

# MINNESOTA

## REPORT ON THE LAWYER DISCIPLINE SYSTEM

September 2022

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Bar Association Standing  
Committee on Professional  
Regulation

**MINNESOTA LAWYER DISCIPLINE SYSTEM  
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## I. INTRODUCTION

### A. Preface

The ABA Standing Committee on Professional Regulation and its Consultation Team thank the Minnesota Supreme Court, the Lawyers Professional Responsibility Board, the Director of the Office of Lawyers Professional Responsibility and her staff, and all interviewees for their time, candor, insights, and suggestions during the consultation process. The Professional Regulation Committee is sensitive to the fact that its work was undertaken at a challenging time for the system, exacerbated by media coverage. Despite this, it was clear to the Professional Regulation Committee that participants at all levels want and are willing to move forward positively and productively – to ensure that the Minnesota Lawyer Discipline System operates with optimal fairness, effectiveness, transparency, accountability, and efficiency.

As in any system, there are differing views as to what change is needed and how to best accomplish it. Reasons for adopting rules and policies decades ago may no longer exist. On the other hand, circumstances may necessitate retention of some older rules and policies. The system will need to make adjustments responsive to data and changes in the practice of law and its regulation. That is not unusual, as systems must demonstrate flexibility and evolve.

Ultimately, decisions about adoption and implementation of recommended changes will and should be the Court's, pursuant to its regulatory authority. The Professional Regulation Committee is confident that under the Court's continued leadership and long demonstrated transparency, coupled with the volunteers' and staffs' ongoing commitment to public service, a good system will be optimized.

### B. History of the Regulation of the Legal Profession by the Judicial Branch of Government

The judiciary has long been responsible for the admission of applicants to the practice of law, and lawyers have been held accountable for their professional conduct by the judges before whom they have practiced.<sup>1</sup> By the late 1800's, the courts were claiming their inherent and exclusive power to regulate the legal profession.<sup>2</sup> Today, in each jurisdiction, the court of highest appellate jurisdiction has the inherent or constitutional authority to regulate the practice of law.<sup>3</sup> This includes Minnesota.<sup>4</sup>

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<sup>1</sup> See, e.g., Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (Spring 1994); *In re Shannon*, 876 P.2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).

<sup>2</sup> COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html).

<sup>3</sup> See, e.g., *In re Attorney Discipline System*, 967 P.2d 49 (Cal. 1998).

<sup>4</sup> The Supreme Court of Minnesota is responsible for regulation of the practice of law and for discipline of lawyers and judges. The Court's constitutional authority derives from the separation of powers set forth in the Minnesota Constitution. Minn. Const., art. III, §1. See also MINN. STAT. 2021, Chapter 480 § 480.05 (2021); *Sharood v. Hatfield*, 296 Minn. 416, 424, 210 N.W.2d 276, 279 (1973); and *In re Riehm*, 883 N.W.2d 223, 232 (Minn. 2016).

It has long been, and remains, the policy of the American Bar Association that the judicial branch of government is best suited to regulate the legal profession. Regulation by either the legislative or executive branch jeopardizes the independence of the legal profession and the judiciary. In the United States, an independent judiciary is crucial to maintaining citizens' rights and freedoms, and the rule of law. As noted in the Preamble to the *ABA Model Rules of Professional Conduct*:

An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.<sup>5</sup>

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate and more effective than executive or legislative branch regulation. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee), issued its report containing findings from a three-year comprehensive review of lawyer discipline in the United States.<sup>6</sup> The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory authority, should legislatures attempt to intervene.<sup>7</sup> In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was “a far less desirable forum” for such reform to occur.<sup>8</sup>

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission) studied the advantages and disadvantages of legislative versus judicial regulation. It examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.<sup>9</sup> The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and specifically that legislative regulation of the legal profession would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.<sup>10</sup> The McKay Commission also found that, where other state agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.<sup>11</sup> In February 1992, the ABA House of Delegates adopted the McKay Commission's recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each U.S. jurisdiction. The ABA has reaffirmed its support of state-based judicial regulation over the years.<sup>12</sup>

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<sup>5</sup> MODEL RULES OF PROF'L CONDUCT pmb1. (2013), *available at*

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html).

<sup>6</sup> Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, Problems and Recommendations in Disciplinary Enforcement xii (1970) [hereinafter CLARK REPORT], *available at*

[http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark\\_Report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf).

<sup>7</sup> *Id.* at 10-18.

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.*

<sup>12</sup> ABA Report of the Commission on Multijurisdictional Practice (2002), *available at* [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_mjp\\_rpt\\_6\\_5\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_mjp_rpt_6_5_1.pdf).

### **C. The Lawyer Discipline System Consultation Program**

In 1980, the ABA Standing Committee on Professional Discipline, now the Standing Committee on Professional Regulation, initiated its lawyer discipline system consultation program. To date, the Committee has completed 67 consultations. A number of courts have retained the Committee's services multiple times.

At the invitation of a jurisdiction's state supreme court, the Professional Regulation Committee sends a team of individuals experienced in lawyer regulation to examine the structure, operations, and procedures of the host jurisdiction's lawyer discipline system. In addition to a Committee member and its counsel, team members include lawyers who represent other lawyers in disciplinary and professional responsibility matters, a regulation counsel, or judges/state supreme court justices. The team spends at least four days onsite interviewing stakeholders, and reviewing files and systems. The Minnesota Consultation Team interviewed 35 individuals while on site and conducted additional interviews in the following weeks.

The team develops recommendations for adoption by the full Professional Regulation Committee. Upon approval of those recommendations, the Professional Regulation Committee issues to the Court a confidential report setting forth its findings and recommendations for improvement of the system, and also noting the system's strengths. The consultation process allows participants in the lawyer discipline system to understand the operation of their system, not only in the context of ABA model disciplinary procedures, but also national practice. Additionally, the consultation program provides an opportunity for the Professional Regulation Committee to learn about additional or alternative procedural mechanisms that may be considered for incorporation into ABA model rules.

In examining a jurisdiction's lawyer regulatory system, the Professional Regulation Committee uses criteria adapted from the *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE) as a guide. The MRLDE identify best policies and procedures drawn from the collective experience of the nation's disciplinary agencies. The Committee also relies upon the Report and Recommendations of the McKay Commission, which reaffirm and expand upon the policies of the MRLDE.<sup>13</sup> In addition, it considers national practices, and carefully examines local factors and characteristics to ensure that its recommendations are tailored to meet specific or unique needs of the inviting jurisdiction. In this Report, those recommendations appear at pages 28 through 88.

### **D. Persons Interviewed and Materials Reviewed**

At the invitation of the Minnesota Supreme Court, the Professional Regulation Committee's Consultation Team conducted the on-site portion of the consultation from April 19 through April 22, 2022. The Team's interviews included the Director and staff of the Office of Lawyers Professional Responsibility, public and lawyer members of the District Ethics Committees and Lawyers Professional Responsibility Board, Referees, complainants, respondents, and lawyers who represent respondents in lawyer disciplinary matters. The Team spoke with Minnesota State Bar Association leadership and staff from the Lawyers Assistance Program. The Team also met with the Court.

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<sup>13</sup> MCKAY REPORT, *supra* note 2.



A non-exhaustive list of documents and records reviewed by the Consultation Team includes:

- (1) the Rules of the Supreme Court on Lawyer Registration;
- (2) the Minnesota Rules on Lawyers Professional Responsibility;
- (3) the Lawyers Professional Responsibility Board Executive Committee Manual on Policy and Procedure Memoranda;
- (4) the Lawyers Professional Responsibility Board Panel Manual;
- (5) multiple Lawyers Professional Responsibility Board and Office of Professional Responsibility Annual Reports;
- (6) the 2008 Report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System;
- (7) caseload, budget, and other statistics compiled by the Office of Lawyers Professional Responsibility regarding the operation of the Minnesota disciplinary system;
- (8) the LDMS caseload management system utilized by the Office of Professional Responsibility and the related document management tools;
- (9) forms utilized by the Lawyers Professional Responsibility Board, District Ethics Committees, and the Office of Lawyers Professional Responsibility;
- (10) relevant case law, reports, Board and Referee findings and recommendations; court orders, admonitions, and communications with complainants and respondents;
- (11) additional materials provided to the team by interviewees;
- (12) webpages related to the system;
- (13) job descriptions for the Office of Lawyers Professional Responsibility; and
- (14) case files.

The Consultation Team appreciates the Office of Lawyers Professional Responsibility staff for their graciousness and hospitality throughout its stay. They went above and beyond in their efforts to make the Team's visit comfortable and productive.

## II. OVERVIEW

### A. Strengths of the Minnesota Lawyer Disciplinary System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee's collective knowledge and experience in lawyer regulation. While the Report will focus primarily on Recommendations for further optimizing the system, a balanced review necessitates recognition of the system's strengths. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note are described elsewhere in this Report.

The Minnesota Supreme Court's longstanding commitment to effective, fair, and transparent lawyer regulation is laudable. This is the second time that the Court has invited the ABA Standing Committee to consult on the Minnesota system. The Court has also directed other reviews of the system, including the Supreme Court Advisory Committee to Review the Lawyer Discipline System, which issued its report in May 2008. That the Court remains committed to ensuring adequate funding and resources for the system is extremely important.

Engagement by and commitment of the system's dedicated volunteers, lawyer and public members is also notable. They take seriously their work of protecting the public and devote significant time and resources to the process. In particular, the Professional Regulation Committee thinks it is important to highlight the commitment of the Lawyers Professional Responsibility Board to ensuring that issues relating to training and education as well as diversity, equity, and inclusion receive focus. As noted in this Report, ensuring diversity at all levels of the system is critical, and the Board's Diversity and Inclusion Committee has spearheaded efforts to increase recruitment of diverse members and developed a Commitment Statement on Non-Discrimination and Inclusion that is easily viewable on the system's website.

The system's website is robust in content and is updated regularly. This transparency is critical for purposes of enhancing public trust and confidence in the system. This Report will set forth some ideas for enhancing the system's web presence, but the recommendations should not detract from this excellent product. In addition to the website, the Board and Office of Lawyers Professional Responsibility provide an excellent Annual Report each year. This allows the public to easily understand a complex system and how it operates. The Report allows each component of the system to showcase its important work and identify areas where improvements are in process.

The Office of Lawyers Professional Responsibility continues to work hard to improve caseload processing times. The Director's work to improve staff training and optimize staff organization is critical to this effort, as is continued work to improve the custom caseload management system, LDMS. The manner in which the system has leveraged technology, including the move to a "paperless" system, helped to ensure as little disruption as possible with the onset of the Covid-19 pandemic and the need for most of the system's work to occur remotely for a long period of time. The shift to a digital work environment also has enabled the office to maintain a flexible hybrid environment, which will, hopefully, help with recruitment and retention of qualified staff.

## **B. Description of the Minnesota Lawyer Disciplinary System**

Minnesota is a voluntary bar state, meaning lawyers need not be members of the Minnesota State Bar Association as a condition of licensure. In 2022, 30,439 lawyers were admitted to practice law in Minnesota. Of that number, 26,106 were engaged in the active practice of law.<sup>14</sup> The Minnesota Supreme Court has the exclusive authority to regulate the legal profession in the State.<sup>15</sup> All lawyers admitted to or engaged in the practice of law in Minnesota, or who render legal services there, are subject to the Court's disciplinary jurisdiction. The Minnesota Rules on Lawyers Professional Responsibility govern discipline, disability, reinstatement, and some conditional admission proceedings.

### **1. Funding**

The Director and staff of the Office of Lawyers Professional Responsibility are Judicial Branch employees. Their job classifications and salaries are determined by the human resources department for the Court system, via the State Court Administrator's Office. Similarly, Referees are employees of the Judicial Branch, serving as judges on senior status. The Consultation Team was informed that their salaries are an expense line item in the budget of the Office of Lawyers Professional Responsibility. Lawyers Professional Responsibility Board members are not compensated. They are reimbursed for reasonable and necessary expenses incurred in the performance of their duties.<sup>16</sup>

The lawyer regulation system is funded by lawyer registration fees set by the Court, which are used to help defray the operations and expenses of the Court's various lawyer regulatory entities, including the Office of Lawyers Professional Responsibility.<sup>17</sup> The Office of Lawyers Professional Responsibility budget (including Lawyers Professional Responsibility Board expenses) has been operating at a deficit and using reserves to fund shortfalls.<sup>18</sup> In 2019, to help address funding shortfalls, the Court reallocated \$6 of the portion of the annual registration fee from the Client Security Board to the Office of Lawyers Professional Responsibility and approved a \$1.5 million reallocation of funds from the Client Security Board to further fund the Office of Lawyers Professional Responsibility. The Court placed that reallocation on hold until needed.

