

By MARTIN COLE

## Lawyers Board Panel Actions

In July 2009, the Rules on Lawyers Professional Responsibility (RLPR) were amended, most significantly as to the manner in which probable cause determinations are made by Lawyers Board panels.<sup>1</sup> The revised procedures have now been in effect for three years, perhaps a sufficient time to gauge the impact these changes have had on the lawyer discipline system.

### Background

Rule 9, RLPR, governs the panel review process whenever the Director's Office issues charges of unprofessional conduct against a Minnesota lawyer, seeking approval to file publicly a petition for disciplinary action with the supreme court.<sup>2</sup> Prior to 2009, in all such cases, an attorney was entitled to an evidentiary hearing before the panel ruled.<sup>3</sup> The advisory committee report noted that Minnesota was the only jurisdiction that conducted such extensive hearings to establish probable cause, since the attorney was (and remains) entitled to a full hearing after the petition is filed before a court referee, applying the Rules of Civil Procedure and Evidence, and requiring findings by clear and convincing evidence. Thus, the court determined that more than one evidentiary hearing was not necessary.

Since the amendments took effect, most probable cause determinations have been conducted by a "paper" review only.



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The attorney files her answer to the charges and, ten days later, both sides simultaneously submit exhibits, affidavits, and usually written memoranda, after which the panel may make a determination. Although the panel has discretion to grant a hearing or argument, the rule changes were crafted to encourage panels to decide the overwhelming

majority of matters on written submissions only, and thus expedite the process of authorizing the filing of a public petition in serious disciplinary matters.

### Results So Far

From July 1, 2009, to May 2012 (when this column is being written), 71 charges of unprofessional conduct were filed with Lawyers Board panels by the Director's Office.<sup>4</sup> In 34 of those matters, the panel reviewed contested submissions, found probable cause for public discipline, and directed that the Director's Office file a public petition. In four instances, the panel instead issued a private admonition to the attorney, finding that rule violations had occurred but were not serious enough to warrant public discipline. Two of those admonitions were issued after the panel had granted an evidentiary hearing at the attorney's request; the other two were issued based on the written submissions. Four charges were pending at the time of this writing.

So what happened in the remaining 29 matters? In 12 cases, the attorney stipulated to probable cause and the filing of a public petition after the charges were filed but before the panel had made a determination. In 13 cases, the panel chair granted the director's motion, made pursuant to Rule 10(d), RLPR, after the attorney failed to file an answer to the charges. In such "default" situations, the panel chair may authorize the filing of a petition without further submissions being required. Another motion was granted pursuant to Rule 10(c), RLPR, which allows approval without submission when the charges are based upon a criminal felony conviction.<sup>5</sup> One matter was heard by a court-appointed referee, as is authorized on motion of the Lawyers Board to the supreme court in certain situations (probable cause then was found by the referee), and in two instances the attorney and the director entered into a stipulation for private probation in lieu of the charges being decided, which was approved by the Board chair, and the charges were then withdrawn.<sup>6</sup>

The 2009 rule amendments have not resulted in any weakening of the standards for lawyer conduct in Minnesota. The Director's Office's charging decisions are most often found to be appropriate, yet in some instances panels remain will-

ing to find that the attorney's conduct was nonserious and issue private discipline, thus allowing that lawyer a chance to reform his conduct without suffering public discipline. Exact percentages for the various types of decisions are, of course, dependent on the unique facts of each case and thus vary over time, but overall the panel probable cause process has remained effective while still protecting respondent attorneys' rights.<sup>7</sup>

### As Hoped?

The revised Rule 9, RLPR, requires that a panel make its determination 40 days after the issuance of the charges, absent good cause for some extension. Panels have met that deadline in almost all cases. The average time matters are pending before panels is certainly shorter than it was prior to the amendments. Previously, contested matters required a formal meeting prior to the hearing to exchange exhibits and affidavits, and arranging the hearing to meet the busy schedules of three volunteer panel members, counsel, the parties, and any witnesses was often complicated. Matters on average thus took three to four months for resolution from the date the charges were issued, so the length of time matters are pending before Lawyers Board panels indeed has been reduced.

Has this savings of time at the panel stage resulted in a corresponding reduction of the time required to resolve a complaint, from the date of its filing to its final disposition? Not always. Because of the short timelines for submission of all documents, affidavits, and memoranda to the panel after the issuance of charges (after a total of 24 days), staff attorneys in the Director's Office must truly "have all their ducks in a row" well before the charges are issued. This is not to imply that investigations preceding charges were any less thorough before the amendments. But in the past, an affidavit that had been discussed and approved but not yet signed, notarized and returned, for example, could provide sufficient evidentiary basis for issuing charges pending receipt of the fully executed version well before the required pre-hearing exchange of information. Now, however, having a fully executed document before issuing the charges has become far more essential. In addition,

## Professional Responsibility

the Director's Office now prepares and submits a written legal memorandum to the panel in advance rather than waiting to present its legal arguments during closing argument before a panel. Time saved after charges are issued is thus sometimes negated by a slightly longer period of time being needed beforehand.

