

**EVALUATION OF THE LAWYER DISCIPLINE SYSTEM
IN THE STATE OF MINNESOTA**

**FINAL REPORT
JUNE, 1981**

**SPONSORED BY THE
AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE**

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INTRODUCTION

In 1980, the Standing Committee on Professional Discipline of the American Bar Association initiated a national pilot project to evaluate, upon invitation, individual state lawyer disciplinary enforcement programs. In aid of the evaluation process, the Standing Committee developed 112 criteria adapted from the American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Lawyer Standards"¹) to be applied by the team during its evaluation of the discipline system. The Lawyer Standards reflect the best policies and procedures drawn from the collective experience of disciplinary agencies throughout the country, and were unanimously adopted by the House of Delegates.

The evaluation project involves sending a team of individuals experienced in the field of lawyer discipline to examine the structure, operation, practice and procedure of the discipline system to be evaluated. At the conclusion of its investigation, the team reports its findings and recommendations for the improvement of the system to representatives of the lawyer discipline agency on a confidential basis.

At the request of the Director and the Lawyers Professional Responsibility Board, a team comprised of Edmund N. Carpenter, II, a member of the Standing Committee; F. LaMar Forshee, a consultant in the field of lawyer discipline; Herbert M. Rosenthal, General Counsel for the State Bar of California; and Jeanne P. Gray and Robert S. Wells, Counsel for the American Bar Association National Center for Professional Responsibility, conducted an on-site

1 Standards for Lawyer Discipline and Disability Proceedings, c. 1978, National Center for Professional Responsibility and the American Bar Association.

evaluation of the Minnesota lawyer discipline system on April 29-30 and May 1, 1981.

In its evaluation, the team examined case records, observed office practices and procedures, reviewed all rules governing discipline in the state of Minnesota, and attended a disciplinary proceeding. In order to obtain an understanding of views about the discipline system, the team also conducted extensive interviews with individuals concerned with and affected by the disciplinary process. These included members of the Minnesota Supreme Court, lawyer and public members of the Minnesota Lawyers Professional Responsibility Board (hereinafter "the Board") and the District Ethics Committees, the Director and his staff, a former respondent, counsel for respondents, a complainant, lawyers not directly involved in the discipline process, representatives of the Minnesota State Bar Association, an Assistant Attorney General, the Chief Judge of the United States District Court for the District of Minnesota and the United States Attorney.

We are grateful to members of the organized bar and the judiciary for their frank discussion of problems and for their cooperation in this evaluation effort. We are especially grateful to the Director and his staff and members of the Board and the Supreme Court for their assistance and willingness to submit the discipline system in Minnesota to examination and constructive criticism.

The purpose of this report is to assist those individuals responsible for the administration of the discipline system by providing constructive suggestions and recommendations based upon our investigation and our collective knowledge and experience in the field of lawyer discipline. As previously noted, in its evaluation of the discipline system the team used the criteria adapted from the Lawyer Standards as a principal guide. Both the functional importance of those criteria and

the level of their implementation were considered by the team in the preparation of this report.

The team has limited its report to recommendations which may improve the discipline system and has generally excluded from discussion those areas of the system which are consistent with the Lawyer Standards and which are otherwise operating effectively. In certain areas, the team did not recommend modifications in practices despite their divergence from the Lawyer Standards because viewed in the context of the system these aspects operate effectively. The recommendations in this report have been divided into three sections: Structure and Staff; Practice and Procedures; and Intra-Agency Relations.

The following analysis and recommendations reflect the collective judgment of the team and bear the endorsement of the Standing Committee on Professional Discipline. The report is intended to provide guidance and assistance to those individuals committed to disciplinary enforcement and responsible for its operation in the State of Minnesota. The recommendations are not presented in any order of priority.

OVERVIEW

Minnesota is a large geographic state with a lawyer population of 11,000 and a citizen population of 4 million. Approximately 70% of the practicing lawyers are concentrated in Ramsey and Hennepin counties which include the twin cities of Minneapolis and St. Paul. The Minnesota State Bar Association is an active voluntary bar organization with a membership of approximately 7,000. Although the state bar entity does not participate directly in the disciplinary enforcement process other than nominating six members of the Board to the Court, District Ethics Committees comprised of members of the District Bar Associations perform a preliminary investigative function in the discipline system.

The Rules on Lawyers Professional Responsibility (hereinafter the "Rules") were promulgated in 1971 by the Supreme Court which created the Board on Lawyers Professional Responsibility as an arm of the Court to administer the Minnesota lawyer discipline system. The Rules reflected a structure and procedures consistent with many of the recommendations for effective enforcement developed by the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement. ²

In the creation of its statewide agency the Court appointed the Board to oversee the administration of the discipline system and to perform a probable cause adjudicative function by panel proceedings, and appointed the Director to perform the prosecutorial function, with District Ethics Committees comprised of volunteer members of the bar performing the initial investigative function. The Rules vested jurisdiction in District Ethics Committees to dispose of matters by dismissal, by the imposition of warnings, or by reference to the Director for the institution of formal disciplinary proceedings.

In 1977 the Rules were amended by vesting ultimate authority for the investigative and prosecutorial function with the Director and divesting the District Ethics Committees of jurisdiction to impose final dispositions. This centralization in functions, which is consistent with the Lawyer Standards, substantially increased the involvement of the Director in the disciplinary process. Although District Ethics Committees conduct approximately 80% of the investigations, all Committee

² Problems and Recommendations in Disciplinary Enforcement, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, c. 1970 American Bar Association.

recommendations for dispositions are reviewed by the Director who is authorized to investigate further, dismiss, impose a warning, or present evidence to a panel of the Board for a probable cause determination to file formal charges. The formal proceedings which are open to the public are conducted by Court-appointed referees, who file their findings of fact and recommendations for disposition with the Court for final action.

The team notes that the Minnesota discipline system is consistent with many of the fundamental and more innovative policies of the Lawyer Standards. The bifurcation of the prosecutorial and adjudicative functions within the unitary agency is reflected in the separation between the investigative and prosecutorial responsibilities of the Director and the District Ethics Committees and the judicial responsibilities of the Board and the referees. Although the combination of a volunteer system with professional staff in the investigative function is not the ideal contemplated in the Lawyer Standards, the team perceived a significant contribution by the District Ethics Committees which provide local bar involvement and augment the limited personnel staff resources.

The Court has demonstrated its commitment to disciplinary enforcement by asserting its authority for the organization of the system and by retaining jurisdiction for the final imposition of public discipline. The commitment to public involvement in the disciplinary process is reflected in the nonlawyer membership of 40% of the Board and 20% of the District Ethics Committees. We commend the utilization of a confidentiality rule which authorizes open proceedings to the public upon a finding of probable cause. This process enhances the credibility of the legal profession by providing an opportunity for the public to observe the operation of the discipline system and to assess the commitment of the profession to self regulation and the protection of the public.