Based on recommendations by the State Court Administrator's Finance Division, and to continue addressing the funding shortfall, on June 23, 2021, the Court issued an order amending the Supreme Court Rules on Lawyer Registration to provide for incremental increases in lawyer registration fees.<sup>19</sup> Effective October 2021, active status lawyers or judges admitted to practice law for three years or more in any U.S. jurisdiction must pay an annual registration fee of \$256; lawyers with income of less than \$50,000 per year pay \$227, and lawyers admitted to practice less

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<sup>14</sup> Sup. Ct. Rules on Law. Registration R. 2 & 10(A).

<sup>15</sup> *Supra* note 4.

<sup>16</sup> Minn. Rules on Law. Prof'l Responsibility R. 4(b).

<sup>17</sup> Sup. Ct. Rules on Law. Registration R. 5, 6 & 7.

<sup>18</sup> July 2022 Annual Report of the Lawyers Professional Responsibility Board and Office of Lawyers Professional Responsibility.

<sup>19</sup> Order Promulgating Amendments to the Rules of the Supreme Court on Lawyer Registration, No. ADM 10-8002 (Minn. June 23, 2021).

than three years pay \$118.<sup>20</sup> On October 1, 2022, those registration fees will be \$263, \$234, and \$121, respectively. On October 1, 2023, they will be \$270, \$241, and \$124, respectively.<sup>21</sup> Fees for lawyers on inactive status also will increase incrementally in 2022 and 2023.

Currently, of the \$256 registration fee, \$128 is allocated to the Office of Lawyers Professional Responsibility. That amount will be \$135 beginning in October 2022, and \$142 starting in October 2023.<sup>22</sup> For Fiscal Year (FY) 2022, the Office projected a reserve balance of approximately \$717,000.<sup>23</sup> Projected revenue that year from all sources (e.g., registration fees and recovery of costs) was approximately \$3.6 million, while expenses were projected to be about \$4 million.

Minnesota lawyers are required to complete an annual Lawyer Registration Statement and submit it to the Lawyer Registration Office.<sup>24</sup> Items lawyers must disclose on the Registration Statement include: whether they maintain professional liability insurance; whether they hold money in trust, and if so, their IOLTA account number; and changes to their email or postal addresses (updates required during the year, if changes occur).<sup>25</sup> Failure to comply with registration requirements results in an administrative suspension.<sup>26</sup>

## **2. Facilities and File Maintenance/Location**

The Office of Lawyers Professional Responsibility is located in a modern office building at 445 Minnesota Street, Suite 2400 in St. Paul, Minnesota. The Office is open to the public. Parking is available. The Office has a comfortable reception area. The rest of the area is comprised of space for the Director and her staff to perform their duties. There are conference rooms with necessary technology for staff and the Lawyers Professional Responsibility Board to hold meetings, and for training. It appeared to the Consultation Team that there exists adequate space for storage of files and supplies. It is laudable that the Director has worked to implement a policy whereby records and files are stored securely in electronic format and accessible electronically to staff, and most communication with respondents and others involved in the system is accomplished electronically. The implementation of this policy was particularly useful when the Covid-19 pandemic necessitated that the Director and her staff work remotely and ultimately transition to a hybrid work environment that continues.

Hearings by the Lawyers Professional Responsibility Board and Referees are held in a dedicated courtroom in the Minnesota Judicial Center, located at 25 Rev. Martin Luther King Jr. Blvd. in St. Paul. Participants must proceed through Judicial Center security, and there is a conference room available for deliberations or for witnesses.

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<sup>20</sup> Sup. Ct. Rules on Law. Registration R. 5.

<sup>21</sup> *Supra* note 19.

<sup>22</sup> *Supra* note 19.

<sup>23</sup> *Supra* note 18.

<sup>24</sup> Sup. Ct. Rules on Law. Registration R. 11.

<sup>25</sup> Sup. Ct. Rules on Law. Registration R. 13 & 22. *See also* Minn. R. Prof'l Conduct R. 1.15(i).

<sup>26</sup> Sup. Ct. Rules on Law. Registration R. 14.

### **3. Components of the Minnesota Lawyer Discipline System**

#### **a. The Lawyers Professional Responsibility Board**

The role and responsibilities of the lawyer and public members appointed by the Minnesota Supreme Court and comprising the Lawyers Professional Responsibility Board (“the LPRB”) are set forth in the Minnesota Rules on Lawyers Professional Responsibility. The LPRB is composed of thirteen lawyers with their principal offices in Minnesota, six of whom the Minnesota State Bar Association may nominate, and nine members of the public who are state residents.<sup>27</sup> The Court appoints each member for a three-year term, with no member serving more than two terms, in addition to any period of service as Chair of the LPRB or for any other shorter term to which they were previously appointed.<sup>28</sup> Terms are to be staggered, and membership on the LPRB is to be geographically diverse and represent diverse practice areas.<sup>29</sup> The Court appoints the Chair of the LPRB to serve a term not to exceed six years.<sup>30</sup> The Chair serves at the pleasure of the Court. All LPRB members serve without compensation, but may be reimbursed for reasonable and necessary expenses incurred when performing their duties.<sup>31</sup> The LPRB does not have its own staff. The Office of Lawyers Professional Responsibility (“the OLPR”) provides staff support for the LPRB.

Members of the LPRB are responsible for administering the Minnesota Rules on Lawyers Professional Responsibility and for establishing policies that govern the disciplinary system.<sup>32</sup> In 2020, the Court reviewed Rules 4 and 5 of the Rules on Lawyers Professional Responsibility as they applied to the LPRB’s supervisory responsibilities over the Director of the OLPR.<sup>33</sup> On February 16, 2021, the Court announced a public comment period on its proposed changes to Rules 4 and 5. On April 19, 2021, the LPRB filed comments opposing the Court’s proposed amendments.<sup>34</sup> Former Directors of the OLPR and others also filed comments, including a committee of the Minnesota State Bar Association.

Under the earlier iteration of these Rules, the LPRB had “general supervisory authority over the administration of the” OLPR. That included the LPRB reviewing the Director’s performance every two years and making recommendations every two years as to the Director’s continued service in that position. Under the previous version of Rule 5, the Director was responsible and accountable directly to the LPRB.

On July 14, 2021, the Court issued an order amending Rules 4 and 5.<sup>35</sup> Effective that date, Rule 4 provided, in relevant part, that the LPRB is responsible for “...providing recommendations and

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<sup>27</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(a)(2).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(a)(1).

<sup>31</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(b).

<sup>32</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(c).

<sup>33</sup> *See* Order Promulgating Amendments to the Rules on Lawyers Professional Responsibility, No. ADM 10-8042 (Minn. July 14, 2021).

<sup>34</sup> Lawyers Professional Responsibility Board Rules Committee Comments on Minnesota Supreme Court’s Proposed Amendments on Lawyers Professional Responsibility Rules 4 & 5 (Apr. 19, 2021)

<sup>35</sup> *Supra* note 33.

guidance to the Director regarding the operations of” the OLPR.<sup>36</sup> The Court deleted the existing provision in Rule 4(d), providing that the Executive Committee was responsible for general supervision of the OLPR. The Court amended Rule 5 to make clear that the Director is an employee of the Judicial Branch, and that the State Court Administrator, with LPRB input, would conduct the Director’s performance evaluation going forward.<sup>37</sup> Amended Rule 5 also specifically stated that the Director is responsible for the day-to-day operations of the OLPR and for supervising its employees.<sup>38</sup> On March 31, 2022, the Court entered an order reappointing the Director of the OLPR and of the Client Security Board for another two years.

The LPRB has three working committees. They are: (1) Training, Education, and Outreach; (2) Rules and Opinions; and (3) Diversity and Inclusion.<sup>39</sup> The Training, Education, and Outreach Committee is responsible for training LPRB members and for public outreach. In advance of the issuance of the system’s July 2022 Annual Report, that Committee worked to complete an update of the LPRB reference manual and held six trainings between February and July 2022, for two new LPRB members.<sup>40</sup>

The Rules and Opinions Committee works collaboratively on rule and policy proposals with the OLPR, the Minnesota State Bar Association, and other stakeholders. According to the July 2022 Annual Report, in the near future this Committee will propose amendments to the Rules on Lawyers Professional Responsibility.<sup>41</sup> The Diversity and Inclusion Committee has devoted much time and effort toward recruiting diverse LPRB members, creating a sustainable model for recruitment, and working on adoption of a LPRB Commitment Statement on Non-Discrimination and Inclusion.<sup>42</sup> The Diversity and Inclusion Committee also has taken steps to enhance its board candidate interview process.

#### **i. Executive Committee of the LPRB**

The Executive Committee consists of the LPRB Chair and four LPRB members (two lawyer and two public members).<sup>43</sup> In order to serve on the Executive Committee, an LPRB member must have served at least one year on the Board. Executive Committee members do not serve on the LPRB Panels described below, nor do they handle complainant appeals.<sup>44</sup>

Executive Committee duties include managing LPRB operations, reviewing LPRB work product, reviewing data provided by the OLPR, assigning LPRB panels, and serving as liaisons to the LPRB committees described above.<sup>45</sup> In addition to its administrative duties, the Executive Committee is

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<sup>36</sup> *Supra* note 32.

<sup>37</sup> Minn. Rules on Law. Prof’l Responsibility R. 5(a).

<sup>38</sup> Minn. Rules on Law. Prof’l Responsibility R. 5(b).

<sup>39</sup> *Supra* note 18.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* See also *Lawyer’s Professional Responsibility Board Commitment Statement for Non-Discrimination and Inclusion* (July 22, 2022), <https://lprb.mncourts.gov/Pages/LPRB%20Commitment%20Statement-%20July%202022.pdf> (last visited August 30, 2022).

<sup>43</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(d).

<sup>44</sup> *Id.* See also Minn. Rules on Law. Prof’l Responsibility R. 8(e).

<sup>45</sup> *Id.* See also *supra* note 18.

responsible for reviewing, approving, or declining the Director’s request to independently initiate an investigation into a lawyer’s conduct without having received a complaint.<sup>46</sup> According to 2015 Executive Committee Policy and Procedure No. 1, the Executive Committee has not delegated its approval authority to any one member of that Committee.<sup>47</sup> When the Director determines to open an investigation on her own initiative, the Executive Committee requires the Director to submit that request on the designated form electronically or via U.S. mail.<sup>48</sup> Any Executive Committee member may request that the Executive Committee as a whole consider the request. Otherwise, if a majority of responding Executive Committee members approve, the investigation may be opened.<sup>49</sup>

If the Executive Committee does not respond to the Director’s request within a week, the Director must follow up with the Executive Committee. If no response is received three days thereafter, the Director may proceed based upon the Executive Committee votes received to date.<sup>50</sup> Executive Committee Policy and Procedure No. 1 also sets out the Executive Committee’s interpretation of circumstances where the Director may open an investigation without seeking its approval but without receiving a formal complaint. For example, the Director may do so when an individual outside the Director’s office refers a matter for consideration, but that individual does not want to be considered the complainant, or for matters referred by the Minnesota Department of Revenue or appropriate child support agencies.<sup>51</sup>

## **ii. LPRB Panels**

LPRB members who do not serve on the Executive Committee serve on Panels appointed by the LPRB Chair. There are six LPRB Panels.<sup>52</sup> Each Panel consists of at least three LPRB members, at least one of whom is a public member.<sup>53</sup> The LPRB Chair designates a Chair and Vice-Chair of each panel. Three Panel members (at least one lawyer and one public member) constitute a quorum.<sup>54</sup> Panels may refer any matters before them to the full LPRB, excluding Executive Committee members.<sup>55</sup>

The Rules on Lawyers Professional Responsibility provide that the Director is to assign matters to Panels in rotation, but the Executive Committee may redistribute matters to balance workloads and appoint substitute Panel members to leverage expertise.<sup>56</sup> The assignment of Panels by the Director occurs via a process put in place by the Executive Committee to ensure fairness and avoid any perception that the Director may “manipulate Panel assignments...”<sup>57</sup> The Chair or the Chair’s designee assigns matters to Panels in a random and equitable manner.

