

*Comment period open*

# ABA issues consultation report on Minnesota's discipline system

BY SUSAN HUMISTON ✉ [susan.humiston@courts.state.mn.us](mailto: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.

**T**he Minnesota Supreme Court periodically undertakes a review of its lawyer discipline system. Earlier this year, the Court invited the American Bar Association's Standing Committee on Professional Regulation to conduct such a review. This is the second time the Court has invited the ABA to consult on Minnesota's discipline system; the first came in 1981 and made the state one of the first jurisdictions to undertake such a review as part of a service that was then new to the ABA.

Since 1980, the ABA's Standing Committee has conducted 67 consultations, and accordingly brings a wealth of knowledge and insight into various ways to ensure "optimal fairness, effectiveness, transparency, accountability, and efficiency" in a discipline system.<sup>1</sup> The report for Minnesota contains a great deal of information and includes 25 recommendations for the Court's consideration to further optimize Minnesota's discipline system. The Court has opened a public comment period through December 30, 2022 and will conduct a public hearing on March 14, 2023.

As a longtime believer in continuous improvement, I have been excited to dig into the recommendations. The report is 88 pages long, so there is no way this brief column can do it justice. But I thought I would take this opportunity to highlight a few aspects of the report in case you were interested in learning more or submitting a comment.

## Consultation team and process followed

The consultation team for Minnesota included Justice Daniel Crothers of the North Dakota Supreme Court; Sari Montgomery, private respondent's counsel from Chicago, Illinois; Maret Vessella, chief bar counsel for the State of Arizona (which has a similar-sized lawyer population to Minnesota's); and Ellyn Rosen, regulation and global initiatives counsel at the ABA and reporter for the Standing Committee. Although the report is the product of the Standing Committee as a whole, these individuals spent a great deal of time interviewing people, reviewing thousands of pages of information, and thoughtfully bringing their experience to bear to assist Minnesota.

The report describes (in almost 20 pages!) Minnesota's discipline system as well as the roles and responsibilities of numerous stakeholders in the process. It includes descriptions of the

additional work of the OLPR beyond investigating and prosecuting discipline cases. The team dug into case files and reviewed dispositions and work product at all levels of the system. Further, the team sought input from a large contingent of stakeholders through interviews, both in person and virtually—complainants; respondents; respondent's counsel; the OLPR director, attorneys, and staff; Lawyers Professional Responsibility Board members (current and past); former OLPR directors; state bar leadership; district ethics committee chairs and investigators (lawyers and non-lawyers); Supreme Court discipline referees; probation supervisors; staff from Lawyers Concerned for Lawyers; and members of the bar generally. The length and detail of the report show the robust nature of the undertaking and the variety of perspectives and information sought and reviewed.

## Strengths and recommendations

The report identified several strengths of our system. Chief among them is the longstanding commitment of the Court to an effective, fair, and transparent system, demonstrated by means that include ensuring adequate funding and resources to support the system and supporting periodic reviews to optimize the process. The report commended Minnesota on the number of dedicated volunteers throughout the state who play an integral role in many parts of the system by devoting significant time and talent.

The report acknowledged the Lawyer's Board work on training and education for Board members and its commitment to diversity and inclusion, including its adoption of a Commitment Statement on Non-Discrimination and Inclusion. The report also highlighted the website and the annual report produced, both of which provide lots of information so that the public and others can gain insight into a complex system. Finally, the report noted the commitment and efforts of the Office to improve case-processing times, the Office's use of technology and movement toward a paperless office, and its flexible hybrid work environment. The report further noted the Office's commitment to accessibility, expressed by various means—such as the fact that the office is open and accessible to the public, the ease of locating information relating to ADA accommodations and processes, and the variety of ways that non-



English-language speakers may access interpreter services or documents in several languages. Although not meant to be all-inclusive, the strengths noted are core strengths of Minnesota's system and are part of our bedrock.