The Minnesota discipline system is funded from registration fees assessed by the Court at \$45 per lawyer, which support the Board of Law Examiners, the Committee on Mandatory Continuing Legal Education and the Lawyers Professional Responsibility Board. Minnesota spends \$33 per lawyer on disciplinary enforcement, with a 1980 budget allocation to discipline of \$280,000.³ Although these budgetary expenditures indicate that Minnesota is consistent with jurisdictions of a similar lawyer population in support of the discipline system, we note that inadequate funding is a common problem in disciplinary enforcement.

Since 1971 there has been a substantial increase in the number of complaints and disciplinary dispositions in Minnesota, from 400 complaints and 16 disciplinary dispositions in 1971 to 916 complaints and 193 disciplinary dispositions in 1980. These statistics are presented at the outset to demonstrate the growth and the extent of the enforcement effort in Minnesota.

³ It may be of interest to the Court and the Board to note that the state of Wisconsin, with a lawyer population of 12,050, spends \$34.80 per lawyer with a budget allocation to discipline of \$334,358, the state of Washington, with a lawyer population of 9,500, spends \$50 per lawyer with a budget allocation to discipline of \$500,000, and the state of Maryland, with a lawyer population of 12,000, spends \$44 per lawyer with a budget allocation to discipline of \$405,842. These statistics are based on the 1980 Disciplinary Enforcement Survey sponsored by the ABA National Center for Professional Responsibility.

I. STRUCTURE AND STAFF

Staffing and Caseload

The office of the Director consists of a Director, three lawyers, four clerical assistants, one paralegal, and a part time law clerk. As previously noted, the investigative and prosecutorial functions are vested in the Director, who is assisted in the investigative function by the lawyer and public members of the 20 District Ethics Committees. In 1980 in excess of 900 disciplinary matters were processed, with all screening and docketing functions performed by the Director and 80% of the initial investigations conducted by the District Ethics Committees. Recommendations for disposition following investigation by the Committees are reviewed by the Director, who dismissed 50% of the matters and referred the balance to his staff for further investigation.

The team notes that adequate professional staff capable of taking prompt action in the investigation of serious charges of misconduct is essential to effective disciplinary enforcement. Inaction and delay in processing complaints contributes to a decrease in public confidence in the ability of the profession to protect society and results in potential harm to the innocent lawyer accused of professional misconduct. Our investigation revealed a dramatic increase in the number of complaints filed in the last two years, from 632 complaints in 1978 to 919 complaints in 1980 with a projection of 1,050 complaints in 1981. This sudden surge in disciplinary matters has burdened the staff and contributed to a significant increase in the backlog of pending cases. Of the 700 pending cases, it is significant to note that 179 cases were added to the backlog in 1980 and that 85 cases were added to the backlog during the first four months of 1981. This situation not only

creates dissatisfaction with the system by all who come into contact with it but may demoralize a staff which is unable to reduce the backlog despite substantial efforts in disposing of disciplinary matters. Delay in the complaint process is further reflected in 140 pending cases older than one year, which include one case filed in 1975 and two cases filed in 1976. In addition, the team learned there are four complex disciplinary matters which are not being actively investigated due to limited staff resources. The team finds the delay in the complaint process and the increase in the backlog of pending cases a serious problem in the Minnesota system requiring immediate action by the agency.

In analyzing the disciplinary mechanism to determine the causes of the increase in pending cases, the team notes that the 1977 Rule amendments increased the involvement of the Director in the investigative stage and Board panels in the hearing process by divesting the District Ethics Committees of the authority to impose final dispositions and by creating a right of appeal by a respondent to a panel of the Board from a warning by the Director. These factors in combination with the increase in the lawyer population were advanced by some individuals as the major cause of the increase in pending cases. Although we acknowledge these factors, the team perceives that the misuse of professional staff resources, the lack of delineation between administrative and lawyer functions, and the cumbersome disciplinary structure involving multiple hearings significantly contribute to delay in the Minnesota discipline system. These problems will be addressed in this report, and in formulating its recommendations, the team has focused on remedial measures to expedite the proceedings, to conserve staff resources, and to provide a mechanism for internal review and case monitoring.

The team perceived a problem with the types of functions being performed by counsel. Our investigation revealed that counsel often spend 30% of their time on administrative duties

involving calendaring for hearings, processing notices, providing administrative support for Board meetings, and coordinating administrative and clerical operations. The team recommends a bifurcation in the administrative and legal functions to limit counsel responsibilities to investigation and prosecution. To ensure this division and increase the opportunity for counsel to concentrate on their primary functions, the team recommends that an office manager be hired as part of an expanded staff to oversee office administration.

1. Recommendation: The team strongly recommends that the Board hire an office manager to provide administrative support for all matters pertaining to the adjudicative function and the operations of the Board, and to coordinate the clerical and administrative functions for the office. This will further separate the adjudicative from the investigative and prosecutorial functions and relieve counsel of ministerial duties.

2. Recommendation: The team recommends that job descriptions be developed to delineate between administrative/clerical and legal responsibilities which properly designate those functions among members of the staff.

The office of the Director includes one counsel position which rotates every eighteen months. Reasons advanced to justify this temporary counsel include the need for "new blood and different attitudes to avoid rigidity within the discipline process." The team does not believe that the rotation of one counsel, particularly the individual with the least experience, will significantly affect office policy. To the contrary, we do believe that frequent rotation militates against the development of investigative and prosecutorial expertise and unnecessarily burdens that individual with administrative

functions. The enforcement of professional ethical standards requires familiarity with a specialized subject of increasing substantive dimensions. This expertise is achieved through ongoing training, job performance, and experience in the disciplinary process.

3. Recommendation: The team strongly recommends that the rotating counsel position be made permanent to provide adequate opportunity for professional training to achieve substantive expertise. This recommendation is consistent with Lawyer Standard 3.8.

As previously noted the team was advised of four complex discipline cases which are not assigned to active investigation due to limited counsel resources. The team believes that this type of inaction is a disservice to effective enforcement. The optimum solution is to retain additional counsel or investigative assistance for these matters. However, we are mindful that additional staff at this juncture may require expenditures not feasible in the current fiscal budget. As an interim emergency measure, the team recommends the appointment of volunteer counsel possessing the requisite skill and experience to conduct a full and complete examination of these complex matters.

4. Recommendation: The team recommends the appointment of special prosecutors to assist the Director in the investigative and prosecutorial functions on a temporary basis to expedite the disposition of complex and old disciplinary matters.

Maximizing the utilization of staff resources requires limiting their functions to the operation of the lawyer discipline system. The team learned that the Director is

responsible for the annual processing and filing of reports concerning professional law corporations. Our investigation revealed that this administrative responsibility takes one clerical assistant two months to perform, which diverts that individual's efforts from the investigative and prosecutorial support function.

5. Recommendation: The team recommends that the Director be divested of the function of processing annual reports on professional law corporations, and that this responsibility be transferred to the Secretary of State.