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<sup>46</sup> Minn. Rules on Law. Prof’l Responsibility R. 8(a).

<sup>47</sup> Policy and Procedure 1, Executive Committee Policy and Procedure Memoranda (June 2015).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Policy and Procedure 2, Executive Committee Policy and Procedure Memoranda (June 2015).

<sup>53</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(e).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Minn. Rules on Law. Prof’l Responsibility R. 4(f) & 9(a)(1).

<sup>57</sup> Policy and Procedure 2, Executive Committee Policy and Procedure Memoranda (May 2022).

As described in more detail below, the LPRB Panels, and in certain instances individual LPRB members who do not serve on the Executive Committee, are responsible for the following:

- 1) making probable cause determinations;<sup>58</sup>
- 2) handling complainant appeals of the Director’s determinations on complaints, including decisions that discipline is not warranted (with or without investigation), admonitions, and private probation;<sup>59</sup>
- 3) handling respondent appeals of admonitions;<sup>60</sup>
- 4) trying reinstatement matters<sup>61</sup>; and
- 5) handling ethics complaints against OPLR staff.<sup>62</sup>

In 2021, LPRB Panels handled 24 matters; from January 1 to June 14, 2022, there were 12 matters assigned to LPRB Panels composed mostly of probable cause and reinstatement cases. The LPRB handles a significant number of complainant appeals, and members frequently are required to review voluminous materials in fulfilling their duties in this regard. The July 2022 Annual Report states that from January 1 to June 14, 2022, LPRB members handled 61 complainant appeals with an average deliberation time of 21.4 days.

### **iii. LPRB Website and Technology**

The LPRB and the OLPR share a website.<sup>63</sup> The website is updated regularly. As noted in the July 2022 Annual Report, the website is not “mobile friendly.”<sup>64</sup> At the time of the Consultation Team’s visit, there was an outstanding request for proposals to update the website platform.<sup>65</sup>

The contact information for each entity is the same. The website is fairly robust in terms of content and generally well organized so that the public and lawyers can easily navigate it to find information. In terms of the LPRB (content related to the OLPR and the District Ethics Committees will be discussed below), the site contains information including up-to-date announcements of LPRB meetings, its new Commitment Statement,<sup>66</sup> the LPRB directory and meeting materials, LPRB advisory opinions (active and repealed), and the LPRB Panel Manual.<sup>67</sup>

The LPRB (and District Ethics Committees) use a 2013 version of SharePoint to communicate and securely exchange documents. The Consultation Team was advised that, by April 2023, all sites need to be migrated from SharePoint 2013 to SharePoint 2019.

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<sup>58</sup> Minn. Rules on Law. Prof’l Responsibility R. 9(j).

<sup>59</sup> Minn. Rules on Law. Prof’l Responsibility R. 8(e).

<sup>60</sup> Minn. Rules on Law. Prof’l Responsibility R. 8(d)(2). A respondent may also appeal a Panel affirmation of a Director issued admonition to the Supreme Court. Minn. Rules on Law. Prof’l Responsibility R. 9(m).

<sup>61</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(c).

<sup>62</sup> Policy and Procedure No. 5, Executive Committee Policy and Procedure Memoranda (Jan. 2018).

<sup>63</sup> See <https://lprb.mncourts.gov/Pages/Default.aspx> (last visited Aug. 30, 2022).

<sup>64</sup> *Supra* note 18.

<sup>65</sup> *Id.*

<sup>66</sup> *Supra* note 42.

<sup>67</sup> *Supra* note 63.



## **b. The Office of Lawyers Professional Responsibility (OLPR)**

The OLPR is the Minnesota Supreme Court entity responsible for investigating and prosecuting allegations that lawyers have violated the Minnesota Rules of Professional Conduct, for handling certain conditional admission matters, and for investigating and, when appropriate, contesting reinstatement petitions. The OLPR handles trusteeships where lawyers have died or abandoned their practices. The OLPR issues advisory opinions to Minnesota lawyers, judges, and out-of-state lawyers seeking guidance about compliance with the Minnesota Rules of Professional Conduct.<sup>68</sup> Limitations on requestors' use of these advisory opinions is set forth on the system's website and conveyed by OLPR lawyers to those requesting opinions. There is no rule requiring the OLPR to provide this service. The practice has been in place for decades and is considered an important and helpful service to the profession.

The OLPR employs 13 lawyers, including the Director, 5 paralegals, an investigator, an auditor, an office administrator, 9 administrative staff members, and 2 law clerks.<sup>69</sup> The Director is responsible for the day-to-day operations of the OLPR, and for hiring (with LPRB approval) and supervising its staff.<sup>70</sup> The Director position is responsible for preparing an Annual Report relating to the operations of the office.<sup>71</sup> The Director of OLPR also serves as the Director of the Minnesota Client Security Board.<sup>72</sup>

The OLPR uses a custom-built, electronic case management system called LDMS. Functionalities for LDMS are evolving. LDMS is not a document management system, although it stores documents using SharePoint. The Consultation Team was advised that the OLPR does not have trust account auditing software or document production software for discovery management.

As discussed above, the OLPR does not have its own, stand-alone website. Rather, it shares a website with the LPRB. The public may access complaint forms via a "quick links" box on the website. Complaint forms, along with instructions for filing electronically or via print format, are available in English, Hmong, Russian, Somali, Spanish, and Karen.<sup>73</sup> The website has a lawyer search function and a public discipline search function. For the public discipline search function, the public and others may search by lawyer name, city, and state.<sup>74</sup> The results link to additional details about the disciplinary action. If public discipline was taken, the order or opinion is viewable. There also is a function allowing those seeking information to search currently disbarred and suspended lawyers.<sup>75</sup> There is a quick link for lawyers seeking the OLPR's advisory opinion

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<sup>68</sup> See <https://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx> (last visited Aug. 30, 2022).

<sup>69</sup> *Supra* note 18.

<sup>70</sup> *Supra* note 38.

<sup>71</sup> *Id.*

<sup>72</sup> Minn. Rules on Law. Prof'l Responsibility R. 5(d). See also MINNESOTA CLIENT SECURITY BOARD STAFF DIRECTORY, <http://csb.mncourts.gov/about/Pages/StaffDirectory.aspx> (last visited Aug. 30, 2022).

<sup>73</sup> See Minnesota Lawyers Professional Responsibility Board Office of Lawyers Professional Responsibility Instructions for Filing a Complaint, <https://lprb.mncourts.gov/complaints/Pages/default.aspx> (last visited Aug. 30, 2022).

<sup>74</sup> See Minnesota Lawyers Professional Responsibility Board Office of Lawyers Professional Responsibility Lawyer Public Decision Search, <https://lprb.mncourts.gov/LawyerSearch/pages/Default.aspx> (last visited Aug. 30, 2022).

<sup>75</sup> See Minnesota Lawyers Professional Responsibility Board Office of Lawyers Professional Responsibility Disbarred and Currently Suspended Lawyers, <https://lprb.mncourts.gov/LawyerSearch/Pages/SuspendedDisbarred.aspx> (last visited Aug. 30, 2022).

services. Relevant rules are accessible from the home page via a drop-down menu. The website does not have a searchable library of disciplinary decisions issued at various levels of the system, nor does such a library, searchable or otherwise, exist. The website has a searchable (by topic, date or rule) repository of articles authored by OLPR personnel on legal ethics topics.

For decades, the LPRB's goal for the OLPR has been to have no more than 500 files open at any given time, and no more than 100 files that have been open for more than one year. Concerns about the volume of aging files in the system long predate the current Director's tenure. The Director and OLPR staff are working to improve performance, and Recommendation 8 below will address in more detail case processing goals and guidelines for all levels of the system.

Information provided to the Consultation Team indicates that, in 2020, the OLPR opened 1,038 files, which included complaints alleging lawyer misconduct, overdraft notifications that were converted to disciplinary matters, reinstatements, resignations, and trusteeships. Of that number, 930 were complaints alleging misconduct. In 2020, the OLPR closed 969 files.<sup>76</sup> At the beginning of calendar year 2021, there remained 442 open files pending.<sup>77</sup> In 2021, the OPLR opened 1,044 files, of which 946 were complaints alleging lawyer misconduct.<sup>78</sup> At the end of that year, 479 files remained open, and 909 had been closed. Of the 909 files closed in 2021, summary dismissals constituted 47%. At the end of December 2020, there remained open 125 files whose age was one year or older; that number was 122 at the end of December 2021.<sup>79</sup>

In 2021, the average number of months that files remained open at various stages of the disciplinary process from the filing of a complaint were:

- 1) Seven months for District Ethics Committees where there was a recommendation that discipline was not warranted;
- 2) Eleven months for the OLPR where there was a recommendation that discipline was not warranted;
- 3) Fourteen months for imposition of a Director's admonition;
- 4) Eighteen months for imposition of private probation;
- 5) Twenty-four months for imposition for probable cause determinations;
- 6) Twenty-eight months for referee determinations;
- 7) Twenty-three months for imposition of a Supreme Court reprimand;
- 8) Eighteen months for imposition of a Supreme Court reprimand and probation;
- 9) Twenty-four months for imposition of a Supreme Court suspension; and
- 10) Twenty-eight months for imposition of disbarment by the Supreme Court.<sup>80</sup>

It is important to note when looking at these time periods that they are necessarily reflective of a variety of factors impacting how matters proceed through the system, including their complexity, time for respondents and complainants to reply and participate in the process as permitted by the Rules (including requests for extensions of time), whether the matter is fully litigated or a

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<sup>76</sup> *Supra* note 18.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

disposition is stipulated, time pending at the LPRB panels, time spent conducting trials before the Referees, briefing and oral argument before the Court, as applicable, and Court deliberations and opinion/disposition issuance.

**c. District Ethics Committees**

Minnesota remains one of a few jurisdictions utilizing volunteer lawyers and public members to investigate complaints of lawyer misconduct. These volunteers serve on District Ethics Committees. There is a District Ethics Committee (“DEC”) for each Minnesota State Bar Association district. The Court appoints the Chair of each DEC.<sup>81</sup> The district bar association appoints the members of its DEC to three-year terms, with some terms being shorter where needed to ensure they are staggered so that one-third of the members’ terms expire each year.<sup>82</sup> Members on a DEC may not serve more than two consecutive, three-year terms, with some exceptions for shorter terms for which a DEC member was originally appointed or served as a DEC chair, and no more than four three-year terms.<sup>83</sup>

At least 20% of a DEC must be composed of public members, and lawyer members should be from diverse practice areas. The LPRB bears responsibility for monitoring compliance with the practice diversity requirement.<sup>84</sup> As of May 2022, 6 DEC’s did not have up to 20% public members; the LPRB and OLPR are working with the District Bars to address this.<sup>85</sup>

The DEC’s are responsible for investigating complaints alleging lawyer misconduct and for making reports to the Director setting forth the DEC’s recommended course of action.<sup>86</sup> The OLPR assigns one of its staff lawyers as a liaison to each DEC. The Consultation Team was advised that, in determining whether to investigate a matter “in house” or refer a complaint to a DEC for investigation, the OLPR duty lawyer considers a number of factors, including: the complexity of the matter and degree of seriousness of the alleged misconduct, which if true, would result in public discipline; whether the OLPR already has open files on the lawyer whose conduct is the subject of the complaint; the matter is politically or topically sensitive; or where a trust account audit will be required. Due to the factors considered, it may be best from an efficiency standpoint to have professional disciplinary counsel conduct the investigation with the assistance of the other professional staff in the office.

A DEC Chair may investigate a matter or assign it to one or more DEC members, and the Consultation Team was advised that some DEC’s investigate matters as a committee.<sup>87</sup> The investigative report may be submitted to the Chair, the Chair’s designee or to the full DEC for review and approval before submission to the Director.<sup>88</sup> The Consultation Team was advised that the full DEC usually determines recommendations for action. DEC recommendations for action after investigation include:

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<sup>81</sup> Minn. Rules on Law. Prof’l Responsibility R. 3(a)(1).

<sup>82</sup> Minn. Rules on Law. Prof’l Responsibility R. 3(a)(2).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Supra* note 18.

<sup>86</sup> Minn. Rules on Law. Prof’l Responsibility R. 3(b).

<sup>87</sup> Minn. Rules on Law. Prof’l Responsibility R. 7(b).

