ABA Proposals for Change . . .

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On February 4 the ABA House of Delegates voted to adopt most of the recommendations made by an ABA commission for change in a model professional responsibility system. However, several recommendations, including one for a fully public discipline records system, were rejected.

Minnesota lawyers played important roles in shaping the ABA's final product. The Lawyers Board filed its comments with the ABA commission, which in turn modified its recommendations. The MSBA, after reports by its own committee (chaired by Janet Dolan) and a committee of the Hennepin County Bar Association (chaired by Judge Marianne Short and Bob Henson) sent well-informed delegates to the convention. Delegates Ted Collins, Ron Seeger, and Fred Finch all spoke on particular proposals.

Before summarizing the debate and results, it should be noted that many of the ABA's new recommendations are already law or policy in Minnesota. Structural recommendations, such as involvement of nonlawyers, ultimate responsibility in the Supreme Court, independence of disciplinary officials and counsel, and adequate funding and staffing have long prevailed in Minnesota. Procedural recommendations, such as advising a complainant of the progress of proceedings, providing for interim suspension in extreme cases and having appropriately simplified or complex procedures, depending on what is at issue, existed in Minnesota before the ABA recommended them. Unfortunately, many states still lack the basic structures, procedures, and funding for a modern and vigorous professional responsibility system.

The issue of whether discipline files should be fully available to the public generated the most controversy in Minnesota and at the ABA. Minnesota has evolved a nuanced system which is much more open than most, particularly in giving information to the complainant. Concern over unwarranted and irreparable harm to lawyers' reputations, from complaints that ultimately proved meritless or exaggerated, has been the basis for keeping records confidential — at least until there is good reason to believe that public discipline is warranted.

The Minnesota delegates helped defeat a recommendation that discipline counsel be removable only on a "for cause" basis. Independence of discipline counsel can be protected in other ways, without also protecting mediocrity in job performance.

What then remains of importance for Minnesota from the ABA proposals? Two small puzzles and one major, far-reaching and somewhat nebulous proposal.

The first puzzle is the following italicized language:

> That the American Bar Association adopts the following recommendations *with the understanding that each jurisdiction should determine for itself whether to accept or modify the individual recommendations.*

Apparently a state may count itself orthodox, while picking and choosing among ABA doctrines — since one of the doctrines is eclecticism.

The second puzzle is in the recommendation that:

The Court should adopt a rule providing that lawyer trust accounts selected at random *may* be audited without having grounds to believe misconduct has occurred and also providing procedural safeguards. (emphasis added)

Truly *random* audits (as opposed to *for cause* audits or audits *on suspicion*) cannot be done effectively on a discretionary basis. Random auditing of trust accounts at any level worth undertaking requires a major funding commitment. The only intelligible proposals would seem to be that (1) random audits *should* be done (and funded); or (2) random audits should not be done because the great expense entailed does not produce proportionate benefits. Minnesota has opted for the second alternative. The legislative history of the ABA proposal apparently suggests that the first alternative might have been intended, but "may" was used instead of "should".

The major remaining ABA proposal, or series of related proposals, is for what is called a "multi-door" approach to complaints, including a series of "diversion" programs. The ABA commission concluded, correctly, that many complainants are dissatisfied with dismissal of their complaints, and that some are dissatisfied with discipline as a response, because it provides no remedy or direct benefit to them. The ABA proposes to remedy this situation through adoption of a series of programs, some of which exist in Minnesota, others of which would be new. An ABA flow chart reprinted below perhaps best introduces these programs.

The general idea of doing something helpful and constructive, where possible, rather than discipline (which is sometimes seen as punitive) has a general appeal. Some of the recommended programs (fee arbitration, client security) already exist in some form in Minnesota or are being considered. However, some clarifications and reservations about the ABA proposals are in order.

First, there is the question of resources. The files which produce most dissatisfaction are the 80 percent of all complaints which are currently dismissed. The alternative here is not between something constructive and discipline, but between something constructive and doing nothing. However, the burden of doing something in a large number of these cases would involve enormous new resources.

Consider, for example, the fairly common complaint — now dismissed unless it is made repeatedly against the same lawyer — that in effect the attorney did a C- job in a marriage dissolution trial. Reviewing files, obtaining transcripts, interviewing relevant parties and trying to fashion a mediated response (if shortcomings are revealed) consumes enormous resources when projected on a statewide scale for all such complaints. Consider also the staffing of "Lawyer Practice Assistance" committees, which would teach subpar lawyers how to improve their lawyering skills. Where would the volunteers be found? How would the expenses be paid? Would resources not be diverted from other worthy projects? The ABA approach seems blithe: we "can't afford not to" undertake programs of unknown, indeed unestimated, cost.

A reservation regarding diversion programs stems from the fact that in Minnesota half of all files are opened without complaint by the client. Most of the complaints of adverse parties, other attorneys, judges, creditors, files opened on notice of a trust account overdraft, etc. do not fit well with the recommended programs.

Third, unlike other ABA proposals, several of these programs have never been tried even on a pilot basis in any sizable jurisdiction. It may be that a county or a district could test one program or another, before all such programs were adopted in a state or nationwide.

This is not to say that no new programs should be tried. On March 20 the Minnesota Supreme Court will hear a petition for a lawyer assistance program. In recent years the Court has adopted an overdraft notice program and created a Client Security Board. Minnesota has been, and should remain, in the vanguard of states willing to consider change. However, the diversion programs as a whole are not digestible.

In the coming months those interested in professional responsibility in Minnesota will, under the ultimate authority of the Minnesota Supreme Court, have to decide how to go about responding to the new proposals of the ABA. This will be a challenging endeavor, but Minnesota has been far enough beyond the national norm, and participated so vigorously in the debate before the ABA, that the challenge can be well met.

ABA's Proposed Multi-Door Approach to Complaints.