Although our discussions revealed that District Ethics Committees function most effectively where assisted by local administrative staff to coordinate assignment and follow-up of the investigative files and to serve as a liaison to the Director, the team learned that many Committees do not have any staff support.

6. Recommendation: The team recommends that each District Ethics Committee obtain the services of an employee of the district bar association or a member of the Committee to provide the necessary administrative support to expedite the investigative function of the Committee.

Outside Employment

The team is aware that the Director has requested approval by the Court to teach a course in professional ethics at a local university. Lawyer Standard 3.8 provides that discipline counsel should be a lawyer admitted to practice in the jurisdiction and should not otherwise engage in the private practice of law, in order to avoid potential conflict in the discharge of disciplinary responsibilities.

7. Recommendation: Authorization for outside employment by the Director should be considered by the Court if the employment furthers the objectives of the lawyer discipline system and does not jeopardize the performance by the Director of his prosecutorial responsibilities.

Ethics Opinions

Authorization to issue opinions on questions of professional conduct by Rule 4(c) vests with the Board, which has published eleven formal opinions for the ethical guidance of the bar. However, the Director has assumed ongoing responsibility for providing informal ethics opinions to members of the bar on request. The Director responds to approximately 2,000 requests a year, and while only a few opinions are provided in writing, this service consumes approximately 500 hours of counsel time. The team believes this delegation has increased the case backlog by diverting counsel from performing their primary investigative and prosecutorial functions.

Lawyer Standard 3.17 provides that the discipline agency should not give advisory opinions about the provisions of codes of professional responsibility because it may place the agency in the position of seeming to fail to take action against conduct which it had suggested would be improper, because the evidence did not establish the fact situation assumed when the ethics inquiry was answered, or because of strong mitigating circumstances presented by the respondent.

The team acknowledges that the issuance of opinions for immediate ethical guidance serves a valuable educational function for the bar and promotes dialogue with the disciplinary agency. Although the team supports this service, we conclude that the priority function of the Director should be the

prosecutorial and investigative functions, and that the issuance of ethics opinions should not be delegated to the Director because it impairs and jeopardizes his primary functions.

Besides the reasons which support Lawyer Standard 3.17, the current staffing patterns and case processing responsibilities suggest that another entity be assigned the ethics opinion function. However, if the Director is required to continue this service, the team recommends additional staff be employed to assist in administering this task and recommends that the facts and the opinion for each inquiry be logged. Further, we recommend that the informal opinions be published in digest format in the bar publication. While this may initially increase the burden on counsel, the periodic publication of recurring ethics opinions should ultimately reduce the number of inquiries as the bar becomes educated to their ethical obligations.

The team also recommends that a specific disclaimer accompany each ethics opinion noting that the applicant is being provided only with resources and authority from which he may draw his own conclusions. This disclaimer procedure will militate against potential situations which might otherwise appear to compromise the prosecutorial authority of the Director.

8. Recommendation: The team strongly recommends that the Director not perform the ethics opinion function, and that this service be provided by another entity designated by the Board or the Court.

The team offers the following alternatives for consideration.

- (8.1) Create a committee of the Supreme Court to furnish rapid opinions on questions arising in litigation and other related matters. This is similar to the Advisory Committee on Litigation Ethical Problems provided by the Delaware Supreme Court.
- (8.2) Constitute an ethics panel within the Board to provide ethics opinions on a rotating basis.
- (8.3) Empower a committee of the Minnesota Bar Association to provide written ethics opinions upon request.
- (8.4) If the Director does retain the ethics opinion function, provide additional staff to assist in administering this duty.
9. Recommendation: The team recommends that the facts and opinion issued for each ethical inquiry be recorded by the entity providing the information and published periodically in digest format in the bar publication.

Training

The team learned that training for the Director and counsel staff has included attendance at meetings of the National Organization of Bar Counsel, and workshops and conferences sponsored by the National Center for Professional Responsibility. We commend the support of staff participation in these educational activities, including the Director's faculty participation at workshops. Further, the team acknowledges and commends the substantial efforts of the Director to educate the bar about the lawyer disciplinary process by publishing monthly articles in the bar publication and by lecturing at bar functions.

However, as the result of several interviews and its own observations, the team recognized a lack of internal training for members of the disciplinary system. Representatives of the bar and members of the agency appeared to recognize the need for additional educational programs and expressed a willingness to participate. Our investigation revealed that some panel members were unaware that the discipline rules provide the right of a respondent to appeal a warning to a panel of the Board. Also, there appeared to be a great potential for inconsistency in the manner in which panel proceedings are conducted. Another individual experienced in the discipline process perceived a need for Board members to receive training on the difference between the enforcement of ethical standards and criminal violations.

We note that the current increase in recommendations for formal discipline will require those responsible for the adjudicative functions to develop specific knowledge and expertise to properly discharge their duties. Further, in order to ensure consistent high performance by counsel and members of the District Ethics Committees, internal training courses in enforcement practices, procedural manuals and other training devices are essential. Those responsible for the system must make an affirmative commitment of time and resources to innovative training for those directly involved in the disciplinary system as well as those affected by it.

10. Recommendation: In general terms, the team strongly recommends that the agency devote a maximum effort consistent with its resources to the planning, preparation and execution of an instructional course in disciplinary enforcement for new and continuing members of the Board, the District Ethics Committees, and the professional discipline staff, and that cooperative efforts

with the Mandatory Continuing Legal Education Program be implemented to inform lawyers in Minnesota concerning the operation of the system to prevent disciplinary problems in the future.

The following is specifically recommended for consideration:

- (10.1) Develop and execute an annual statewide disciplinary workshop with participation by the Director and counsel staff, the Court, the Board, and the District Ethics Committees to discuss problems relating to the enforcement process in Minnesota. This session should focus on a review of the disciplinary rules, an analysis of possible rule changes, and a discussion of problems in disciplinary enforcement and developments in the field. Substantive workshop materials should be prepared to serve as a reference. In an effort to minimize costs, this session may be held in conjunction with the annual meeting of the Minnesota Bar Association. Similar workshops sponsored by the disciplinary agencies in Florida and Hawaii have been successful.
- (10.2) Develop a manual of internal procedures to be used by members of the panel during probable cause proceedings. This will ensure consistency in the proceedings and provide guidance to members in the proper discharge of their judicial responsibilities.
- (10.3) Provide each new Board member with instructions and practical training which clearly define their adjudicative responsibilities. This training should include a lengthy interview with the

Chairman of the Board, the Director, and a detailed review of the disciplinary rules and the manual for panel proceedings.