<sup>88</sup> *Id.*

- (1) a determination that discipline is not warranted;
- (2) issuance of an admonition by the Director;
- (3) referral to an LPRB panel for a probable cause determination; and
- (4) a request for further investigation by the OLPR.<sup>89</sup>

DEC reports recommending dismissal of a matter because discipline is not warranted or that the Director issue an admonition should be accompanied by a draft disposition letter.<sup>90</sup> DEC reports must be completed within 90 days from receipt of the complaint unless good cause is shown.<sup>91</sup> Pursuant to the Rules on Lawyers Professional Responsibility, if a DEC is routinely exceeding the 90 day time limit, the Director is to advise the LPRB, so that the Chair can work to remedy the problem.<sup>92</sup> Information provided to the Consultation Team indicates that, in 2021, the number of days it took the 18 DEC's to complete an investigation where there was a recommendation that discipline was not warranted ranged from a low of 54 days to a high of 346 days. The Director has the authority to remove a matter from DEC consideration at any time.<sup>93</sup>

According to the July 2022 Annual Report, the average monthly number of files being investigated by the DEC's was 86. From January to April 2022, the average number of files was 87. In 2021, DEC's completed 220 investigations.<sup>94</sup>

#### **d. Referees**

Referees are senior status Minnesota judges whose role is to be the trier of fact in hearings on Petitions for Disciplinary Action or to conduct probable cause hearings in matters where an LPRB Panel Chair and the LPRB Chair agree that extraordinary circumstances exist.<sup>95</sup> Referees who substitute for LPRB panels for the purposes of making a probable cause determination have the power of a district court judge.<sup>96</sup> The Court may assign to the same Referee who made the probable cause determination any resulting Petition for Disciplinary Action.<sup>97</sup> Referees also serve as the trier of fact in proceedings to revoke conditional admission to the practice of law.<sup>98</sup>

Referees conduct hearings on Petitions for Disciplinary Action pursuant to the Minnesota Rules of Civil Procedure and, for purposes of these hearings, have the power of a District Court Judge.<sup>99</sup> The Minnesota Supreme Court has held that the Rules of Evidence apply to disciplinary proceedings. After the hearing, the Referee must prepare findings of fact, conclusions of law, and

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Minn. Rules on Law. Prof'l Responsibility R. 7(c).

<sup>92</sup> *Id.*

<sup>93</sup> Minn. Rules on Law. Prof'l Responsibility R. 7(d).

<sup>94</sup> *Supra* note 18.

<sup>95</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(g) & 14(a).

<sup>96</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(g).

<sup>97</sup> *Id.*

<sup>98</sup> Minn. Rules on Law. Prof'l Responsibility R. 14(e).

<sup>99</sup> Minn. Rules on Law. Prof'l Responsibility R. 14(b). The Rules also provide that, if agreed upon by the Director, Respondent, and Panel Chair, the Court may appoint to hear the case the LPRB Panel that made the probable cause determination in the matter. Minn. Rules on Law. Prof'l Responsibility R. 14(f).

a recommendation for submission to the Court.<sup>100</sup> Referees do not have staff to assist them in performing their duties.

After the filing of the Referee's report, the respondent and Director may decide to order the transcript. If they determine not to order the transcript of the hearing, within ten days of the issuance of the Referee's report and recommendation, the Referee's findings of fact and conclusions are deemed conclusive.<sup>101</sup> If either party orders the hearing transcript, the Referee's finding and conclusions are not deemed conclusive, and either party may decide to challenge them.<sup>102</sup> A party appealing the Referee's report is required to set forth, in an initial brief to the Court, the disputed findings, conclusions, and recommendations.<sup>103</sup>

#### **e. The Court**

As noted above, the Minnesota Supreme Court has delegated investigative, prosecutorial, and some adjudicative functions to the LPRB, OLPR, DEC's, and Referees. The Court retains the ultimate decisional authority on Petitions for Disciplinary Action and other disciplinary matters.<sup>104</sup>

Upon the issuance of the Referee's findings, conclusions, and recommendations, the respondent and Director may, as described above, order a transcript of the proceedings or not, which triggers the ability to challenge the Referee's findings and conclusions. Regardless of that action, within 30 days of the issuance of the Referee's report, the Court issues a briefing order and will thereafter calendar the matter for oral argument upon the completion of briefing on the next available oral argument calendar.<sup>105</sup> Pursuant to Rule 15 of the Rules on Lawyers Professional Responsibility, at the conclusion of the proceedings, the Court may discipline the lawyer, dismiss the matter, or order any other disposition it deems appropriate.

Matters involving temporary suspensions, reinstatement petitions, trustee and disability status proceedings are initiated at the Court.

#### **4. Filing a Complaint**

As noted above, there is helpful information about the Minnesota lawyer discipline process available on the system website and a "quick link" box on the homepage called "File Complaint." A person wishing to complain about a Minnesota lawyer may download and complete the online form. Complainants also may print the form and mail it to the OLPR. As noted above, complaint forms are available in a number of languages. A downloadable "Complaints and Investigations" pamphlet, available in all languages for which there is a complaint form, can be viewed by following the directions on the "Instructions for Filing a Complaint" page.<sup>106</sup> That pamphlet

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<sup>100</sup> *Id.*

<sup>101</sup> *Supra* note 97.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> The same is true for conditional admission revocation proceedings.

<sup>105</sup> Minn. Rules on Law. Prof'l Responsibility R.14(g).

<sup>106</sup> MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY COMPLAINTS AND INVESTIGATIONS, *available at* <https://lprb.mncourts.gov/complaints/LawyerComplaintDocs/Complaint%20Brochure%20-%20English.pdf> (last visited Aug. 30, 2022).

includes information about what the OLPR can and cannot do, sets forth general information about the process and what complainants can expect, and offers advice for preventing problems between lawyers and clients. The OLPR will mail complaint forms and brochures to persons requesting them, and staff will provide a copy to persons visiting the office.

The top of the complaint form advises those wishing to file a complaint that they must do so against individual lawyers and not against firms. If a complaint is against multiple lawyers, they are required to complete one form per lawyer.<sup>107</sup> The form available via “Click to Print Complaint Form” asks the complainant whether they need the assistance of an interpreter and, if so, for which language.<sup>108</sup> In the Consultation Team’s experience, this is unique and praiseworthy. The form available via “Click to File Online Complaint” omits this field. The form available for printing requires that it be dated and signed. The online form does not require an e-signature. The complaint form for online submission also states that, if the complainant is submitting documents with the electronic form, they must do so via U.S. mail and those documents must be received within seven days to be considered as part of the complaint.<sup>109</sup> However, the “Instructions for Filing a Complaint” page states: “If you are submitting documents with your Online Complaint, you can email those documents to [OLPRComplaintDocs@courts.state.mn.us](mailto:OLPRComplaintDocs@courts.state.mn.us).”

Both forms state:

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at [lprada@courts.state.mn.us](mailto:lprada@courts.state.mn.us) or at 651-296-3952. All requests for accommodation will be given due consideration and may require an interactive process between the requestor and the Office of Lawyers Professional Responsibility to determine the best course of action. If you believe you have been excluded from participating in, or denied benefits of, any Office of Lawyers Professional Responsibility service because of a disability, please visit [www.mncourts.gov/ADAAccommodation.aspx](http://www.mncourts.gov/ADAAccommodation.aspx) for information on how to submit an ADA Grievance form.<sup>110</sup>

The OLPR assists complainants with questions about completing the form. As noted above, the Director may initiate complaints, but must receive the approval of the Executive Committee of the LPRB to do so.

## **5. Intake and Investigations**

### **a. Summary Dismissals**

The Consultation Team learned that the Director reviews, approves, or disapproves all recommendations for summary dismissal, dismissals because discipline is not warranted (with some exceptions as discussed below), requests to send matters to the LPRB panels for probable

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<sup>107</sup> MINNESOTA OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY COMPLAINT FORM, <https://lprb.mncourts.gov/complaints/LawyerComplaintDocs/Complaint%20Form%20-%20English.pdf> (last visited Aug. 30, 2022).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

cause determinations, and other matters. Interviewees raised concerns about the need for the Director to do so and questioned whether certain of these tasks could be delegated to senior lawyers in the OLPR. It is important to note at the outset that the nature of decisional authority for staff in the OLPR is a function of job descriptions and classification determined by the Judicial Branch's Human Resource Department.

With one exception, all complaints alleging misconduct or disability must be reviewed and may be investigated, if appropriate.<sup>111</sup> Upon receipt of a complaint against a Minnesota lawyer, the OLPR screens it to determine whether there exists a "reasonable belief that professional misconduct may have occurred."<sup>112</sup> Initial complaints to the OLPR are reviewed under this standard by "duty" lawyers, who are less senior lawyers in the office operating under the supervision of a more senior OLPR attorney. When, after consideration of the complaint, the duty lawyer determines that the matter should be summarily dismissed, that lawyer prepares a draft determination to the complainant explaining the basis for the summary dismissal. The duty lawyer's supervisor reviews the matter and, if they agree, the file is sent to the Director for approval. Service as a duty lawyer and the associated supervisor review are part of the training process for new OLPR lawyers. The Director may agree with the recommendation for summary dismissal, after which the determination is issued to the complainant advising them of the decision and their appeal rights under Rule 8(e). Historically, summary dismissal determinations are detailed and lengthy, using formal legal terms and phrases. The Director may also refer the matter back to the duty lawyer for further consideration. In addition to performing this screening function, duty lawyers maintain their own investigative and prosecution caseloads.

In 2021, the OLPR summarily dismissed 429 complaints (this is not unusual in the Consultation Team's experience). Of the 429 matters summarily dismissed, complainants appealed to the LPRB 83 times, and those dismissals were all sustained. OLPR case processing goals recommend that cases involving summary dismissal be handled within 14 days from receipt of the complaint. Data provided to the Consultation Team indicates that, in 2021, summary dismissals were issued approximately 20 days after receipt of the complaint. Information provided to the Consultation Team indicates the Director spends approximately six hours each week reviewing and making final determinations on recommendations for summary dismissal.

### **b. Investigations**

Matters that are not summarily dismissed are investigated and are either "noticed" to a DEC by the duty lawyer or assigned by the Director to an OLPR lawyer. In 2021, DEC's and the OLPR investigated 414 complaints. The Rules on Lawyers Professional Responsibility do not provide times by which respondents are to respond to complaints forwarded to them by DEC's or the OLPR, or times in which the complainant may reply to a respondent's response. However, the Consultation Team was advised that Notices of Investigations request a response within 14 days

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<sup>111</sup> Minn. Rules on Law. Prof'l Responsibility R. 6(a) & 8(a). The exception is found in Rule 8(b) of the Minnesota Rules on Lawyers Professional Responsibility. The Consultation Team was advised that, while the title to Rule 8(b) references "criminal defendants," the text of the Rule refers to "a party represented by court-appointed counsel." For that reason, the OLPR reads the Rule to apply to all appointed counsel when the allegation is incompetent representation in a pending matter. Summary dismissals under Rule 8(b) are without prejudice and not appealable to a LPRB member.

<sup>112</sup> *Supra* note 46.

of the date of the Notice. Complainants are generally afforded the same period of time to reply upon receipt of the respondent's response.

In addition to complaints against Minnesota attorneys, the investigative caseload of OLPR lawyers includes overdraft notifications. In 2021, the Office received 37 overdraft notifications, 11 of which were converted to full investigations. In addition, the OLPR handles trusteeships (which as discussed below in Recommendation 15, require significant staff resources). In addition to their investigative and prosecutorial caseload, OLPR senior lawyers are assigned by rotation to handle requests for advisory opinions. In 2021, the OLPR received 2,004 requests for advisory opinions, which was an increase of 18% from 2020.<sup>113</sup> The OLPR also handles collection of costs in disciplinary matters, administers a probation department, provides staff support for the Client Security Board, makes disciplinary history disclosures, receives and tracks the employment of suspended or disbarred lawyers pursuant to applicable rules, and handles compliance with reporting requirements for professional firms.<sup>114</sup>

Matters are assigned to the DEC for investigation, as described at pages 17 to 18. The DEC to which a matter is referred for investigation is the district where the lawyer's principal office is located, unless extraordinary circumstances warrant otherwise.<sup>115</sup> The Rules on Lawyers Professional Responsibility require that complainants be provided an opportunity to review and respond to the respondent's response to a complaint, whether investigated by a DEC or the OLPR.<sup>116</sup> DEC recommendations for discipline or further investigation are provided to the Director for assignment to an OLPR lawyer for further consideration as may be warranted.

