

## WHAT WE DON'T DO

By

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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. The trust account overdraft notification program<sup>Ftn 1</sup> is an excellent example of a mechanism for both detecting possible misconduct and for educating lawyers about their fiduciary obligations. Fee arbitration programs, while not mandatory in Minnesota, are available to help resolve lawyer-client fee issues. Other programs in use in Minnesota include the use of probation as a disciplinary option, the telephone advisory opinion service provided by the Office of Lawyers Professional Responsibility (OLPR, or Director's Office) and the trust account brochures and information available on the Lawyers Board and MSBA websites.<sup>Ftn 2</sup>

There are other programs and ideas that Minnesota has chosen not to have as part of our disciplinary system. Each of these programs is in use in some other state or states, or is recommended by the American Bar Association Model Rules for Disciplinary Enforcement. What are some of them and why don't we have them?

### Random Audits

Several states have a random audit program by which attorney trust accounts are selected and audited by professional staff to determine whether the attorney is maintaining proper records and that the account is properly in trust. States that maintain such a program seem 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.

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 number 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.

## **Insurance Check Notification**

A second program or rule intended to detect misappropriation is what is known as an insurance check notification or insurance payee notification program, which was first used in New York and now exists in a small number of states. Whenever an insurance company issues a settlement check to an attorney, principally in personal injury matters, the insurer must copy the attorney's client on the letter transmitting the payment. This puts the client on notice that their attorney is receiving funds so that the client can monitor the distribution of the funds by their lawyer. This requirement was established in response to several instances of lawyers forging client endorsements on settlement checks and misappropriating the funds, sometimes without the client ever knowing that their case had even been settled.

While an insurance notification rule may have caught a small number of Minnesota's 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 most states, 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 payee be missed.

## **Central Intake**

A group of programs that several states have in some combination involve what are known as central intake offices, diversion programs, and ethics schools. Central intake is an idea that grew out of ABA proposals in the 1990s. 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 other separate entities each with their own function to which the matter may be referred for handling. The central intake office itself also may act in an ombudsman capacity and handle some "minor" misconduct allegations such as noncommunication by simply contacting the lawyer and requesting they contact their client. Some offices accept complaints by telephone.

The supporters of such a program believe it is especially consumer-friendly and, as part of an overall program that includes the alternative methods of resolution mentioned above, better meets the real concerns of most client-consumers and complainants than treating all matters as disciplinary complaints. Wisconsin adopted such a program in 2001. In Minnesota, without all of the mandatory entities to which a matter could be referred, central intake would be a needless extra step. Further, the Director's Office already refers simple fee disputes to voluntary fee arbitration.

## **Ethics Schools**

Along with central intake, diversion and ethics schools also are becoming more common as a means of dealing with "minor" misconduct. California is an example of a state employing diversion to an ethics

school, which is somewhat akin to criminal diversion programs. An attorney who has had a complaint filed against her, particularly one involving “minor” neglect or noncommunication, is offered the opportunity to attend classes on professional responsibility or take other law office management-type classes; if the attorney takes up this offer, the complaint does not result in a disciplinary decision or record. As long as the attorney then has no further complaints for some period of time, no permanent record is maintained.

In addition to concern for the logistical challenges of creating and running such a “school,” an argument raised in Minnesota against such a program is that Minnesota has always treated violations of rules involving diligence and communication as disciplinary matters; just like the violation of any other rule of professional conduct, they are not considered “minor” matters. In addition, the mandatory ethics CLE requirement has helped fulfill some of the same goals in Minnesota.

### **Advertising Regulations**

One area of conduct that some other states regulate to a far greater degree than does Minnesota is lawyer advertising. In particular, several states, including Florida and Missouri, require preapproval of advertisements by an agency of the disciplinary system. To accomplish this purpose, Florida employs an office roughly the size of the entire Director’s Office in Minnesota. Perhaps these states have experienced egregious examples of improper lawyer advertising that established the need for such an entity; fortunately that has never been the case in Minnesota. Very few instances of false or misleading advertisements are brought to the Director’s attention, and just as few that, even while not in violation of any disciplinary rule, exhibit particularly poor taste.

Some states also attempt to regulate advertising content in a manner unlikely to be duplicated in Minnesota. For example, a New Jersey ethics opinion recently prohibited New Jersey lawyers from advertising that they have been named a “Super Lawyer” by a publication because it was considered inherently misleading.<sup>Ftn 3</sup> The opinion went on to further prohibit lawyers from participating in any survey or poll that produces the basis for such designations. The opinion has been stayed and is under consideration by the New Jersey Supreme Court as this is written. Even if that court upholds the opinion, the Lawyers Board and Director’s Office have no intention of taking a similar position in Minnesota. 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 mandatory malpractice insurance is on the horizon in the foreseeable future.

Minnesota has joined a growing number of states in 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 tabled 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 October 1, 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.<sup>Ftn 4</sup> 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 creates 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 resonate and work in some states, but not in others. The Director's Office, the Lawyers Board, and the Client Security Board regularly review the alternatives that are available, and will recommend any of them if it appears that protection of the public can be significantly increased. For some other programs, they'll remain something that we don't do.

## NOTES

<sup>1</sup> See Shaw, "Overdraft Notification," *Bench & Bar of Minnesota* (April 2006). Copies of all articles written by members of the Director's Office are available on the LPRB/OLPR website at [www.courts.state.mn.us/lprb](http://www.courts.state.mn.us/lprb).

<sup>2</sup> The MSBA website offers a guide to using *QuickBooks* for lawyer trust accounting, which is not available on the LPRB/OLPR website. [www2.mnbar.org/qbguide/qbguide1.htm](http://www2.mnbar.org/qbguide/qbguide1.htm).

<sup>3</sup> New Jersey Ethics Opinion 39, August 2006.

<sup>4</sup> Rule 6, Minnesota Rules for Attorney Registration.