- (10.4) Adopt statewide the District Ethics Committee Handbook compiled by the Director to ensure consistency in the investigative function performed by the Committees. The team notes that the Director has offered to conduct training sessions for District Ethics Committees and strongly advocates that all Committees participate in this training effort.
- (10.5) Develop and execute an internal training program to develop the trial skills of inexperienced staff counsel. Practical training manuals addressing such matters as the preparation of an effective disciplinary prosecution, the application of rules of evidence, examination procedures to verify the accuracy of lawyer accounts, and recurring substantive questions of law in the field of disciplinary enforcement should be prepared. The team urges the Board and the Court to provide the Director with resources to support this training.
- (10.6) In cooperation with the Continuing Legal Education Program, develop innovative preventative programs for the bar addressing such topics as law office management, caseload management, and other topics designed to minimize the probability of unintentional misconduct. The Board is an appropriate entity to provide this training based on its detailed knowledge of problems in professional conduct.

- (10.7) In order to provide guidance to the bar, publish periodically in the bar publication the facts and dispositions of private discipline, sanitized to preserve confidentiality.

Educating the Public

A necessary function of any discipline system is to educate and inform the public and the bar about the existence and the availability of the lawyer disciplinary process. A theme which recurred during the interviews was a lack of knowledge by the public concerning the disciplinary process. One witness involved in a panel proceeding did not know that the filing of formal charges requires a further proceeding before a referee.

The team is concerned about the failure of the agency to provide a brochure describing the grievance process. Our investigation revealed that approximately 30% of the individuals who contact the agency about the complaint process never file formal complaints. The team believes that the public is not sufficiently knowledgeable about the disciplinary process, and views the failure to inform and educate the public about the operation and availability of the enforcement program as a deficiency in the Minnesota discipline system. Lawyer Standard 3.16 notes that public confidence in the disciplinary system will be increased by wide publication of the availability and operation of the discipline system.

11. Recommendation: The team strongly recommends a joint effort by the Board and the Director in the development of a campaign to disseminate information about the disciplinary system to the public, as well as the bar, which reflects a posture of mutual concern and assistance for both the client and the lawyer.

The following is specifically recommended for consideration:

- (11.1) Develop a brochure describing the disciplinary process for distribution to the public upon inquiry.
- (11.2) Issue press releases to publicize the appointment of public members to the Board and the District Ethics Committees to enhance the credibility of the disciplinary process.
- (11.3) Offer press releases on public discipline imposed and assistance in drafting feature articles about the disciplinary system (explaining its operation and the location of its office) to the Minnesota newspapers. Monthly articles published by the Director in the bar journal could be utilized for this purpose.
- (11.4) Solicit speaking engagements in which nonlawyer members of the agency address citizen groups on the structure and operation of the discipline system.

II. PRACTICE AND PROCEDURES

Hearing Process

Our examination of the disciplinary proceedings revealed a multiple stage hearing process providing dual hearings at which the Director and the respondent may introduce evidence and witnesses in an adversary proceeding. Pursuant to Rule 9, one of these hearings is a probable cause proceeding by a panel of the Board. Upon a finding of probable cause to file formal

charges with the Court, the matter is referred for formal proceedings before a referee, who submits findings of fact and recommendations to the Court for final disposition. This duplication of the adjudicative function, which in practice provides two adversary hearings prior to the final disposition of public discipline, is burdensome for the complainant, an expense for the discipline system, and a substantial drain on limited counsel resources. Although some individuals expressed the view that these procedures are needed to provide a check on prosecutorial authority and to assure due process to the respondent, the team concludes that the multiple stages encompassed in the hearing process are a major factor contributing to the delay in dispositions and exceed the requirements of due process. We note that an individual charged with a capital offense is entitled to only indictment by a grand jury and one trial.

The Lawyer Standards contemplate a hearing process which provides a probable cause review of the recommendation of counsel for disposition by the chairman of a hearing committee and formal disciplinary proceedings before a hearing committee, rather than a referee. While we recognize that a restructuring of the discipline system may not be feasible, we believe that the proceedings would be streamlined and delay would be minimized by the adoption of a hearing process consistent with the Lawyer Standards.

- (12.1) Recommendation: The team recommends the adoption of a rule in accordance with Lawyer Standard 8.11 which provides that the recommendation of counsel for disposition of a matter should be reviewed by the chairman of a hearing committee designated by the board, who may approve, modify, or disapprove the recommendation, or direct that the matter be investigated further. In addition, the team recommends the adoption of a rule in accordance

with Lawyer Standard 8.26 which provides that upon the filing of formal charges, the Board should assign the matter to a hearing committee for formal proceedings.

If it is not possible to restructure the system at this time, then as a minimal alternative the team makes the following recommendations.

- (12.2) Recommendation: The team strongly recommends that the "probable cause" proceeding be limited to the submission of written evidence supplemented by oral arguments and briefs, but precluding the adversary presentation and cross-examination of witnesses. This streamlined procedure preserves the adjudicative review of prosecutorial authority by the Board while reducing duplication and delay in the disciplinary process. This procedure is consistent with Lawyer Standard 8.11 which provides a probable cause review of counsel's recommendation for formal charges by the chairman of a hearing committee.

In support of its recommendations to limit panel proceedings to a probable cause determination, the team recommends amendment of Rule 9(e) which authorizes the panel after hearing to dismiss, impose a warning, issue a private reprimand, or recommend a petition for disciplinary action which may include a recommendation as to the ultimate disposition. The team believes that the jurisdiction of the panel to issue a private reprimand from which there is no right of appeal by the respondent and to make a recommendation as to the ultimate disposition have contributed to an expansion of the "probable cause" proceeding by encouraging the submission of substantial evidence by the Director and the respondent to achieve the desired disposition.

- (12.3) Recommendation: The team recommends that Rule 9(e)(3) be amended to eliminate the sanction of private reprimand in order to reduce the need for an adversary panel proceeding. This also alleviates the potential due process challenge to the imposition of discipline which denies a respondent the right to a judicial determination of the misconduct. The retention of a warning provides a sufficient sanction for minor misconduct which is consistent with Lawyer Standard 6.10.
- (12.4) Recommendation: The team strongly recommends that Rule 9(e)(4) be amended to divest panels of the authority to make recommendations as to ultimate disposition. The panel adjudicative function should be limited to a probable cause finding to file formal charges. By eliminating the authority of a panel to recommend ultimate disposition, the need to engage in an adversary proceeding at the probable cause stage is reduced.

The duplication problem is further exacerbated by evidentiary hearings conducted by some of the District Ethics Committees charged with investigative responsibilities. Appearances by the complainant and the respondent are often required thereby increasing the burden for those individuals and creating delay in reporting Committee findings and recommendations to the Director. The team believes that investigations conducted by the Committees should be limited to written and telephonic communication and personal interviews. The team notes that a review and investigation by the Director and District Ethics Committee, a limited "probable cause" proceeding before a panel of the Board, and a de novo hearing before a referee of the Court afford significant due process protection to the respondent.

- (12.5) Recommendation: The team recommends that Rule 7 be modified to prohibit investigative evidentiary hearings before District Ethics Committees.

