to utilize its own process, but lawyers now will be required to participate.

Mediation of disciplinary complaints and mandatory fee arbitration will not be a panacea. There will always be complainants who are unhappy or dissatisfied with the lawyer disciplinary system. The pilot projects provide an opportunity, however, to measure consumer satisfaction with the alternative remedies, while also weighing the associated costs. In this regard, careful evaluation of the pilot projects will be critical. The Director's Office must report to the Court on the operation of the mediation pilot program by no later than July 1, 1997, and on the mandatory fee arbitration program no later than July 1, 1996.

NOTES

¹ Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement (1992) ("*McKay Report*").

² In 1970 the ABA Special Committee on Evaluation of Disciplinary Enforcement (Clark Committee) published its report and evaluation of lawyer disciplinary procedures in the United States. The report described the professional discipline system in the United States as "scandalous" and called for the profession's "immediate attention."

³ Rule 6X will apply to any lawyer whose principal office is located in Chippewa, Hennepin, Houston, Kandiyohi, Lac Qui Parle, Meeker, Olmsted, Renville, Swift, Wabasha, Winona, or Yellow Medicine County.

⁴ Rule 6Y will apply to any fee dispute between a client and a lawyer whose principal office is located in Blue Earth, Kittson, Mahnommen, Marshall, Norman, Pennington, Polk, Ramsey, Red Lake, Roseau or Watonwan County.

⁵ Another option provided for under Rule 6X(b)(4) is to refer the complaint to the district ethics committee with a direction that the complaint be mediated, if found to be appropriate after investigation. In those situations, the mediation would be conducted by the district ethics committee investigator, who may or may not have formal mediation experience.

⁶ Over time, records will be also be reviewed to determine whether a lawyer has had multiple other complaints referred for mediation.