ACCESS TO DISCIPLINE FILES

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Which professional discipline records should be available to the public? When should they be available? What should be *publicized* — not merely available? These are among the important questions being considered by the ABA Commission on Evaluation of Disciplinary Enforcement. The commission will report its recommendations to the ABA House of Delegates in August 1991. The issues were also examined at the annual Minnesota professional responsibility seminar.

The consumer advocacy groups have urged the commission to recommend an open records system on two grounds: 1) a prospective client should be able to learn whether a lawyer has been disciplined, or is under investigation, so that an informed decision on retaining the lawyer can be made; and 2) accountability demands that the professional responsibility system's records be open so that the system's efficacy can be judged by the public.

Opponents of an open discipline records system argue that: 1) a lawyer's reputation can be permanently damaged by revelation that the lawyer is under investigation, when it is ultimately shown that the complaint was meritless; and 2) complainants will be reluctant to complain about lawyer misconduct in delicate matters if the complaints are public. A client aggrieved by a lawyer's breach of confidence would, for example, be reluctant to make the breach itself public.

Minnesota's lawyer discipline system has tried to balance these competing interests. Generally, the system has been more open than most other states' systems, and more open than other Minnesota professional discipline systems. If, for example, a person complains against a Minnesota judge, in almost all cases, the person is told only that "appropriate action has been taken" — whether the judge has been privately disciplined or not. While all doctor disciplines are public, discipline hearings are not and many private dispositions are reached which are in effect diversionary or probationary — rough parallels to private lawyers disciplines. Permanent records of private lawyer discipline are kept.

Some of the dangers perceived in an open records system have long existed in Minnesota, without notable adverse consequences. For example, notices of investigation and copies of private discipline are routinely furnished to complainants. The complainants cannot constitutionally be restricted from disseminating these documents, and yet they have rarely chosen to do so. The malicious complainant in Minnesota already has the wherewithal to smear a lawyer's reputation with the portions of the discipline file available to the complainant. That complainants have rarely done so is perhaps an indicator that they would not do so under an open records law. It is also perhaps an indication of the general lack of interest in small-scale lawyer discipline matters.

The levels of interest of the public and the media in lawyer discipline matters are very uneven.

Hearings on petitions for disciplinary action before Supreme Court referees are open to the public, but outsiders to the case seldom attend. Outstate newspapers prominently report public discipline proceedings against local attorneys. On the other hand, the *Star Tribune* and the metro TV stations feature stories on prominent attorneys and large-scale misconduct, but do not regularly report on other matters. The first petition against Mark Sampson was the subject of a news release sent to the *Star Tribune,* which did not result in an article. The *Pioneer Press* more consistently covers lawyer discipline matters.

There is a significant difference between that which is "public" and that which is "publicized." The Lawyers Board has maintained a media release policy since 1983. The most important aspect of this policy is that those petitions for disciplinary action which seek an attorney's suspension or disbarment are released to the media when filed with the Minnesota Supreme Court. The public should know, even before the final adjudication, that there is probable cause to believe a lawyer has acted so unprofessionally that his or her license should be in question.

The fulcrum on which most of the public-versus-private considerations are balanced is the Lawyers Board panels' probable cause system. This system provides, with certain exceptions, that allegations of misconduct against a lawyer cannot be made public unless, after hearing, a Board panel determines there is probable cause to believe public discipline is warranted. Exceptions to the probable cause system exist for situations in which the private hearing is not needed: for example, when the attorney waives the hearing; the attorney has been found in another forum to have committed the misconduct; the attorney is already on probation, and so forth. These exceptions have helped keep the system in good repute with the public, by allowing very prompt public filings of disciplinary petitions against attorneys like Flanagan and O'Hagan, who have clearly committed extremely serious misconduct.

Public confidence in the system is also promoted by the discretionary disclosure of investigations of matters that are already public in some other significant sense. Thus, the director will confirm investigation of a matter involving lawyer ethics which has already come to the public's attention.

Various parties have, from time to time, sought to compel disclosure of lawyer discipline records. The courts generally have quashed civil litigants' or state prosecutors' subpoenas for Board files. The rare federal grand jury subpoena that has been served for production of a Board file has generally been obeyed.

Controversies attend all systems governing access to official records. Consensus on the best answers to these questions has not emerged from among the various state discipline agencies.

It may be comfortable to conclude that Minnesota's relatively open lawyer discipline system balances the difficult interests nearly as well as possible. There is, however, a radical challenge to this view. The Oregon lawyer discipline system has had an almost completely open file policy for nearly 15 years. Oregon attorney discipline records are generally open; however, there are a few exceptions, such as investigation files while the investigation is pending. The press can obtain copies of all disciplines and complaints against any Oregon attorney, as can prospective clients. The sky has not fallen in Oregon as a result of its open records policy.

Any open records policy should have provisions for protecting highly confidential client matters and information regarding noncomplaining clients. For example, a trust account audit might disclose that the attorney had taken funds from Smith, who had not complained; Smith's financial information should not be unnecessarily publicized when Smith did not complain.

It may be that further tinkering with the current system would increase openness in circumscribed situations without jeopardizing reputations which are now protected. On February 1 the Minnesota Supreme Court will hear a Board petition for rule changes, including one providing that complainants receive copies of their lawyer's responses to their complaints. Perhaps the danger of disclosing what prove to be groundless complaints could be mitigated by disclaimers indicating that, at the investigatory stage, no conclusion has been drawn about the accuracy of the complaint.

Tinkering to solve particular problems can produce anomalies. Thus, to ensure that attorneys with dismissed complaints are treated for judicial appointments like attorneys with no complaints, disclosure of dismissed complaints was proscribed. The anomaly is that, if an investigation of an attorney has been publicly confirmed, the Director cannot disclose or confirm the ultimate dismissal of the matter.

The ABA Commission will ponder whether tinkering or wholesale change is appropriate for public access to lawyer discipline records. Minnesota can then consider whether its relatively open system should be opened still further.