The Director's Office and the Lawyers Board are dedicated to finding a proper balance between prompt and efficient handling of matters presented to it, protecting attorneys' due process rights, and still ensuring thorough and fair investigations of complainants' concerns. The 2009 amendments to the panel probable cause process have maintained that balance thus far. ▲

### Notes

<sup>1</sup> See, Report of Supreme Court Advisory Committee to Review the Lawyer Discipline System, May 19, 2008 (available at: <http://tinyurl.com/7gxfxq>); Cole, "Supreme Court Advisory Committee Report," 65 *Bench & Bar of Minnesota* 6 (July 2008), p. 16; Cole, "New Rules Galore," 66 *Bench & Bar of Minnesota* 5, (May/June 2009), p. 20.

<sup>2</sup> Lawyers Board panels also conduct hearings on admonition appeals—actually *de novo* reviews of admonitions issued by the Director's Office and challenged by the attorney—and on petitions for reinstatement. The 2009 amendments to the RLPR did not affect these types of hearings in any significant manner.

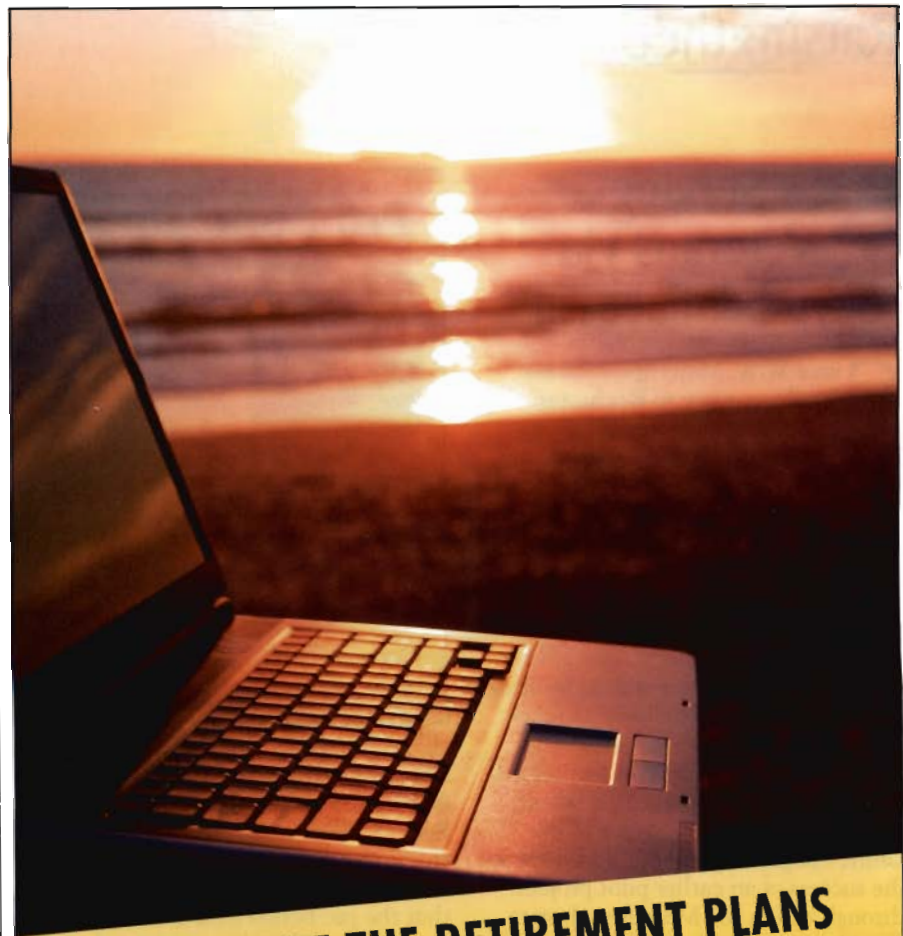
<sup>3</sup> There are some modifications at the probable cause hearing stage; for example, live testimony other than from the attorney and complainant is only upon a showing of good cause. Testimony by affidavit is therefore allowed.

<sup>4</sup> In many matters, the respondent attorney waives the necessity of a panel probable cause determination and stipulates that the Director's Office may file a public petition for disciplinary action even before charges are filed.

<sup>5</sup> Respondent attorneys waive the necessity of panel proceedings and stipulate to probable cause in the overwhelming majority of public matters based upon criminal convictions.

<sup>6</sup> Rule 8(d)(3), RLPR.

<sup>7</sup> The totals for probable cause decisions for the three-year period prior to the adoption of the changes were similar. Sixty-three of 74 charges resulted in public petitions from July 1, 2006, to June 30, 2009.



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