

MORE ON THE ABA CONSULTATION REPORT

BY SUSAN HUMISTON ✉ susan.humiston@courts.state.mn.us



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The November professional responsibility column (“ABA issues consultation report on Minnesota’s discipline system”) provided an introduction to the September 2022 ABA consultation report on Minnesota’s lawyer discipline system. In addition to a general overview, the column focused briefly on three recommendations (Nos. 19, 21, and 23), and the potential impact that adopting these recommendations would have on the current private versus public discipline distinction. Because there are several additional recommendations, I thought it beneficial to continue to explore the consultation report. For this column, my focus is on recommendations that require additional resources or change responsibility for tasks currently performed within the discipline system to other organizations.

Funding

As a refresher, Minnesota’s attorney discipline system is funded by your annual registration fees. Of the \$263 annual registration fee you pay as an active lawyer, \$128 is allocated to attorney discipline. The Minnesota Supreme Court has worked hard over the years to keep the annual registration fee largely steady. As a result, Minnesota compares quite favorably to annual registration fees paid in other jurisdictions generally.

For example, Tennessee has a similar lawyer population and is a voluntary bar state like Minnesota (meaning that lawyers need not be members of the state bar association as part of licensure). In Tennessee, the annual registration fee is \$570 and \$140 is dedicated to attorney discipline. Colorado is also a voluntary bar jurisdiction, with an annual registration fee of \$325; it is unknown what portion of that amount is dedicated to discipline because Colorado combines all regulatory responsibilities under one umbrella. Iowa’s annual registration fee is \$270, very comparable to Minnesota, but \$200 of that fee is allocated to attorney discipline. Wisconsin is a mandatory bar state, so the trade association bar performs the lawyer regulation tasks. Wisconsin’s annual lawyer registration fee is \$504, of which \$150 is allocated to attorney discipline. Of the 18 voluntary bar associations, Minnesota ranks 10th in terms of its annual required fee. Of 23 jurisdictions that report funds earmarked for discipline, Minnesota ranks 14th.

Our office also does a lot for that \$128 per active lawyer. In addition to investigating and

prosecuting ethics complaints (the majority of our workload), the Office has several additional responsibilities. For example, staff attorneys frequently speak at ethics CLEs. We staff an ethics hotline that answers approximately 2,000 calls annually. We administer a large probation department. We train, support, and review the work of the district ethics committees (which provide tremendous assistance to the Office in the investigation of cases). We administer the Professional Firms Act’s annual and first reports, a required annual compliance task for every entity organized in Minnesota for the provision of legal services on a for-profit basis.

We provide administrative and investigative support to the Client Security Board. We obtain and collect on discipline judgments. We act as trustee, when appointed, over client files and trust accounts if a lawyer dies, abandons their practice, or through disability becomes unable to return client files and close their client trust account. We respond to written requests for disciplinary history and track legal employment of suspended and disbarred lawyers. We provide administrative support to the Lawyers Professional Responsibility Board. We administer the discipline expunction rules. We administer a trust account overdraft program and provide guidance to lawyers regarding use of and compliance for their trust account. Finally, we administratively handle attorney resignations, reinstatements by affidavit, and conduct reinstatement investigations and hearings. Given the breadth of work performed by this Office, the annual fee paid by lawyers in Minnesota as part of a self-regulating profession is a very good value.

Recommendations

The ABA generally recommends against discipline offices providing ethics advice.* The primary reasons for that recommendation are the significant time commitment required and the risk of the OLPR attorney who provided the advice being a witness in a later discipline or other proceeding. Because Minnesota has a long-standing tradition of providing ethics advice, the ABA did not recommend elimination of this service but encouraged the Court to take this staffing commitment into consideration in setting goals for case processing, and also recommended the Court explore whether the bar association could take on this task (recommendation 2(B)).

This is one area in which you may wish to provide comment to the Court during the comment period. Is this a valuable service? Do you believe attorneys in the OLPR should provide this service? What is its value to you? Would you support an increase in attorney registration fees if needed to keep this service available, or do you wish to keep it but not at additional cost?

The ABA also recommended additional investments in resources. Specifically, the ABA recommended the Lawyers Professional Responsibility Board (and a new Administrative Oversight Committee) have a staff person, and that referees be provided with additional staff assistance (recommendation 4). Right now, the OLPR provides staff support for the Board, and the Court's commissioner's office provides some clerical assistance to referees. The ABA recommended the OLPR hire an additional investigator and noted that it may need an additional paralegal to support case-processing objectives (recommendation 5).

The ABA recommended that the Court invest in additional technology tools for use in the discipline system, including enhancements to our database management system, document production tools, and forensic auditor tools, to name a few (recommendation 6). The ABA recommended the creation of a lawyer discipline decision database that is searchable, which would require resources to create and maintain (recommendation 7). The ABA recommended that the OLPR and the Board maintain separate websites, which would require additional resources to create and keep up to date (recommendation 9). The ABA recommended that paid court-appointed referees instead of board volunteers conduct reinstatement hearings (recommendation 13), a recommendation that will increase expenses for referees.

These are great ideas, worth exploring to understand the cost and likely return on investment that the additional allocations would provide. What are your thoughts on these various recommended additional investments? Before you say "none," because you want to keep the annual registration fee low, please work with me for a minute. What would you like to see the Court prioritize if they were going to provide some additional resources or look to reallocate existing resources? Can we also agree that doing more with the same resources is not in the best interest of a sustainable and optimized system?

The ABA also recommended that the Court consider having the Office do less in another area, such as taking on fewer trusteeships (recommendation 17). As the report indicates, this function can be quite time-consuming. Is there another entity that could take on this role? Is it important that the Office perform this function if another entity is unable to do so?

One additional area that requires exploration is who will create practice management programs if they are to be used as part of a disciplinary diversion program (which, as I noted last month, is a central recommendation (recommendation 19)). The ABA report specifically provides that "[t]he organized bar's active role in this process via programming to which the lawyer can be referred is vital to the success of the diversion process." (Report at 74.) If others are unable to step forward to create the programming necessary to support the diverted lawyer, and the creation of a diversion program is a priority, does the OLPR have sufficient resources to undertake this task? Where in the list of resource priorities should this fall, in your estimation? Budgets are in part statements of values. How would you weigh in?

Conclusion

As I stated last month, we have a solid system that can always be improved, including—potentially—in some fundamental ways if we think the changes are in the best interest of Minnesota. At its center, a lot of the ABA consultation report focuses on re-examining the policy choices reflected in current resource allocations, including suggestions on where the Court may wish to invest further to optimize the system. The questions presented are important.

I hope those of you with an interest in the subject have had an opportunity to read the report or at least review the recommendations. If you have comments, I would love to hear them, as would the Court, through your participation in the public comment period. Comments are due by December 30, 2022, and must be filed electronically in Supreme Court File No. ADM10-8042. ▲

* ABA Model Rules for Lawyer Disciplinary Enforcement 4(C) provides "Advisory Opinions Prohibited. Disciplinary counsel shall not render advisory opinions, either orally or in writing."