The Consultation Team was advised that the OLPR conducts a *de novo* review of DEC recommendations for dismissal. These recommendations are routed to senior OLPR lawyers who may approve the dismissal, using the draft disposition provided by the DEC, or modify the disposition as they see fit. Senior staff also may forward the file to the Director for in-house assignment if further investigation is warranted or senior staff disagrees with the recommended dismissal. OLPR file processing goals aspire to have these dispositions advising of the decision that discipline is not warranted sent within 21 days after receipt of the DEC's report. In cases where the DEC recommends an admonition, the goals provide for closure of that matter within 90 days of receipt of the DEC recommendation. If the DEC recommends further investigation, the OLPR may conduct that investigation, if the Director agrees. If the DEC recommends that the matter be submitted to an LPRB Panel for a probable cause determination, and the Director agrees, the OLPR prepares the matter for submission to the Panel as described below.

When investigating matters, the OLPR may, with LPRB Chair or Vice-Chair approval, subpoena testimony of witnesses.<sup>117</sup> The Consultation Team was advised that this happens infrequently because affidavits or sworn declarations are favored. More frequently, investigatory subpoenas are used to secure documents, generally bank records, if a respondent fails to provide records as requested.

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<sup>113</sup> *Supra* note 18.

<sup>114</sup> *Id.*

<sup>115</sup> Minn. Rules on Law. Prof'l Responsibility R. 6(b).

<sup>116</sup> Minn. Rules on Law. Prof'l Responsibility R. 6(d).

<sup>117</sup> Minn. Rules on Law. Prof'l Responsibility R. 8(c).



All recommended dispositions after investigation, except for DEC recommended dismissals finalized by senior OLPR staff, are reviewed by the OLPR lawyer's supervisor, if the lawyer is supervised by someone other than the Director, before it is submitted to the Director for review. The Director may recommend further investigation, issue an admonition or dismissal, or approve the submission of the matter to an LPRB Panel for a probable cause determination.

If the Director (or the Senior Assistant Director for DEC dismissals) decides to dismiss a matter after investigation, the OLPR must notify the complainant, respondent, and if the matter was investigated by a DEC, that DEC Chair.<sup>118</sup> The Rules require that the dismissal notification provide a brief explanation of the action and inform the complainant of their right to appeal. The Consultation Team observed that, akin to summary dismissals, these determinations were frequently lengthy and use formal legal terms and phrases. The Consultation Team was advised that this practice dates back some time.

After investigation by the OLPR or a DEC, the Director may issue an admonition, which is private discipline.<sup>119</sup> The standard for issuing an admonition is whether the lawyer's conduct was "unprofessional but of an isolated and non-serious nature."<sup>120</sup> In its admonition, the Director must advise the respondent that the admonition is being issued in lieu of presenting a matter to an LPRB Panel.<sup>121</sup> The respondent may notify the Director within 14 days of notice of the admonition that they demand the Director present the matter to an LPRB Panel or instruct the Director to file a Petition for Disciplinary Action with the Court.<sup>122</sup> If the respondent does not do so, the Director issues the admonition. The complainant may appeal the Director's decision to issue an admonition to the LPRB, which, in turn, is decided by a single LPRB member.

Unlike a probable cause determination, an LPRB Panel consideration of a respondent's admonition appeal is one that necessitates the Panel making an evidentiary determination.<sup>123</sup> The standard of proof as to whether to affirm or reverse the Director's admonition is clear and convincing evidence.<sup>124</sup> If an LPRB Panel determines the appeal without a hearing and affirms the issuance of the admonition, the respondent has the right to a hearing *de novo* before a different Panel.<sup>125</sup> If that LPRB Panel holds a hearing, Rule 9(i)(1)(ii) provides that, at the commencement of the proceeding, the Panel Chair must explain that the purpose of the hearing is to determine whether to affirm the admonition as being supported by clear and convincing evidence, reverse the admonition, or, if there is probable cause for public discipline, proceed with a Petition for Disciplinary Action in the Court. A respondent may appeal to the Court an LPRB Panel affirmation of a Director's admonition after a hearing.<sup>126</sup> The complainant also may appeal an LPRB Panel's

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<sup>118</sup> Minn. Rules on Law. Prof'l Responsibility R. 8(d)(1).

<sup>119</sup> Minn. Rules on Law. Prof'l Responsibility R. 8(d)(2).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* This is considered a respondent's appeal of an admonition issued by the Director under Rule 8(d)(2).

<sup>123</sup> Special Procedures for Admonition Appeals and Reinstatement Petitions, Lawyers Professional Responsibility Board Panel Manual (Revised Jan. 1, 2017).

<sup>124</sup> *Id.* The Lawyers Professional Responsibility Board Panel Manual notes that "the level of gravity of unprofessional conduct" in these admonition appeals "is far lower than that considered at a probable cause hearing; the issue at an admonition appeal hearing is whether there was unprofessional conduct of an 'isolated and non-serious nature.'"

<sup>125</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(j)(1)(iii).

<sup>126</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(m).

decision to issue an admonition.<sup>127</sup> In 2021, there were 89 admonitions issued, and 9 complainant appeals; none of those appeals resulted in reversal of the admonition. Respondents appealed admonitions three times and the LPRB Panels reversed once. The 89 admonitions also include three Panel admonitions in lieu of public discipline.

The Director may, after investigation and with the approval of the LPRB Chair or Vice-Chair and the agreement of the respondent, agree to private probation for up to two years.<sup>128</sup> The Director must notify the complainant of this agreement, and the complainant may appeal that decision to a LPRB member. In 2021, there were nine private probations issued and no complainant appeals.

When, under Rule 8(e), complainants appeal the Director's decision to dismiss, issue an admonition or agree to private probation, the record on appeal is limited to the facts, allegations, and other information available to the Director when making the decision.<sup>129</sup> The Rules do not provide the standard of review the LPRB member should apply. Materials outside that record submitted by the complainant, respondent or other person must be provided by the Director to the reviewing LPRB member without providing them to the respondent or complainant.<sup>130</sup> If the LPRB member assigned to the appeal determines that the new information may have impacted the Director's decision, the member shall refer the matter back to the Director for further investigation and explain the decision to do so.<sup>131</sup> Otherwise, the LPRB member may sustain the Director's decision, direct the OLPR to conduct further investigation, or instruct the Director to proceed to a LPRB Panel for a probable cause determination. If a DEC recommended discipline and the Director determined discipline was not warranted, the LPRB member may resolve the complainant's appeal by instructing the Director to issue an admonition.

Finally, the Director may determine after investigation that there is a basis for disciplinary charges and that the matter should be referred to a LPRB Panel for a probable cause determination.<sup>132</sup>

## **6. LPRB Panel Determination of Probable Cause**

When the Director decides a matter should proceed to an LPRB Panel for a probable cause determination, the OLPR must prepare a draft of the charges of misconduct that would comprise a Petition for Disciplinary Action.<sup>133</sup> The Director is required to notify the respondent of the charges, the name and contact information of the Panel Chair and Vice-Chair, and the provisions of Rule 9 of the Rules on Lawyers Professional Responsibility. Within 14 days of receiving notice, the lawyer is required to submit an answer to the charges and may request a hearing.<sup>134</sup> Ten days following the respondent's answer, the parties may submit affidavits and other documents supporting their positions.<sup>135</sup>

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<sup>127</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(1).

<sup>128</sup> Minn. Rules on Law. Prof'l Responsibility R. 8(d)(3).

<sup>129</sup> Policy and Procedure 13, Executive Committee Policy and Procedure Memoranda (Sept. 2010).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Minn. Rules on Law. Prof'l Responsibility R. 8(d)(4).

<sup>133</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(a)(1).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

The parties may agree to proceed without following some or all of the hearing procedures under Rule 9 or may stipulate to bypass probable cause determinations.<sup>136</sup> Whether to hold a hearing or make a probable cause determination on the record submitted is a decision within the discretion of the Panel. The Consultation Team was advised that most matters proceed through the probable cause finding stage without a hearing.

When Panel hearings are held, Rule 9 of the Rules on Lawyers Professional Responsibility sets forth the detailed procedures for those matters. The Lawyers Professional Responsibility Board Panel Manual provides additional procedures and guidance for the Panels to follow. These include procedures relating to pre-hearing meetings, requests for admission of facts, depositions, and acceptable forms of evidence.

The Minnesota Rules on Professional Responsibility do not define probable cause. The Lawyers Professional Responsibility Board Panel Manual notes that various definitions of probable cause exist. The Manual cites to the probable cause standard used in grand jury proceedings, a dental disciplinary case, and Black's Law Dictionary. The Manual does not advise which standard the Panels are to use. However, it states that, in determining whether there is probable cause to warrant filing a Petition for Disciplinary Action with the Court, the Panel should "apply the probable cause standard in answering these questions:

- i. Is there probable cause to believe that certain alleged facts are indeed the facts of the matter?
- ii. If the previous question is answered in the affirmative, is there also probable cause to believe that the facts constitute violation(s) of the Minnesota Rules of Professional Conduct?
- iii. If the first two questions are answered in the affirmative, is there probable cause to believe that the rule violation(s) are serious enough to warrant public discipline?"<sup>137</sup>

Upon the conclusion of its deliberations,<sup>138</sup> the Panel may: (1) determine there is not probable cause to warrant proceeding with a Petition for Disciplinary Action; (2) find probable cause exists to do so without making any recommendation as to the ultimate disposition of the case; or (3) issue a Panel admonition. The Director must notify the complainant and any DEC that was involved in investigating the matter of the Panel's decision.<sup>139</sup> The notice must advise the complainant of their right to appeal the Panel's decision to the Court.<sup>140</sup> The standard of review of a complainant appeal to the Court is whether the Panel acted in an arbitrary, capricious, or unreasonable manner.<sup>141</sup> Complainants do not have access to the file and cannot see what materials were provided to the Panel for purposes of making their appeal. As noted above, the respondent may appeal the Panel's affirmance of a Director's admonition, or a Panel's issuance of admonition in lieu of charges, to the Court.<sup>142</sup> There is no provision for appeal by the Director.

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<sup>136</sup> Minn. Rules on Law. Prof'l Responsibility R. 10(a).

<sup>137</sup> Procedures After Panel Hearing, Probable Cause Determination, Lawyers Professional Responsibility Board Panel Manual (Revised Jan. 1, 2017).

<sup>138</sup> Conditional admission revocations are omitted from this discussion, but the procedure is identical.

<sup>139</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(k).

<sup>140</sup> *Id.*

<sup>141</sup> Minn. Rules on Law. Prof'l Responsibility R. 9(l).

<sup>142</sup> *Supra* note 125.

## 7. Petition for Disciplinary Action

After a finding of probable cause, the Director personally serves the Petition for Disciplinary Action on the respondent and then files with the Court the Petition and proof of service.<sup>143</sup> If the respondent cannot be located for personal service, the Director may mail the Petition to the respondent's last known address and must file an affidavit with the Court and request an order suspending the respondent from the practice of law.<sup>144</sup> Within a year of any order so suspending the respondent, that lawyer may move to vacate the suspension and request leave to file an answer to the Petition for Disciplinary Action.<sup>145</sup> If a respondent who cannot be located does not move to vacate the suspension within a year, the Director must petition the Court to issue an order to show cause why the Court should not take appropriate disciplinary action.<sup>146</sup> The order to show cause is to be served by publication or personally if the lawyer can be located. If the lawyer fails to answer the order to show cause, the Court will proceed to briefing on the appropriate level of discipline, and then impose discipline on the respondent.

Respondents served with a Petition for Disciplinary Action are required to file their answer to the Petition within 20 days after service.<sup>147</sup> If the respondent fails to answer within that time period, the Court may, upon the Director's motion, deem the allegations admitted.<sup>148</sup> This happens prior to the matter being assigned to a Referee.

Referees are appointed by the Court to serve as the trier of fact on Petitions for Disciplinary Action.<sup>149</sup> Hearings are to be recorded, and the rules of civil procedure apply.<sup>150</sup> Proceedings on Petitions for Disciplinary Action are public, although Referees, when necessary, may issue protective orders to keep confidential appropriate information.<sup>151</sup> In 2021, the OLPR filed 38 public matters; 36 public matters were filed in 2020, and 43 were pending at the beginning of 2022. Procedures for the Referees' issuance of findings of fact, conclusions, and recommendations and for proceedings before the Court on the Referee's report are set forth above at pages 18 and 19.