The team believes that delay in the proceedings can be reduced further by limiting the size of panels. Rule 4(d) provides for a minimum of four member panels consisting of not less than three lawyer and one nonlawyer members. It is often difficult to find an acceptable time for this many individuals to meet for proceedings. The team learned that one panel took six months to reconvene a quorum. Lawyer Standard 8.11 recommends that a chairman of a hearing committee perform the probable cause review function. The team recommends that hearing panels consist of two lawyer and one nonlawyer members, which is consistent with Lawyer Standard 3.16. A reduction in the size of panels will allow the Board to constitute additional panels from its membership and increase the opportunities for proceedings.

- (12.6) Recommendation: The team recommends that Rule 4(d) be amended to provide three member panels, composed of two lawyer and one nonlawyer members, with a lawyer member serving as chairman. This recommendation is consistent with Lawyer Standard 3.16.

Delay may also be minimized by developing a calendar fixed one year in advance which assigns a specific day(s) each month for individual panels to convene hearings. Advanced calendaring should increase participation and preparation by panel members. The current procedure of scheduling hearings on Fridays should be refined to reflect fixed panel assignments based upon the volume of the cases and their anticipated duration.

(12.7) Recommendations: A fixed calendar assigning a specific day(s) each month for individual panels to convene hearings should be developed to facilitate the hearing process.

Our discussions revealed a severe problem in scheduling appropriate courtroom facilities to convene panel hearings. The disciplinary enforcement agency is a significant part of the judicial system which should be afforded adequate facilities for the prompt discharge of its judicial functions.

(12.8) Recommendations: The team recommends that the Court provide adequate facilities on an ongoing basis suitable to conduct disciplinary proceedings.

Warnings

The team perceives a problem with a system that allows a panel of the Board, upon a finding of probable cause, to impose discipline in the form of a warning and a private reprimand against a respondent who is denied any right of appeal. The power to impose discipline should be subject to the accused lawyer's right to request that a formal disciplinary proceeding embracing all due process protections be instituted against him so that the charges may be judicially determined. The team recommends two changes in the rules: (1) elimination of the sanction of private reprimand by a panel which denies any right of appeal to the respondent (see Recommendation 10.3); and (2) review of a warning by a referee upon application by a respondent.

A disciplinary agency should have a procedure to process misconduct not sufficiently serious to warrant the institution of a formal disciplinary proceeding. Such a procedure conserves the limited personnel and financial resources of the

agency. However, the imposition of a private sanction for minor misconduct should be subject to the right of the respondent to request a judicial determination of the misconduct.

Rule 8 provides that a lawyer may refuse the warning and demand that the Director present formal charges to a panel of the Board. However, the review by a panel is limited to a probable cause proceeding from which the respondent has no right of appeal. Lawyer Standard 8.17 provides that discipline counsel should notify the respondent in writing of the proposed informal admonition and of his right to demand in writing that the matter be disposed of by a formal proceeding. If the respondent does not consent to the admonition, formal charges are instituted before a hearing panel to determine the allegations of misconduct. The team believes that a warning should constitute private discipline for minor misconduct, subject to the right of a respondent to request a formal disciplinary proceeding to adjudicate the propriety of the conduct upon which the warning is predicated. We also recommend that the warning be characterized as an informal admonition in accordance with Lawyer Standard 8.17.

13. Recommendation: The team recommends that Rule 8(c) be amended in accordance with Lawyer Standards 8.17 and 8.18 which provide that a warning constitutes private discipline for a finding of minor misconduct. If the respondent requests a judicial determination of misconduct, the warning should be vacated and the proceeding determined by a probable cause hearing before a panel and an adversary hearing before the referee.

Appeal by Complaint

Rule 6(c) provides that a complainant dissatisfied with the disposition may appeal his complaint to the Attorney General,

who, pursuant to Minnesota Statutes 481.16, may investigate and petition the Board for further investigation or sanctions necessary to protect the public. The Consumer Division of the Office of the Attorney General receives approximately 40 complaints per year, the majority of which are disposed of by explanatory letter to the complainant. Neither the rule nor the existing statute prescribes the procedures for processing these complaints nor establishes the standard of review. The team advocates the adoption of pending legislation to divest the Attorney General of this function, and recommends the development of a formal review mechanism within the discipline system to process these appeals.

14. Recommendation: The team recommends that the Attorney General be divested of the review function for complainant appeals and that these appeals be performed by the Board and the Court to assure the public that their matter has been given the proper attention.

The team specifically recommends adoption of the following procedures:

- (14.1) The adoption of a rule similar to Lawyer Standard 8.15 which provides a complainant dissatisfied with the disposition following investigation to appeal the matter to a panel of the Board which may approve, modify or disapprove the disposition, or direct that the matter be investigated further.

- (14.2) The adoption of a rule consistent with Lawyer Standard 8.16 which provides the complainant with a further appeal by petition for review to the Court, which review will be granted only upon a prima facie showing that the agency acted arbitrarily, capriciously or unreasonably.

Evidence of Prior Discipline

Our investigation revealed that Rule 19(b) specifically allows the Director in a pending matter to introduce in evidence the record of prior discipline. Evidence of prior discipline is relevant and material to a determination of the degree of discipline to be imposed for conduct which is the subject of the pending matter. However, except in circumstances involving impeachment of the lawyer or where the prior discipline is a necessary element of proof of the present charges, basic considerations of due process require that the introduction of such evidence be withheld until there is a determination of misconduct, at which time the evidence of prior discipline may be received by the panel or referee on the question of sanctions.

15. Recommendation: The team recommends that Rule 19(b) be amended in accordance with Lawyer Standard 8.39 which provides that prior discipline of a respondent may be disclosed to a hearing body after a finding of misconduct in the present matter for the sole purpose of determining the degree of discipline to be imposed.

Rotation of Board Membership

The proper rotation of membership of the disciplinary agency is an important factor in effective enforcement. While frequent rotation may result in a lack of procedural and substantive expertise, infrequent rotation may result in rigidity. The team notes that the appointment of new members produces an opportunity for different views, new approaches, and a reevaluation of the system. This process of reevaluation often results in periodic improvement as less effective approaches are replaced.

In analyzing the rules, the team notes that the limitation on individual member service to two consecutive three-year terms does not apply to the Chairman, who potentially may serve twelve consecutive years on the Board. In addition, some individuals interviewed expressed strong support for limiting board membership to one three-year term in order to provide an opportunity for meaningful contribution and participation in the system by the growing number of young lawyers admitted to the bar. These individuals expressed concern that the discipline system is perceived as less representative of the bar it supervises because of its composition of older members of the bar.

The team recognizes the desirability of retaining those members who in their first term demonstrate outstanding capability, in order to assume leadership responsibilities and the training of newly appointed members during their second term. However, the team does not favor the service of any individual member beyond six consecutive years.

16. Recommendation: The team recommends that Rule 4(a) be amended in accordance with Lawyer Standard 3.4 to provide that members of the Board including the Chairman serve for fixed terms, not to exceed two three-year terms.

