

Court issues order on ABA discipline system recommendations

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In August, the Minnesota Supreme Court issued its order regarding the recommendations it received from the American Bar Association’s Standing Committee on Professional Regulation.¹ In past columns I’ve discussed the lengthy report prepared by the ABA at the Court’s request, as well as some of the report’s 25 recommendations.² Following a comment period and public hearing, the Court’s order reflects careful and thoughtful consideration of the various recommendations. We are fortunate in Minnesota to have an active and engaged Court willing to commit significant time to attorney discipline matters. The order is lengthy, so I think an overview of the Court’s decisions and next steps is in order.

Recommendations adopted

The order begins by acknowledging a core strength of Minnesota’s discipline system: the many talented volunteers and other participants who are “engaged, committed, and take their responsibilities and work seriously.”³ I could not agree more. Thank you to everyone who cares about and contributes to this important work. We all share the belief that because lawyers hold an important role in society, the legal profession is diminished when lawyers fall short of the applicable ethical standards. To that end, a well-functioning discipline system helps to protect the public and to maintain confidence in the profession.

The order adopts a number of changes that in turn necessitate procedural rule changes to the Rules on Lawyers Professional Responsibility (RLPR). To assist, the Court is appointing a 10-person Advisory Committee, chaired by Judge Lucinda Jesson of the Minnesota Court of Appeals, to make recommendations on particular rule amendments by June 30, 2024.⁴

One recommendation that the Court has adopted—and perhaps the most impactful—is the decision to implement a diversion program. In Minnesota, we issue a lot of private discipline, which is generally reserved for conduct deemed isolated and non-serious. The Office spends a lot of time on those private admonitions. And, as the Office indicated in its public comments, there is more recidivism than one would like to see.

Roughly one in three Minnesota lawyers who has received an admonition has received more than one. Perhaps something different is necessary to help the lawyer modify their conduct such that misconduct is unlikely to happen in the future? This is where diversion can fit in—the hope is that education or other programming will have a more significant impact on the lawyer’s practice than a private discipline decision. Most states have some form of diversion program. I’m excited to explore with the Advisory Committee what a diversion program should look like in Minnesota.

One key thing to keep in mind is that educational programs will need to be created for diversion to be effective, and I hope stakeholders currently engaged in educational programming for lawyers answer the call to develop effective and targeted law office management programming to which lawyers can be diverted.

Another consequential recommendation adopted by the Court is to change the presumptive suspension period from 91 days to six months for cases in which a reinstatement hearing is required. The Court adopted other recommendations to streamline and make transparent the requirements and timing of reinstatement proceedings. In doing so, the Court articulated a new and important rule—lawyers who have previously been suspended for any period and engage in conduct that warrants another suspension will be required to petition for reinstatement and will not be reinstated by affidavit, no matter the length of the subsequent suspension.

The Court adopted other changes, such as the recommendation to define “probable cause” as that term is used to determine whether public discipline is warranted for misconduct. The Court changed this term to “reasonable cause” and directed the Advisory Committee to make recommendations for defining this standard and streamlining reasonable-cause proceedings. The Court adopted the ABA recommendations to make changes to several specific procedural rules.

The Court also referred several recommendations to the State Court Administrator, Board, and Director for consideration; most of them involved recommendations that had budgetary impact.

As I have discussed previously in this space, the portion of annual attorney registration dollars allocated to the discipline system compares quite favorably to the amounts allocated in other jurisdictions. We do a lot in Minnesota for the dollars allocated. And even lawyers are often surprised, since we are part of the taxpayer-funded judiciary, that no taxpayer dollars are used to cover attorney-regulation activities. As a consequence, we are constantly weighing and balancing competing priorities, and because annual registration fees have remained quite steady for long periods of time, we are currently stretched for resources, as the ABA report recognized.

Recommendations rejected

The Court rejected several recommendations. A few are notable. The Court rejected the ABA recommendation to create a separate Administrative Oversight Committee. In doing so, the Court noted its recent (2021) changes to Rules 4 and 5, RLPR, relating to the division of responsibilities between the Board and Office and decided a longer period of adjustment was appropriate. The Court asked the Advisory Committee to consider whether some clarifying amendments to Rules 4 and 5 may be appropriate.

The Court also rejected the recommendation to transfer Rule 18, RLPR (reinstatement hearings), to referees versus a panel of the Board, preserving public member participation in this important process. The Court further rejected the recommendation that the Office relinquish to some other entity the advisory opinion service currently operated by the Office. While the Court noted this service is time-consuming, the benefits to the practicing bar outweighed the issues raised in the Court's estimation. The Court likewise rejected the recommendation to appoint the Director as trustee less often when a lawyer dies, is disabled, or abandons their practice, but recommended the Director work with the state bar on resources for succession planning. I'm pleased to report that this effort is already underway; a subcommittee of the MSBA's Professional Regulation Committee—of which I am the chair—is currently working on succession planning resources. Finally, the Court rejected the ABA's recommendations to provide for discretionary review of referee reports and to eliminate the ability of Board panels to issue admonitions.

Conclusion

This short article is a selective summary of the Court's decisions, just as prior articles were not able to discuss all the many ABA recommendations. As one can surmise from the length of each of the referenced documents—the ABA report is 88 pages; the Court's order is 36 pages, plus a concurrence/dissent from Justice Thissen and a summary attachment—there is a lot more to the recommendations and the Court's decision.

What I hope is clear, however, is that a lot of very engaged stakeholders have given careful consideration to a lot of ideas

and recommendations, and in doing so, have demonstrated a deep commitment to the quality of Minnesota's discipline system. A periodic system review process has been a hallmark of Minnesota's discipline system since its creation in 1970. Thanks to the ABA Standing Committee on Professional Regulation, the Lawyers Professional Responsibility Board, OLPR personnel, members of the MSBA Professional Regulation Committee, district ethics committee (DEC) members, and the Court for the time and continuing attention given to this important subject. As always, feel free to contact me if you have recommendations or concerns. I welcome your input as we strive to operate the best system possible. ▲

NOTES

¹ Order Regarding the Report and Recommendation of the American Bar Association Standing Committee on Professional Regulation on the Minnesota Discipline System dated 8/23/2023, located in Supreme Court File No. ADM10-8042.

² See Susan Humiston, "ABA Issues Consultation Report on Minnesota's Discipline System," *Bench & Bar* (November 2022); Susan Humiston, "More on the ABA Consultation Report," *Bench & Bar* (December 2022), both available at [lprb.mncourts.gov/articles](http://prb.mncourts.gov/articles).

³ Order dated 8/23/2023, at 2.

⁴ The Court established a 9/15/2023 deadline to apply to be a member of the Advisory Committee; a date that will have passed before this article is published. In addition to the chair, Lawyers Board Chair Ben Butler or his designee will be on the Advisory Committee, as will I or my designee.