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<sup>143</sup> Minn. Rules on Law. Prof'l Responsibility R. 12(a).

<sup>144</sup> Minn. Rules on Law. Prof'l Responsibility R. 12(c)(1).

<sup>145</sup> *Id.*

<sup>146</sup> Minn. Rules on Law. Prof'l Responsibility R. 12(c)(2).

<sup>147</sup> Minn. Rules on Law. Prof'l Responsibility R. 13(a).

<sup>148</sup> Minn. Rules on Law. Prof'l Responsibility R. 13(b).

<sup>149</sup> Minn. Rules on Law. Prof'l Responsibility R. 14(a).

<sup>150</sup> *Supra* note 99. *See also* Minn. Rules on Law. Prof'l Responsibility R.14(d).

<sup>151</sup> Minn. Rules on Law. Prof'l Responsibility R. 20.

### III. STRUCTURE

The focus of the Standing Committee on Professional Regulation's consultation program is the effectiveness, fairness, and efficiency of the jurisdiction's disciplinary system. There are many factors and much data that inform the Committee's study of the structure and operation of a system, and Minnesota was no exception. The Committee is very appreciative of the information provided to the Consultation Team to ensure that it had input from many diverse perspectives.

The Committee makes clear prior to and at the time of its engagement by a jurisdiction's Supreme Court, and to interviewees, that its evaluation does not address personnel matters. Personnel matters are separate from resourcing issues, which may impact personnel numbers and position types. The Committee's recommendations, by necessity, cannot be and are not guided by past, present, or future personnel issues or conflicts.

The structure of disciplinary systems can contribute to inefficiencies, as can process and resources. The current structure of the Minnesota system, along with procedures, has led to inefficiencies. The Consultation Team identified several areas where adjustments to the structure and concomitant responsibilities of its component entities (supplementing the Court's July 2021 changes to Rules 4 and 5 of the Rules on Lawyers Professional Responsibility) will help address those inefficiencies. These Recommendations, as requested by the Court, will include examples from other jurisdictions, where appropriate.

A diagram describing how a complaint proceeds through the current system is attached as Appendix A. The revised structure proposed by the Professional Regulation Committee, as described in the recommendations below, is attached as Appendix B.

**Recommendation 1: The Court Should Amend the Rules on Lawyers Professional Responsibility to Further Clarify the Roles and Responsibilities of the LPRB and Provide Further Separation Between the OLPR and the Adjudicatory and Administrative Components of the System.**

Commentary

The Consultation Team heard from a significant number of interviewees at all levels of the system that there is a need for enhanced separation between the LPRB and the OLPR, as well as enhanced separation within the LPBR of its administrative and adjudicative functions. The Professional Regulation Committee agrees. The following Recommendations address those concerns while maintaining a necessary, but properly limited, collaborative relationship between the Director's Office and the volunteer components of the system in certain areas. The need for staffing resources for the volunteer components of the system, not associated with the OLPR, is addressed in Recommendation 4 below. The Professional Regulation Committee is sensitive to the budgetary implications of these and other recommendations.

The Professional Regulation Committee recommends complementing the Court's July 2021 amendments to Rules 4 and 5 by further separating the LPRB's adjudicative and administrative functions. That also will involve increasing the LPRB's separation from the OLPR. The Regulation

Committee suggests this will result in a healthier system without diminishing the importance of the system’s volunteers in its operation and administration.

**A. The Court Should Eliminate the Executive Committee of the LPRB and Create a New Administrative Oversight Committee to Assist the Court in Carrying Out Its Discipline and Disability Responsibilities.**

In 2021, the Court amended Rules 4 and 5 of the Rules on Lawyers Professional Responsibility to clarify lines of supervisory responsibilities for the system’s operation and division of administrative duties.<sup>152</sup> The amendments provided, in relevant part, that the LPRB is responsible for “...providing recommendations and guidance to the Director regarding the operations of” the OLPR, and deleted the provision in Rule 4(d), which provided that the Executive Committee was responsible for general supervision of the OLPR.<sup>153</sup> The Court amended Rule 5 to make clear that the Director is an employee of the Judicial Branch, and that the State Court Administrator, with LPRB input, conducts the Director’s performance evaluation.<sup>154</sup> Amended Rule 5 also stated the Director is responsible for the day-to-day operations of the OLPR and for supervising its employees.<sup>155</sup>

While the LPRB acts *en banc* for some administrative purposes, in many respects its administrative and adjudicative functions are divided between the Executive Committee (administrative) and the LPRB Panels (adjudicative). Executive Committee members do not serve on Panels or handle complainant appeals. The Executive Committee manages LPRB operations, reviews LPRB work product, reviews data provided by the OLPR, assigns LPRB panels, and its members serve as liaisons to the LPRB Committees. The Executive Committee is responsible for acting on the Director’s request to independently initiate an investigation into a lawyer’s conduct without having received a complaint, a quasi-adjudicative function.

To supplement the amendments to Rules 4 and 5 and assist the Court in carrying out its discipline and disability functions in a manner that addresses concerns about “hands-on management” by the Court, the Professional Regulation Committee recommends that the Court create a stand-alone Administrative Oversight Committee and eliminate the Executive Committee. The new Administrative Oversight Committee, a completely separate entity from the LPRB, will replace the current Executive Committee. The Administrative Oversight Committee will be responsible for general administrative oversight of and outreach regarding the entire system, including the LPRB, and working with the Director’s Office to help address delays and optimize the system’s efficiency, accountability, and transparency.<sup>156</sup> The Director should continue to report to the State Court Administrator relating to the performance of that position’s duties.

This new oversight entity should be composed of 7 members (four lawyers and three public members) appointed by the Court. There should be no overlap between the members on this new

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<sup>152</sup> *Supra* note 33.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Examples of administrative oversight entities include: Colo. R. Civ. P. 242.3, Advisory Committee; Guam R. Law. Disciplinary Enforcement & Disability Proceedings, Rule 2; La. Sup. Ct. R. XIX, § 2(G)(3); Utah Code of Judicial Administration R. 11-503.

entity and the LPRB. The Professional Regulation Committee recommends that to ensure institutional memory, the Court consider retaining two experienced members (one lawyer and one public) from the current Executive Committee, and that the remaining five new members should not have served on the Executive Committee or LPRB. The Professional Regulation Committee suggests that this will provide a fresh perspective as the Court moves forward in implementing change for the improvement and evolution of the system.

The Court should amend the Rules to eliminate “Bar Association” designated appointees. While the bar associations in the State may make recommendations to the Court for appointments to the Administrative Oversight Committee, applicants recommended by bar associations should not be given extra preference over other applicants.<sup>157</sup> Members should serve fixed, staggered three-year terms, and a subsequent three-year term, but no more than two consecutive three-year terms. Individuals selected to serve on the Administrative Oversight Committee should be diverse in representation of all segments of the public and the profession, including minority members, women and solo or small firm practitioners. There also should be geographic diversity on the Administrative Oversight Committee.

### **1. The Court Should Adopt a Process for Selecting Administrative Oversight Committee Members.**

It is important for there to be a process for those interested in serving to apply and to be screened for appointment to the Administrative Oversight Committee. This process should also be used for selection of LPRB members going forward. This will allow the Court or its designee to vet and select appropriate candidates for appointment.<sup>158</sup> It need not be a complicated process. The Court, in consultation with the current LPRB members, the Director, and bar associations, can develop minimum requirements for lawyer and public member appointees.

All candidates should have to complete an application and the Court may consider whether applicants should undergo a background check.<sup>159</sup> The Professional Regulation Committee commends to the Court for consideration in developing this process the good work of the current LPRB Diversity and Inclusion Committee, which has focused on recruiting diverse LPRB members, creating a sustainable model for recruitment, and adopting an LPRB Commitment Statement on Non-Discrimination and Inclusion. If there are not enough applicants for any given appointment period, the Court may direct the Chair of the Administrative Oversight Committee to initiate contact with qualified lawyer and public members for consideration.

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<sup>157</sup> Separation from any perceived control of the system by bar associations is important. The process should be directed by the Court, its rules, and policies, and not seen to be influenced by bar association politics. *See, e.g.*, ABA Model Rules for Lawyer Disciplinary Enforcement R. 2 cmt.

<sup>158</sup> This process should include the development of resources for recruitment of public members. Currently, the OLPR has a list of such entities that it provides to the DEC for public member volunteer recruitment, and that list includes entities that focus on diversity. The LPRB also has been provided with this list.

<sup>159</sup> For example, in Louisiana, those wanting to serve on a Hearing Committee (the trier of fact akin to Minnesota’s Referees) must complete an application that asks for disclosure of all lawsuits, bankruptcies, state or federal tax liens, and moving violations for the last five years, in addition to authorizing a criminal background investigation. In other jurisdictions, like Illinois, applicants complete the application, lawyer disciplinary backgrounds are checked, and all applicants are interviewed. In Nebraska and Maryland, the disciplinary history of lawyer applicants is checked.

Publicizing the appointment process is important to broaden the pool of lawyer and public applicants. By developing and publicizing criteria for evaluating applicants, lawyers and public members interested in serving the system will be better able to understand what their duties will be, and the time commitment expected of them. The application and appointment process should be publicized on the Court's, LPRB's, and OLPR's websites (see Recommendation 9 below), and on websites of the bar associations in the State. The Court should also request posting on websites of appropriate community organizations and in local print and online media.

## **2. The Court Should Amend the Rules to Set Forth the Duties and Responsibilities of the New Administrative Oversight Committee.**

The Court should set forth in the Rules the Administrative Oversight Committee's authority and responsibilities. This includes where the Administrative Oversight Committee and Director will need to work together in the interest of the system and the public while retaining their independence from each other.

The Court should amend the Rules to provide that the new Administrative Oversight entity has no authority to review, approve, or decline the initiation of an investigation by the Director absent receipt of a complaint.<sup>160</sup> The Professional Regulation Committee understands the historic reasons for that practice. However, based on interviews with system participants at different levels, those reasons no longer exist. Further, this is typically a matter left to the discretion of the chief regulatory counsel, and sufficient safeguards via the probable cause finding process are in place to address concerns of abuse.<sup>161</sup>

The Committee suggests that the Administrative Oversight Committee should be authorized to:

- a. Screen and recommend for Court approval applicants for system volunteers and be responsible for ensuring that LPRB and DEC members effectively and efficiently perform their duties;
- b. Utilizing the new staff position suggested in Recommendation 4, make assignments to LPRB Panels using the current process put in place by the Executive Committee. If a LPRB member is not performing their duties, the Administrative Oversight Committee should recommend that member's removal to the Court. If a DEC member is not meeting their responsibilities, the Administrative Oversight Committee should address that with the DEC Chair;
- c. Consistent with the Court's July 2021 amendments to Rules 4 and 5, work with the Director to identify where system delays occur and develop a strategy for addressing such concerns. To do so, the Administrative Oversight Committee should regularly review case management reports provided by the Director that include information about the type of misconduct alleged, whether the facts and

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<sup>160</sup> The Professional Regulation Committee recommends doing so even if the Court retains the current LPRB structure, including the Executive Committee.

<sup>161</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(B)(1) & (2) & 11(A).



evidence are complex, the work already completed, the nature and extent of the investigation that needs to be performed and an estimate of how long that will take. Case management reports must omit the names of respondents and complainants. The Director must remain responsible for the day-to-day operations of the office, including managing staff and setting investigative and prosecutorial priorities. The exercise of appropriate prosecutorial discretion with respect to the manner in which cases are investigated, prosecuted, and appealed must remain with the Director without the possibility of interference. The Administrative Oversight Committee should not engage in micromanagement;

- d. In consultation with the Director, propose rules of procedure for lawyer discipline and disability proceedings for adoption by the Court. If the Administrative Oversight Committee and Director cannot agree on proposed rules or amendments to existing Rules, the Committee and Director may submit their proposals separately for Court approval, but the goal is for the submission to be a joint one;
- e. Consult with the Director relating to the necessary budget for the operation of the OLPR, which includes funding operation of the LPRB. There currently is no separate budget for the LPRB. Given Recommendation 1B relating to the LPRB's revised duties, the Professional Regulation Committee does not believe it necessary that it have one. Its functions can continue to be funded from the OLPR budget. The Court will need to decide how to fund the new Administrative Oversight Committee.