Investigative Subpoena Power

Subpoena power is an essential element in disciplinary enforcement which should be available to disciplinary counsel and the respondent during the investigative stage of the proceedings. Without it, investigation of complaints of misconduct is limited to the evidence voluntarily produced.

In analyzing the Rules, the team notes that the Director does not have the right to an investigative subpoena, to take

depositions, or to present a petition for contempt for failure to comply until a panel has convened a probable cause proceeding. The team believes that the absence of these powers creates delay in dispositions and wastes the limited personnel resources of the agency which may be prevented from disposing of a matter on the merits prior to the probable cause proceeding.

17. Recommendation: The team recommends the adoption of a rule which provides the Director as well as the respondent with the right to subpoena evidence, to take depositions, and to present a petition for contempt for failure to comply during the investigative stage prior to the probable cause proceeding. This is consistent with Lawyer Standard 8.6.

Complaints Against Disciplinary Agency Members

During its investigation, the team learned that there are no established procedures for processing complaints of professional misconduct filed against the Director and counsel staff, and members of the District Ethics Committees and the Board. The team advocates the adoption of a rule which affords due process to agency members subject to investigation. The team recommends that complaints against members of the District Ethics Committee be referred to the Director for investigation and reference in accordance with the established disciplinary process; and that complaints against the Director and his staff and members of the Board be referred to the Court for appointment to a special prosecutor for investigation and reference for proceedings before a referee as appropriate. This procedure will ensure an effective separation of the prosecutorial and adjudicative functions.

18. Recommendation: The team recommends the assignment of volunteer counsel by the Court to perform the investigative and prosecutorial functions and referees to perform the adjudicative function relating to complaints filed against the Director and his staff and members of the Board. Complaints filed against members of the District Ethics Committee should be investigated by the Director and proceed, as appropriate.

Disposition Following Investigation

In analyzing the review process of the Director's investigations and recommendations for disposition, the team notes that Rule 8(c) allows the Director to dismiss a complaint or impose a warning without a review of his recommended disposition by any member performing an adjudicative function. Lawyer Standard 8.11 provides that the recommendation of discipline counsel for disposition of a matter should be reviewed by the chairman of a hearing panel, who may approve, modify, or disapprove the recommendation, or direct that the matter be investigated further. This review process preserves elements of bifurcation within the unitary system, because the recommendation of counsel is subject to review and approval by a representative of the adjudicative body. It also promotes understanding by members of the agency about the nature and extent of the caseload and the underlying facts which serve as the basis for dismissals, the imposition of warnings, and the determinations to file formal charges.

19. Recommendation: The team recommends the adoption of a rule which provides that the recommendation of the Director for disposition of a matter should be reviewed by the chairman of a hearing panel. This is consistent with Lawyer Standard 8.11.

The team questions whether the rules adequately deal with the situation created when there is a disagreement between the Director and a panel of the Board concerning a recommendation for disposition following investigation. Rule 9 does not provide the Director with an appeal from a disposition by the panel in the event of a conflict. Lawyer Standard 8.12 provides that, in the event of disagreement on disposition between disciplinary counsel and the chairman of a hearing committee, counsel may appeal to the chairman of another hearing committee for review and final decision.

20. Recommendation: The team recommends the creation of a Review Committee within the Board to review on appeal the recommendation for disposition by the Director in the event of a disagreement between the Director and a panel of the Board. Members of the panel who participated in a recommendation in conflict with the Director should be disqualified from service on the Review Committee for that specific matter.

Disability Status

The lawyer discipline system should concern itself with the disabled lawyer who endangers the interest of clients, even if no misconduct has been established. The Lawyer Standards dealing with lawyers incapacitated by reason of mental illness, senility, or addiction to drugs or intoxicants provide alternatives to a judicial determination of disability with suspension as the only possible sanction. To be effective, such proceedings should occur within the disciplinary process and should allow discipline counsel to petition the Board for the right to have the respondent undergo a medical examination for a determination of disability.

If the lawyer's disability has been judicially determined or is admitted, there is no need for a probable cause proceeding by a panel before the Court issues an order transferring the lawyer to disability inactive status. If a respondent in a disciplinary proceeding alleges that he is unable to defend himself because of present disability, he should immediately be transferred to disability inactive status to protect existing and prospective clients. A proceeding to determine whether the respondent is in fact disabled should be initiated immediately.

It is important that incapacity not be treated as misconduct, to clearly distinguish willful conduct from conduct beyond the control of the lawyer. An immediate transfer to inactive status recognizes that incapacity is not misconduct and provides the agency with sufficient flexibility to encourage the development and the utilization of alternative programs designed to address the needs of the incapacitated lawyer. Another reason for the implementation of rules transferring lawyers to disability inactive status is a lack of due process which may occur with the institution of standard disciplinary proceedings against a lawyer alleged to be mentally or physically disabled.

21. Recommendation: The team strongly recommends that the Court adopt a rule consistent with Lawyer Standard 12 which provides for the transfer to disability inactive status of any lawyer incapacitated by mental illness, senility, or addiction to drugs or intoxicants, until such time as the incapacity no longer exists.

Conviction of A Crime

A recurring theme in our discussions was the need to streamline the disciplinary process. The present procedures

require the Director to present a felony conviction of a lawyer to a panel for a probable cause determination prior to filing a petition for interim suspension with the Court. A judgment of felony conviction should constitute sufficient probable cause to file a petition for immediate interim suspension with the Court. The conviction should be deemed conclusive evidence that the lawyer committed the crime, and the sole issue in any hearing regarding the conviction should be the nature and extent of the discipline to be imposed. Lawyer Standard 9 provides that counsel should file a proposed order for interim suspension predicated upon the conviction of a lawyer for a "serious crime". Unless the lawyer establishes a jurisdictional or due process deficiency, the Court should immediately suspend the respondent and direct discipline counsel to proceed with formal disciplinary proceedings based upon the conviction. The standard of "serious crime" is recommended to provide the Court with flexibility in determining the types of crimes which warrant interim suspension.

Our investigation also revealed that the clerks of the Minnesota courts are not required by rule to notify the Director when a lawyer is convicted of a crime. The team believes that the Board and the Director should formalize communication with the court clerks and local prosecutors to ensure that criminal convictions, arrests, and dismissals with respect to offenses which would otherwise constitute grounds for lawyer misconduct are reported to the discipline agency.

(22.1) Recommendation: The team recommends that Rule 17 be modified to eliminate the probable cause proceeding and to authorize the Director to file a petition for immediate interim suspension predicated upon the conviction of a lawyer for a serious crime with the court. This recommendation is in accordance with Lawyer Standard 9.

(22.2) Recommendation: The team recommends that Rule 17 be amended in accordance with Lawyer Standard 9.1 by requiring the clerks of the courts to send a certified copy of the judgment of conviction of a lawyer to the Director for appropriate disciplinary action. Further, the discipline agency should encourage court clerks and local prosecutors to report arrests and dismissal of charges against lawyers for offenses which may constitute professional misconduct.

