

## LAWYERS' AND DOCTORS' DISCIPLINE

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A recent report notes, "The number of disciplinary cases brought before the Board has risen sharply . . . to 1,044 in the 1988-89 fiscal year." The "growing pains" associated with this rapid increase are also noted, as is the high "level of tension" between the board and professionals. The report examines such issues as procedural fairness, public information, delay in proceedings, subjects of discipline, and the "perception of unfairness" within the regulated profession.

The report is that of a task force appointed to review the practices of the Minnesota Board of Medical Examiners. It echoes, in some ways, the 1985 report of the Supreme Court Advisory Committee on Lawyer Discipline. Many interesting comparisons and contrasts between lawyer and doctor discipline systems can be found in the reports.

**The Boards and Directors.** Great responsibility for lawyer and doctor discipline systems is vested in the respective boards, the Board of Medical Examiners (BME) and the Lawyers Professional Responsibility Board (LPRB). The BME is established by legislative act (Ch. 147) and includes 30 percent public members. The current BME chair is a lawyer, as is the chair of the task force. The LPRB is established by the Supreme Court, and 40 percent of its members are nonlawyers.

There are executive directors in both systems, but the director in the lawyer system exercises far greater authority in case dispositions. Complaints against doctors can result in dismissal only upon direction of two board members and charges against doctors generally are filed only on agreement of three board members. In contrast, all initial dismissal and charging decisions affecting lawyers are made by the director. The Lawyers Board sets guidelines for the director to follow, particularly for summary dismissals. While the final disciplinary order against doctors is — subject to appellate court review — made by BME, neither the Lawyers Board nor the director have authority to issue orders affecting an attorney's license — the Supreme Court itself makes such orders, on stipulation or on a judge's recommendation.

**The Investigative Systems.** The Attorney General's Office, with a staff of investigators, investigates complaints against doctors. The great majority of complaints against lawyers are investigated by the district ethics committees, including lawyers and nonlawyers. Some doctors believe that having more physician involvement in investigations would be desirable.

**Complaints.** While the number of complaints against physicians are comparable to those against lawyers, the sources and subjects are quite different. Less than half of all complaints against physicians come from patients, while about 52 percent of complaints against lawyers come from clients. A stricter reporting law enacted in 1985 led to a great increase in complaints about doctors from third parties, such as pharmacists and other doctors.

Over 40 percent of complaints against lawyers allege neglect and noncommunication. In contrast, the most frequent complaint against physicians concerns competence, especially malprescribing. Various forms of dishonesty account for the most serious complaints against lawyers, who deal with words in an adversarial litigation system, and occasionally with people's money. Sexual contact with patients is one of the most serious offenses by physicians.

It appears that competence and quality control issues are more closely regulated among physicians than for lawyers. In addition to more disciplinary actions for such matters, there are medical institution committees, peer review mechanisms, and insurance controls to a degree not found among lawyers.

Chemical dependency, psychological difficulties, and other disabling conditions affect doctors and lawyers alike, and result in significant numbers of files. Both systems endeavor to treat such conditions as disabilities rather than as subjects of discipline.

Tax offenses are regulated by both professions, although for doctors the focus is on the *payment* obligation, pursuant to Minn. Stat. §270.72, while for attorneys the first obligation is to *file* returns. The Court is considering whether its longstanding policy on discipline for tax matters should be modified.

**Procedures.** As might be expected, lawyers seem to have obtained more due process rights than physicians. There is no lawyer counterpart to the broad, catchall provision of Minn. Stat. §147.091, subd. 1(k) which allows disciplinary action for "engaging in unprofessional conduct." Nor is there any lawyer counterpart to the provision that the medical "board may, without a hearing, temporarily suspend the license of a physician. . . ." Physicians cannot see an investigative report on complaints against them, but lawyers can see such reports and indeed the whole file, except for the work product.

The task force has recommended that the medical board increase the amount of notice given to physicians of the receipt of a complaint and the nature of possible allegations. The Data Practices Act applies to physicians but not lawyer discipline systems, and the identity of a complainant and certain witnesses may be withheld during investigation.

The general tone of discipline proceedings is probably more adversarial for lawyers than doctors. Doctors appear to be less inclined to litigate than attorneys. More importantly, because the subjects of physician discipline tend to concern disability and competence issues, rehabilitation and education are more often appropriate remedies. Time in the classroom is more apt to remedy a problem with malprescribing than a lack of basic integrity.

**Public Information.** On the issues of publicity and public access to information, the systems differ in several ways. The physician discipline system is more open in three respects. There are private disciplines for lawyers, but none for physicians. *All* physician disciplines are public, but not until after stipulation or a final evidentiary hearing. All physician disciplines except those relating to disability are the subject of periodic news releases. In other respects the lawyer discipline system is more open. No evidentiary hearing on charges against a physician is open to the public, nor are the charges themselves available. Charges of serious misconduct against lawyers are initially made privately, but if a Lawyers Board panel determines there is probable cause to believe public discipline is warranted, all subsequent proceedings are public. Media releases are issued on filing of a public petition for disciplinary action, if suspension or disbarment is sought. The Lawyers Board does not publicize the discipline decisions made by the Court, but the Court makes them available to the media.

There are significant differences between doctor and lawyer discipline systems. Some of these are attributable to the differing subject matters, others to historical factors. More significant than the differences are common general trends: increasing numbers of professionals, along with greater demands for public accountability, result in more complaints, more discipline, and more elaborate discipline programs. The openness of professional discipline is also increasing, both in procedures and in public scrutiny of these systems.

The 1985 Dreher Committee report was constructive for the lawyer discipline system. Both review committees heard from a broad variety of persons interested in and affected by professional discipline proceedings. Both boards showed a willingness to listen, to respond and to accept suggestions for improvement. Consensus was achieved for the recommendations of the medical board, while the Supreme Court needed to resolve only a handful of issues after the report of its task force.

Both task forces recommend that there be further periodic review. For lawyers, that review is already on the horizon. In 1991 the ABA McKay Commission will report the results of its nationwide study of lawyer discipline systems. Periodic open, public reviews of professional discipline systems are in the interests of both the public and the professions.