The system is on a biennium budget cycle. The Consultation Team was advised that the Director works with Court finance personnel to develop the budget. Currently, the Director provides the proposed budget to the LPRB for review. That should no longer happen. The Director should provide the proposed OLPR budget to the Administrative Oversight Committee for review, and the Director should remain responsible for submitting the OLPR budget to the Court for approval.<sup>162</sup> If there is disagreement about the OLPR budget, the Administrative Oversight Committee can submit comments to the Court;

- f. Work with the Director in the preparation of the Annual Report for submission to the Court, including a report of the Administrative Oversight Committee's work, and on publication of the Report;
- g. Periodically report to the Court regarding the operations of the system, and consistent with Rule 5, provide appropriate input to the State Court Administrator relating to the Director's performance;

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<sup>162</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(B)(14).

- h. Develop and implement, in coordination with the Director, training programs for the LPRB, DEC's, and Referees; and
- i. Engage in public outreach, including informing the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed. This may include seeking input from stakeholders, including complainants, about their experiences with the system. That is a rarity in practice nationally, but there is precedent in Minnesota with the 2017 LPRB/OLPR Strategic Planning Survey. In addition, Illinois has done so in relation to its Proactive Management-Based Regulation Program.

Rule 4(c) of the Rules on Lawyers Professional Responsibility provides that the LPRB may issue ethics opinions. The Professional Regulation Committee strongly recommends that the Court not include this among the Administrative Oversight Committee's duties. Any services that help lawyers avoid violating the rules of professional conduct are in the best interest of the public and the profession, but in the Professional Regulation Committee's view, such opinions should not be issued by any component of the disciplinary system (see also Recommendation 2 regarding the provision of these opinions by the OLPR).<sup>163</sup> The risks posed by this practice are too great. Allowing the issuance of advisory opinions by the Administrative Oversight Committee puts the members in danger of being called as witnesses in a proceeding against a lawyer who relied, or claims to have relied, on such advice.

**B. The Court Should Amend the Rules to Streamline and Clarify the Remaining Responsibilities of the LPRB and Its Procedures.**

In addition to the creation of the Administrative Oversight Committee, the Professional Regulation Committee recommends that the Court amend the Rules to streamline the role and responsibilities of the LPRB and related procedures. The Consultation Team heard from a number of interviewees that this would improve the efficiency of the system.

Using the selection process described above, the Professional Regulation Committee recommends that the revised LPRB be composed of no more than 15 members appointed by the Court. The reconstituted LPRB should operate in panels of three (one-third public members and two-thirds lawyer members). Each Panel should have a Chair, and the Committee recommends that the Chair be a lawyer. These members should serve fixed, staggered three-year terms, and may serve subsequent three-year term, but no more than two consecutive three-year terms. The LPRB should be diverse in all respects as noted above.

The Professional Regulation Committee recommends the Court change the role of the LPRB Panels to make probable cause determinations when Petitions for Disciplinary Action are recommended by the Director. That modification should include, as discussed below, removing the LPRB's authority to hear respondent and complainant appeals of admonitions (see Recommendation 2) and eliminating LPRB Panel admonitions. Complainants may still appeal the Director's dismissal of complaints to an LPRB member, but no further. The Committee

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<sup>163</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(C) and cmt.

recommends that Panel Chairs be assigned to consider these appeals, using a standard of whether the decision of the Director's office was arbitrary, capricious, or unreasonable. Changing the LPRB's responsibilities to making probable cause determinations and hearing complainant appeals of dismissals allows these volunteers to continue to serve a crucial function by providing an important check and balance in the disciplinary process, while allowing prosecutorial discretion to more appropriately reside with the Director's office.

The LPRB handles a significant number of complainant appeals. In addition to the 132 complainant appeals in 2021 (including the few admonition appeals), the July 2022 Annual Report states that from January 1 to June 14, 2022, LPRB members handled 61 complainant appeals with an average deliberation time of 21.4 days. Of the 132 complainant appeals in 2021, the LPRB sustained the OLPR dismissal 95% of the time. Of the 61 complainant appeals received through 2022, the LPRB sustained the Director's decision 85% of the time.

As noted above, the Professional Regulation Committee recommends that complainant appeals of dismissals continue, but not through the level of the Court, and that appeals of admonitions be discontinued. In the Professional Regulation Committee's experience, Minnesota grants more extensive appeal rights to complainants than other jurisdictions. Limiting complainant appeals to dismissals balances the goal of enhancing public trust and confidence in the system with appropriate resource management. The Committee is not aware of evidence that multiple levels of appeals for complainants, extending up to the Court, adds value or results in process improvements.

### **1. The Court Should Consider Adopting a Definition of Probable Cause.**

In addition to changing the LPRB's duties to making probable cause determinations and handling certain complainant appeals, the Professional Regulation Committee recommends streamlining the probable cause finding process. A number of interviewees at all levels of the system, and the Consultation Team, found the probable cause process to be unnecessarily elaborate.

In the Professional Regulation Committee's experience, most disciplinary procedural rules do not include a definition of probable cause, and there is no such definition or guidance in the Minnesota Rules on Lawyers Professional Responsibility. The LPRB has worked to address the issue in its LPRB Panel Manual, and the Consultation Team heard from several interviewees that it continues to grapple with the issue, including whether and how to incorporate the standard of clear and convincing evidence into its probable cause determinations.

The Manual states that various definitions of probable cause exist, and cites the standard used in grand jury proceedings, a dental disciplinary case, and Black's Law Dictionary.<sup>164</sup> The Manual does not advise which standard the Panels are to use, but advises that the Panel should "apply the probable cause standard in answering these questions:

- i. Is there probable cause to believe that certain alleged facts are indeed the facts of the matter?

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<sup>164</sup> *Supra* note 137.

- ii. If the previous question is answered in the affirmative, is there also probable cause to believe that the facts constitute violation(s) of the Minnesota Rules of Professional Conduct?
- iii. If the first two questions are answered in the affirmative, is there probable cause to believe that the rule violation(s) are serious enough to warrant public discipline?”<sup>165</sup>

To guide the LPRB in performing its duties effectively, efficiently, and with consistency from case-to-case, the Professional Regulation Committee recommends that the Court consider amending the Rules to define the standard of probable cause and make clear that the role of the LPRB is **not** to reach a decision on the merits of the matter. The Consultation Team heard from interviewees, including respondents’ counsel, that this would be helpful.

As noted above, most disciplinary procedural rules do not define probable cause, but some do. For example, the Governing Rules of the North Carolina Bar define it as “a finding by the Grievance Committee that there is reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action.”<sup>166</sup> In South Carolina, reasonable cause is defined as “a reasonable ground for belief in the existence of facts warranting the filing of formal charges for discipline...”<sup>167</sup> The Wisconsin Procedures for the Lawyer Regulation System use the term “cause to proceed” which is defined as “a reasonable belief based on a review of an investigative report that an attorney has engaged in misconduct that warrants discipline or has a medical incapacity that may be proved by clear, satisfactory and convincing evidence.”<sup>168</sup> A Glossary of Court-Related Terms on the Minnesota Judiciary website defines probable cause as a “strong belief, based on facts, that a crime has been committed, that a particular person has committed the crime and that evidence related to the crime exists.”<sup>169</sup>

## **2. The Court Should Streamline Probable Cause Procedures, Including Elimination of Hearings.**

Currently, when the Director determines that a matter should proceed to an LPRB Panel for a probable cause determination, lawyers in the OLPR prepare a draft of the charges of misconduct that would comprise a Petition for Disciplinary Action.<sup>170</sup> The Director is required to notify the respondent of the charges, the name and contact information of the Panel Chair and Vice-Chair, and the provisions of Rule 9 of the Rules on Lawyers Professional Responsibility. Within 14 days of receiving notice the lawyer is required to submit an answer to the charges and may request a hearing.<sup>171</sup> Ten days following the respondent’s answer, the parties may submit affidavits and other documents supporting their positions.<sup>172</sup> The parties may agree to proceed without following some or all of the hearing procedures under Rule 9 or may stipulate to bypass probable cause

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<sup>165</sup> *Id.*

<sup>166</sup> See NORTH CAROLINA STATE BAR GOVERNING RULES OF THE STATE BAR, DEFINITIONS, <https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0103-definitions/> (last visited Aug. 30, 2022).

<sup>167</sup> S.C. App. Ct. R. 2.

<sup>168</sup> Wis. Procedures for the Lawyer Regulation System, SCR 22.001.

<sup>169</sup> See MINNESOTA JUDICIAL BRANCH GLOSSARY OF COURT-RELATED TERMS, <https://www.mncourts.gov/Help-Topics/Glossary-of-Court-Related-Terms.aspx> (last visited Aug. 30, 2022).

<sup>170</sup> *Supra* note 133.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

determinations.<sup>173</sup> Whether to hold a hearing or make a probable cause determination on the record submitted is a decision within the discretion of the Panel. As described above, the Consultation Team was advised that probable cause hearings occur infrequently.

When hearings are held, Rule 9 of the Rules on Lawyers Professional Responsibility sets forth detailed procedures, akin to a full evidentiary hearing, including pre-hearing meetings, requests for admission of facts, depositions, and acceptable forms of evidence. The LPRB Panel Manual provides additional procedures and guidance for the Panels to follow.

The LPRB may find that probable cause exists to file a Petition for Disciplinary Action, decline to find probable cause, or issue a Panel admonition. The Director must notify the complainant and any DEC involved in the investigation of the LPRB decision. Complainant's may appeal the LPRB decision to the Court, which determines if the LPRB acted in an arbitrary, capricious, or unreasonable manner.<sup>174</sup> The respondent may appeal the Panel's affirmance of a Director's admonition, or a Panel's issuance of admonition in lieu of charges, to the Court, and this is addressed further in Recommendation 21 below.

The Professional Regulation Committee recommends that the Court amend the Rules to provide a straightforward process for LPRB panels to determine probable cause, and to include in the Rules that the Panels must make their decisions promptly. This would include elimination of probable cause hearings.

Our recommendation to eliminate probable cause hearings is consistent with that of a majority of the members of Minnesota's 2008 Supreme Court Advisory Committee to Review the Lawyer Discipline System, and the ABA Professional Regulation Committee's (then the Professional Discipline Committee) 1981 Consultation Report. The Professional Regulation Committee finds no compelling evidence or unique jurisdictional need to provide a respondent with an evidentiary hearing at the probable cause stage of the proceedings. Most other jurisdictions do not permit probable cause hearings and that is consistent with ABA policy.

This streamlined procedure would include the Director continuing to provide to the Panel a draft of possible charges for a Petition for Disciplinary Action and other evidence supporting the request for the probable cause finding in an easily digestible and efficient manner, preferably electronically. In addition, the OLPR should be required to provide the LPRB with any exculpatory information identified during the investigation. The respondent's responses to requests for information during the investigation and supporting documentation also should be provided to the Panel.

Some jurisdictions permit the probable cause finding entity to allow the respondent an opportunity to appear before it.<sup>175</sup> The Court may wish to consider allowing the LPRB Panels to do so. The Court should ensure that such requests by respondents to do so are not utilized for purposes of delay but are allowed as a matter of fairness when the facts or circumstances warrant it. An

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<sup>173</sup> *Supra* note 136.

<sup>174</sup> *Supra* note 141.

<sup>175</sup> *See, e.g.*, Ill. Sup. Ct. R. 102.

alternative to allowing respondents an opportunity to appear would be to permit them a short period to provide additional written materials to the Panel for its consideration.

At the conclusion of its consideration of a matter, the LPRB Panel should determine whether probable cause exists, does not exist, or whether further investigation is necessary. If the latter, the Panel should refer the matter back to the OLPR and indicate what it believes requires additional investigation. The Panel should convey its decision, which should not include any explanation, to the Director, the respondent, and to the complainant. The Professional Regulation Committee recommends that complainants not be permitted to appeal the decision of the Panel, nor should the respondent or the Director. The Professional Regulation Committee believes that this process will provide a sufficient check on any risk of abuse of prosecutorial authority and not inappropriately limit the respondent's due process rights.

The Committee further recommends that the Court amend the Rules to eliminate the role of the Referee in making probable cause determinations in matters where an LPRB Panel Chair and the LPRB Chair agree that extraordinary circumstances exist to conduct a probable cause hearing. With the elimination of probable cause hearings, Referees will no longer need to serve in this role.