Discipline on Consent

A procedure for discipline on consent protects the public from further misconduct by a lawyer who otherwise might continue to practice until a formal proceeding is concluded, and relieves the discipline agency of the expensive necessity of prosecuting a formal proceeding. Our evaluation revealed extensive use of stipulations by the Director which we commend. However, in reviewing the procedures for discipline on consent, the team notes that Rule 10 requires the Director to file a petition for disciplinary action together with the lawyer's admission of charges with a panel for review and reference to the Court. The team believes that review by a panel is an unnecessary procedure and that the admission should be deemed sufficient probable cause to file formal charges directly with the Court.

23. Recommendation: The team recommends that Rule 10 be amended to authorize the Director to file a petition for disciplinary action together with the lawyer's admission of charges or tender of conditional admission directly with the Court for its consideration and approval. In the event that the proposed stipulated disposition is disapproved by the Court, the matter should be

referred to a panel for formal proceedings. This recommendation is consistent with Lawyer Standards 11.1 and 11.2.

Jurisdiction

The team identified three areas relating to jurisdiction which have not been formally addressed by Court rules.

There is no rule which provides the discipline agency with jurisdiction over specially admitted lawyers. Lawyer Standard 4.2 requires all lawyers specially admitted to practice in a state for a limited purpose to be subject to the jurisdiction of the agency in the state for any misconduct related to that purpose. This Standard recognizes that the state in which the lawyer is specially admitted cannot rely exclusively upon the home jurisdiction of the lawyer to enforce ethical standards. Further, the jurisdiction in which the rules of conduct were violated will have a greater interest in pursuing the matter and should be provided with the necessary jurisdictional authority to do so. Though this is not perceived as a problem because the Director believes he has the jurisdiction to proceed in such matters, the team recommends the adoption of an appropriate Court rule to vest jurisdiction.

(24.1) Recommendation: The team recommends the adoption of a rule comparable to Lawyer Standard 4.2 which subjects lawyers specially admitted to practice in Minnesota to the jurisdiction of the Minnesota Supreme Court.

Protection of the public is assisted by a rule which provides that the lawyer discipline and disability proceedings should not be subject to any statute of limitations. Lawyer Standard 4.6 notes that regardless of the time of its occurrence, the conduct of a lawyer is always relevant to the question of fitness to practice.

(24.2)

Recommendation: The team recommends that the Court adopt a rule which provides that lawyer disciplinary proceedings are not subject to any statute of limitations.

Final Suspension

Rule 15(a)(3) does not require that an order of suspension specify the minimum period of time which must elapse before a lawyer may seek reinstatement. We learned that the Court frequently imposes indefinite suspensions, which do not distinguish between acts of misconduct of differing severity. Lawyer Standard 6.3 notes that the duration of the suspension should reflect the nature and extent of the lawyer's misconduct and any mitigating or aggravating circumstances involved.

25. Recommendation: The team recommends that Rule 15 be amended to provide that suspension be imposed for a specified period of time in accordance with Lawyer Standard 6.3.

Burden and Standard of Proof

The Rules do not provide that the burden of proof is upon discipline counsel, nor do they indicate the standard of proof which must be established to sustain formal charges of misconduct. Although the Court has held by decision that the Director has the burden to prove formal charges of misconduct by "clear and convincing evidence," the team recommends that these standards be adopted by formal rules to provide notice to all parties.

26. Recommendation: The team recommends the adoption of Court rules similar to Lawyer Standards 8.38 and 8.40 which provide that the burden of proof should be upon discipline counsel and that formal

charges should be established by "clear and convincing evidence".

Proposed Amendments to Rules

The team acknowledges and advocates the adoption of three proposed amendments to the Rules on Lawyers Professional Responsibility recommended by the Lawyers Professional Responsibility Board.

- (27) Recommendation: The team recommends the adoption of proposed Rule 25 which is consistent with Lawyer Standards 5.1 and 13.3.

More specifically, the team recommends adoption for the following reasons.

- (27.1) Proposed Rule 25 provides that failure of the respondent to cooperate with the disciplinary agency in the course of an investigation constitutes professional misconduct for which discipline may be imposed. This Rule will assist those responsible for the investigative and prosecutorial function and expedite the disposition of matters.
- (27.2) Proposed Rule 25 also requires any lawyer subject to investigation to comply with the request of the District Ethics Committee, the Director and the Board to furnish designated papers, documents, or tangible objects. The team recommends that the proposed Rule be expanded to require lawyers to maintain complete financial records concerning client funds in their possession and to produce evidence of annual compliance with the rule. This provision will

provide a more powerful deterrent to client fund misuse. Lawyer Standard 13.3 authorizes counsel to verify the accuracy of bank accounts of lawyers that should contain or have contained funds belonging to clients whenever there is probable cause to believe that the accounts have not been properly maintained or the funds have not been properly handled. Requiring lawyers to maintain financial records concerning client funds in their possession and to verify the accuracy of those funds upon probable cause will assist the agency in its investigative function. Moreover, case law suggests that a recordkeeping requirement would preclude a lawyer from invoking the Fifth Amendment privilege to avoid production of the records.

28. Recommendation: The team recommends the adoption of proposed Rule 26 which reflects the notification requirements of Lawyer Standard 6.11. This notice provision is necessary to insure that the respondent's inability to practice does not prejudice the rights of existing clients or other parties, and that those who might otherwise have occasion to deal with a lawyer are made aware of his suspension, disbarment or resignation.

29. Recommendation: The team recommends the adoption of proposed Rule 27 which acknowledges the affirmative obligation of the discipline agency to protect the clients of a lawyer who is unable to properly discharge his responsibilities due to disability, disappearance or death. Protecting the clients of an attorney whose practice is terminated suddenly is difficult because the

lawyer is either not responsible or unavailable. It is essential that the agency have the right to seek appointment of counsel to protect the clients of the lawyer, which is fully consistent with the undertaking to protect the public in its dealings with the legal profession. This Rule amendment is in accordance with Lawyer Standards 13.1 and 13.2.

Discipline in the Federal Courts

The team met with the Chief Judge of the United States District Court for the District of Minnesota and the United States Attorney with respect to disciplinary enforcement in the federal court system in Minnesota. The federal rules of discipline authorize the United States Attorney to investigate and prosecute complaints against members of the federal bar in Minnesota. Although our investigation revealed extensive cooperation between the United States Attorney and the Director involving the exchange of disciplinary information, we note that disciplinary enforcement in the federal system has been limited to reciprocal matters, and that procedures for initiating original investigations are not prescribed in the rules. While we believe that federal disciplinary enforcement may be operating effectively, the team recommends that the United States District Court adopt the Model Federal Rules of Disciplinary Enforcement⁴ and utilize the developed expertise of the Minnesota state discipline agency. The Model Rules contemplate reliance upon the state discipline agency, which

⁴ Model Federal Rules of Disciplinary Enforcement, (February 14, 1978), Standing Committee on Professional Discipline and Center for Professional Discipline.

avoids unnecessary duplication of proceedings and conserves limited resources. Disciplinary matters which come to the attention of the federal courts are referred to discipline counsel for investigation and, if investigation indicates that a formal complaint is warranted, the matter proceeds through the normal disciplinary process in Minnesota. In order to compensate the state discipline system for its services, financing is provided by the federal court through a periodic assessment of lawyers.