The 25 recommendations were categorized in several areas: structure, resources, metrics, public access and outreach, training, procedures, diversion, and sanctions. Although there is a lot in the recommendations, a clear theme of the report is the recommended value to Minnesota of streamlining and updating processes and, depending on priorities, allocating additional resources. The theme of the report really resonated with me. Minnesota has a complex system that is not easily summarized or understood by those who have not spent years handling attorney discipline cases. While process is very important, it is also important to continually ask whether the right balance is being struck, the right structure is in place, and changes in practice over time are being reflected in the Office's procedures and rules.

The report offers a lot of substantive advice and includes several significant rule change recommendations. For example, recommendation 19 advocates the adoption of a diversion rule.<sup>2</sup> This is something that the Board and Office included in its 2018 strategic plan as an area to explore—though we have not yet had an opportunity to do so. The idea is that instances of isolated and non-serious misconduct, which currently result in private discipline such as an admonition, are better handled by referral to programs that are helpful to the lawyer (and therefore their clients), such as law practice management courses, trust account schools or ethics programs, or lawyer assistance programs. Most of these referral programs do not exist in Minnesota (beyond the excellent Lawyers Concerned for Lawyers—specifically acknowledged in the report), but nonetheless, many jurisdictions have successfully adopted diversion programs in lieu of discipline after creating such programs. Many jurisdictions around the country have diversion programs and they are structured in a variety of ways.

Recommendation 21 concerns streamlining the admonition process. Minnesota has more private discipline, per the team's experience, than other similarly situated jurisdictions (80-110 admonitions plus several private probations annually). Some of this discipline would necessarily be impacted by the creation of a diversion program, if adopted, but the report also recommended changing how and who reviews admonitions to eliminate a complex and inefficient appeal process.

This recommendation touches on more than just process, however. It is about when a private sanction is appropriate. The report recommends that admonitions "should only be issued in cases of minor misconduct where diversion is not appropriate, there is little or no injury caused by the misconduct, and the admonition will result in little likelihood of repeated misconduct."<sup>3</sup> In related fashion, recommendation 23 suggests eliminating the sanction of private probation.<sup>4</sup>

In my experience reviewing cases from other jurisdictions, Minnesota issues admonitions or private probation in a lot of circumstances where public discipline would more likely be pursued elsewhere. Also, I'm concerned that we have lawyers with more private discipline than they should have. Adopting these recommendations would materially change how Minnesota approaches the distinction between private and public discipline, and in the Standing Committee's view, bring Minnesota more in line with other jurisdictions while fulfilling the primary purpose of discipline—protecting the public.

### Conclusion

The report contains a lot of additional recommendations, as you can no doubt glean from the fact that I have only discussed three. I also do not want to leave you with the impression that, because there are 25 recommendations, our discipline system is a fixer-upper. Because it is not, and the nature of the recommendations make that clear. As I wrote in last month's column, lawyer regulation is an interesting and dynamic area of law, and there is a lot of change and innovation happening throughout the country. 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. I'm very thankful to the Court for taking this opportunity to look beyond our borders and engage in this deliberative and transparent process. I hope you read the report. I hope you engage in the public comment process. And know that I would love to hear your opinion on the recommendations or other ideas you may have as we work together to optimize Minnesota's lawyer discipline system.

### Postscript/Author's note

As already noted at its online posting, my September 2022 column was an update of Martin Cole's July 2015 Bench & Bar column entitled "Dealing with Unrepresented Persons," available on our website at [lprb.mncourts.gov](http://lprb.mncourts.gov), as are all prior articles written by this Office. My failure to highlight that fact and provide the appropriate attribution was an error, which I regret. Thank you to Mr. Cole for graciously accepting my apology for this mistake. Also, to clarify any potential confusion caused by the statement, "The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel," Rule 4.3(d), MRPC, permits but does not require a lawyer to advise an unrepresented person to secure counsel. ▲

### NOTES

<sup>1</sup> American Bar Association Report on the Lawyer Discipline System for Minnesota (September 2022), on the Minnesota Judicial Branch website ([www.mncourts.gov](http://www.mncourts.gov)), with a link found at [www.lprb.mncourts.gov](http://www.lprb.mncourts.gov).

<sup>2</sup> Report at 71-74.

<sup>3</sup> Report at 78.

<sup>4</sup> Report at 81-83.