30. Recommendation: The Board and the Court are encouraged to actively solicit the adoption of the Model Federal Rules of Disciplinary Enforcement by the federal courts in Minnesota to enhance the probability of operating one system for discipline with consistent standards and dispositions in the state.

Fines

Lawyer Standard 6.14 recommends against the imposition of fines as a disciplinary sanction because they are punitive and might be deemed to imply that the proceedings are criminal. Although the Court has on occasion imposed fines in addition to other discipline, it has provided no guidelines to identify the circumstances for which fines may be imposed. Further, the team believes there is a danger that the public may view the imposition of fines as a means by which the respondent has avoided otherwise more severe discipline. Also, we note that fines should not be used as a substitute for the payment of costs by the respondent.

31. Recommendation: The team recommends that fines not be imposed upon respondents. If the Court continues this practice, fines should be reflected in the Rules as a disciplinary sanction and criteria should be developed outlining the circumstances for which fines may be imposed.

III. INTRA-AGENCY RELATIONS

Lines of Responsibility

From our interviews and personal observations, the team perceives a need to clarify the relationships and responsibilities among the Director, the Board, and the Court. While we commend the Court for its interest and support in establishing the disciplinary system, we believe that the lines of authority should be clearly defined to serve as guidelines for the daily operation as well as the long range planning of the disciplinary system. It was evident to the team that the lines of accountability, supervision, and responsibility are not sufficiently defined, especially those related to the hiring of staff and assignment of functions, the formulation of staff and budget, the development of internal policies and rule changes, and the administrative functions central to the operation of the discipline system.

The team urges the Court, the Board, and the Director to jointly develop standards of administrative accountability and procedural guidelines for the operation of the discipline system, which preserve the bifurcation of functions between the Board and the Director. The Lawyer Standards contemplate a bifurcation of the prosecutorial and the adjudicative functions within a unitary entity. While the Board has oversight responsibility for the system, it should not direct the prosecutorial authority in the discharge of its functions. Lawyer Standard 3.5 provides the Board with responsibility to propose rules of procedure, establish panels and allocate their work, perform the review adjudicative function, appoint and supervise members of its staff, and periodically review the operation of the system with the Court. In performing such duties, the Board may appoint its own staff to assist in

matters pertaining to the administrative and adjudicative functions. (See Recommendation 1). However, the Board should neither direct the internal operations nor supervise the functions performed by the Director and his staff.

32. Recommendation: The team recommends that the Director appoint and supervise all members of his staff. This authorization should include the right to hire, compensate, and fire the staff necessary to carry out the investigative and prosecutorial responsibility in conformity with the limits established in the budget. This recommendation is consistent with Lawyer Standard 3.9.

Self Evaluation and Planning

The team recognizes a need for the discipline system to institutionalize a self-evaluation process to identify needs and implement improvements for effective enforcement. Our investigation revealed that in most instances problems are addressed as they arise on an ad hoc basis. While we support the recent appointment of a special committee of the Board to study the hearing process, we recommend that the Board constitute a standing committee to evaluate the disciplinary process on an ongoing basis to identify problems and formulate recommendations for their resolution. Further, we believe that an internal review committee is needed to conduct an effective analysis of the recommendations in this report.

The review committee should establish and implement both short and long range goals and develop criteria for judging the effectiveness of internal operating procedures, and the relative costs and benefits of increased staffing, the acquisition of new equipment including utilization of computer hardware, and the expansion of office facilities. The development of a mechanism for monitoring the backlog and

delay in dispositions will create a data base from which rational decisions can be made to expedite the disciplinary process.

The findings and recommendations of the internal review committee should be periodically reviewed by the Board and the Director, and submitted to the Court for its consideration.

33. Recommendation: The team strongly recommends the establishment of an internal review and planning process within the discipline system. More specifically, the Board should appoint a committee to review the operation of the system on an ongoing basis and develop specific recommendations reflecting both short and long term objectives.

Meaningful self evaluation and internal planning requires strengthened communication between the Court, the Board, the Director and the District Ethics Committees which encourages the free exchange of views and concerns about the disciplinary process. The following are specifically recommended to promote internal communication.

- (33.1) Recommendation: Policy changes relating to the procedural rules of discipline and the substantive rules of professional conduct and changes in functions within the disciplinary system should be formulated by the Board in consultation with the Director for submission to the Court. If the Director and the Board disagree on recommended changes, both parties should advocate their positions to the Court for its consideration.

- (33.2) Recommendation: An annual report should be prepared by the Director for the Board and filed

with the Court, summarizing in detail the activities in the disciplinary system and the disposition of all matters. This recommendation is consistent with Lawyer Standard 3.5.

- (33.3) Recommendation: A formalized budget process should be developed which gives a role to the Board and the Director in formulating the budget for consideration by the Court.
- (33.4) Recommendation: Disciplinary cases should be prioritized to focus prosecutorial energies based on criteria reflecting the seriousness and gravity of the offense and the delay and age of the disciplinary matter.
- (33.5) Recommendation: The team recommends that the Director and members of the Board continue to meet periodically to discuss developments in disciplinary enforcement, to draft recommendations for changes in rules and policy, to review the record of dispositions and to analyze the effectiveness of the disciplinary process.

Our investigation revealed an affirmative and continuing commitment to effective disciplinary enforcement by members of the Court. We were fortunate in our interviews to visit with the membership of the Court. We praise the Court for its appointment of one of its members to serve as a liaison with the disciplinary agency. We strongly encourage continued dialogue and contact between members of the Court, the Board, and the Director to address mutual problems and concerns and to develop policies for their satisfactory resolution.

(33.6) Recommendation: The team strongly recommends that the Chairman of the Board, the Director, and the liaison member of the Court meet at regular intervals to review procedures, caseload, and administrative activities of the agency.

Conclusion

This is the third evaluation of a disciplinary enforcement system sponsored by the Standing Committee on Professional Discipline. In the course of our investigation we found respect for the discipline system and a conscientious interest and commitment on the part of the individuals responsible for its operation. This commitment is reflected in the knowledge and participation by members of the Court, the high quality of performance by the discipline staff and members of the Board, and the contribution to the investigative effort by members of the District Ethics Committees. The team believes that a greater effort should be concentrated on streamlining processing procedures, defining lines of responsibility, and institutionalizing self-evaluation and planning. We are mindful that many of our recommendations will require a renewed commitment of time, finances and resources. However, the team is confident that the recommendations will receive the careful consideration and attention necessary for the improvement of the discipline system.

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