Finally, the Professional Regulation Committee recommends that the Court amend Rule 14 to eliminate the substitution of an LPRB Panel for a Referee to hear Petitions on Disciplinary Action and provide that Referees serve as the triers of fact in reinstatement matters as discussed in Recommendation 13. Regarding the substitution of a Panel for a Referee, if the concern is that there is an insufficient number of Referees available, the Court should take steps to address that issue. In terms of reinstatements, the Regulation Committee is uncertain why a Referee would not hear these often-complex cases, consistent with their acting as the trier of fact on Petitions for Disciplinary Action. They are trained and experienced in handling such matters, and this is a better use of system resources.

**Recommendation 2: The Court Should Amend the Rules to Further Clarify the Role and Responsibilities of the OLPR; the Director’s Office Should Continue Working to Streamline Procedures for Moving Cases Through Decision Points.**

Commentary

Chief regulation counsel in the majority of jurisdictions are hired by and serve at the pleasure of the Court.<sup>176</sup> In some jurisdictions with unified bars, the state bar association may be involved in the hiring and firing of the chief regulation counsel.<sup>177</sup> In other jurisdictions, an oversight entity appointed by the Court is responsible for hiring the chief regulation counsel, subject to the Court’s approval.<sup>178</sup> The Professional Regulation Committee did not find other jurisdictions where the chief regulation counsel is subject to a decision, every two years or other period of years, as to whether they should be retained.

The Director of the OLPR, a judicial branch employee, already serves at the pleasure of the Court and is subject to an annual performance evaluation by the State Court Administrator. Consistent with national practice and ABA policy, the Professional Regulation Committee recommends that the Court amend Rule 5(a) of the Rules on Lawyers Professional Responsibility to eliminate the two-year renewal of employment provision.<sup>179</sup>

Also, aligning with the Court’s July 2021 amendments to Rule 5(b) and Recommendation 1 above, the Professional Regulation Committee recommends that the Court amend Rule 5(c) to eliminate the requirement that the Director receive LPRB authorization to hire employees. The Director should be responsible for the hiring of staff for the OLPR. This Recommendation is not intended to impact any applicable state law or rules of the State Court Administrator relating to the employment of judicial branch employees.

The Professional Regulation Committee was asked whether the Director should consider having OLPR lawyers’ work assignments divided by areas of expertise, and whether this would be a good idea from an efficiency and effectiveness perspective. The Model Rules for Lawyer Disciplinary Enforcement do not speak to this issue. The Director is achieving stability in staffing and employing new counsel with experience and who are enmeshed in a training program that exposes them to all types of cases in the system. Given the variance in the types of complaints against lawyers, and for training, retention, and job satisfaction purposes, the Professional Regulation Committee is of the view that not dividing counsel responsibilities in this manner is optimal.

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<sup>176</sup> See, e.g., Procedures of the Ark. Sup. Ct. Regulating Prof’l Conduct of Attorneys at Law §5; Colo. R. Civil Procedure, Ch. 20, R. 242.5 (Regulation Counsel); Del. Sup. Ct. Rules R. 64; Iowa Ct. Rules, R. 49.4(1); Mich. Ct. Rules Prof’l Disciplinary Proceedings R. 9.109; Mo. Sup. Ct. R. 5.06; Mont. Rules for Lawyer Disciplinary Enforcement, R. 5; Neb. Ct. R. § 3-308; S.C. Sup. Ct. R. 413; Utah Code of Judicial Administration R. 11-502; and Wis. Sup. Ct. Rules R. 21.03.

<sup>177</sup> See, e.g., Ala. Rules of Disciplinary Procedure R. 6. See also Wash. State Ct. Rules, Rules for Enforcement of Lawyer Conduct R. 2.8.

<sup>178</sup> See, e.g., Ill. Sup. Ct. R. 751; Ind. Sup. Ct. Rules for Admission to the Bar & Discipline of Attorneys R. 23; La. Sup. Ct. R. XIX § 4; and Me. Bar Rules R. 2.

<sup>179</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(A).

There is one area where it may make sense to have a disciplinary counsel with special expertise handle the OLPR's cases on that subject and where some disciplinary offices have done so. That is for cases involving conversion and other financial misconduct. These cases tend to be document heavy and have become more complex and resource intensive. A lawyer with expertise in these types of cases is able to handle them with enhanced effectiveness. The Professional Regulation Committee also can see, from an efficiency standpoint and where caseload justifies, that having a lawyer whose expertise lies in this area handle these matters would be helpful. The OLPR employs an auditor to assist counsel in these cases already. However, caseloads fluctuate in terms of numbers and types of misconduct alleged. Therefore, should the Director, who retains the responsibility for the management and division of labor for her staff, determine to have a counsel whose focus is financial misconduct cases, that lawyer should remain available to handle other matters as necessary.

## **A. Internal Processes for Handling Dismissals Can Be Streamlined**

### **1. Summary Dismissals**

As noted above, complaints against Minnesota lawyers are first screened by the OLPR to determine whether there exists a “reasonable belief that professional conduct may have occurred.”<sup>180</sup> “Duty lawyers,” who are less senior lawyers operating under the supervision of a more senior OLPR attorney, handle screenings. When the duty lawyer determines that the matter should be summarily dismissed, that lawyer prepares a draft determination to the complainant explaining the basis for the summary dismissal.

The duty lawyer's supervisor reviews the matter, and if they agree, the file is sent to the Director for approval. The Director may agree with the recommendation for summary dismissal, after which the determination, with any Director edits incorporated, is issued to the complainant advising them of the decision and their appeal rights under Rule 8(e). Alternatively, the Director may refer the matter back to the duty lawyer for further consideration.

Information provided to the Consultation Team indicates the Director spends approximately six hours each week reviewing and making final determinations on recommendations for summary dismissal. OPLR case processing goals recommend that cases involving summary dismissal be handled within 14 days from receipt of the complaint. Data provided to the Consultation Team indicates that in 2021, summary dismissals were issued approximately 20 days after receipt of the complaint. It is unclear how much of the additional six days results from the Director needing to review the files and make a decision along with her other responsibilities.

The Professional Regulation Committee understands that in many instances the nature of decisional authority for staff lawyers in the OLPR is a function of job descriptions and classification determined by the Judicial Branch Human Resource Department. As a result, certain efficiencies are outside the control of the Director, who is amenable to delegating certain duties. With that in mind, the Professional Regulation Committee believes that the Director should not have to review, approve, or disapprove summary dismissal recommendations. The lawyer

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<sup>180</sup> *Supra* note 112.



supervising the duty lawyer, or another senior lawyer in the Office should have the authority to do so. How that can be achieved in the context of the current job classification structure should be explored.

Until the human resources issue is resolved, the Professional Regulation Committee recommends several ways in which the summary dismissal process can be made more efficient. The Consultation Team was advised and observed that the determinations written in support of summary dismissals are far too long and are written more in the form of a legal memorandum, using formal legal terms and phrases. The Consultation Team was advised that this practice dates back many years and has simply continued.

The Professional Regulation Committee urges that these determinations be significantly shortened and be in the form of a letter to the complainant, in relatable language. The letter should explain concisely why the matter was summarily dismissed. For example, summary dismissals often happen because the allegations do not allege a violation of the Rules of Professional Conduct and therefore do not fall under the Court's jurisdiction. In the Committee's experience, most summary dismissals can be explained in a manner that a complainant can understand and appreciate in one page.

Under the current practice where the Director reviews all summary dismissal recommendations, a reason for such lengthy determinations may be that the Director wants to see, as part of training of less senior lawyers, that counsel's analysis leading to the recommended summary dismissal. If that is the case, and the Consultation Team did not hear one way or the other, the Professional Regulation Committee suggests that review by the duty lawyer's supervisor negates a need for that. The Director has confidence in her supervising lawyers. As such, she should defer to their judgment.

## **2. Investigations and Dismissals After Investigation**

For matters that proceed to investigation, the Rules do not set a time for respondents to respond to complaints sent by the OLPR or DEC's, nor do the Rules set forth the time in which the complainant may reply to a respondent's response. OLPR Notices of Investigation request a response from the respondent within 14 days of the date of the Notice. Complainants are generally afforded the same time to reply upon receipt of the respondent's response. The Professional Regulation Committee recommends that the Court amend Rule 8 to provide that the respondent must respond to the OLPR within a time (preferably 14, but no more than 21 days), unless an extension is granted by the Director. Similarly, the Rule should provide complainants with a similar time to reply to a respondent's response.

The Consultation Team was advised that the OLPR conducts a *de novo* review of DEC recommendations for dismissal. The Consultation Team was advised that occurs, in part, because there is variance in the quality and length of DEC recommendations, which are routed to senior OLPR lawyers for review. Those senior lawyers may approve the dismissal, using the draft disposition provided by the DEC, or modify the disposition. They also may forward the file to the Director for in-house assignment if further investigation is warranted or senior staff disagrees with the recommended dismissal.

As noted in Recommendation 3 below, the Professional Regulation Committee is not recommending that the use of DEC's be eliminated at this time and that all complaints be investigated by the OLPR. However, it is not an efficient or effective use of resources to have the OLPR conduct a *de novo* review of DEC recommendations of dismissal. It defeats the purpose of using the DEC's. Problems relating to variances in the quality of DEC investigations and reports, including for dismissal of matters, can be improved with enhanced training and the assistance of the new Administrative Oversight Committee. Other recommendations for improving the efficiency of the DEC's are described below and should help relieve the OLPR's need to conduct a *de novo* review.

All recommended dispositions after investigation are submitted to the Director for review. The Director may recommend further investigation, issue an admonition or dismissal, or approve the submission of the matter to an LPRB Panel for a probable cause determination.

The Rules require that the dismissal notification provide a brief explanation of the action and inform the complainant of their right to appeal. The Consultation Team observed that, akin to summary dismissals, these determinations were often lengthy and use formal legal terms and phrases. These dismissal determinations also should be shortened and put in letter form to the complainant using relatable language. These letters may need to be slightly longer than those for summary dismissal, but in the Regulation Committee's experience should not exceed two pages. The complainant should be left feeling that their concerns have been heard and considered, and that the basis for not proceeding is supported by the results of the investigation, concisely described. The Committee believes these recommended changes will help to reduce the number of complainant appeals. There are some complainants who will never be satisfied that their complaints have been dismissed, but in the Regulation Committee's experience that is infrequent.

As noted in Recommendation 1B, complainants should continue to be able to appeal a dismissal of a complaint to a LPRB member, preferably a Panel Chair, using a standard of whether the decision of the OLPR was arbitrary, capricious, or unreasonable. Appeals of admonitions should be eliminated, as should appeals of dismissals to the Court.

Similar efforts should be made to streamline other decisional memorandum, including those recommending that the Director approve sending a matter to the LPRB for a probable cause determination. The Consultation Team was advised that in the past such documents were more concise and the Professional Regulation Committee is confident that, as staffing stability continues and lawyers gain more experience, this will happen.

### **3. Status Updates to Complainants and Respondents**

The Professional Regulation Committee was asked to provide its view on the requirement that the OLPR contact the complainant every three months to provide an update on the status of matters. A similar requirement does not exist for respondents, and the Committee was asked to opine on whether such a requirement should be added to the Rules.

Complainants and respondents should be kept apprised of the status of matters and that is consistent with Rule 4 of the ABA Model Rules for Lawyer Disciplinary Enforcement. The

Committee is not aware of other jurisdictions that have a requirement like Minnesota's that regulation counsel do so every three months or at other specified intervals. The Committee would not recommend a similar timing requirement relating to respondents. Once time metrics and guidelines are established for the handling of cases, the Court may consider whether to require OLPR to update the respondent if the investigation will be prolonged and why.

Complainants should similarly be advised when an investigation is going to be delayed, but the OLPR must take care with its explanation. For example, there may be other investigations pending against the respondent and, under Rule 20, that information is confidential.

## **B. Advisory Opinions**

The OLPR issues advisory opinions to Minnesota lawyers, judges, and out-of-state lawyers seeking guidance about compliance with the Minnesota Rules of Professional Conduct.<sup>181</sup> There is no rule requiring that the OLPR provide this service, but it has done so for decades and is viewed as an important service. More senior lawyers in the OLPR serve on rotation during the week to provide these non-binding opinions, including the Director. This service is provided in addition to the other investigation, prosecution, trusteeship, and administrative work by OLPR lawyers.

In 2021, the OLPR received 2,004 requests for advisory opinions, up from 1700 in 2020.<sup>182</sup> Issuing those opinions took 435 hours of OLPR lawyers' time. In many jurisdictions, this is a role served by state and local bar associations.

The provision of advisory opinions diverts resources from time spent on the detection, investigation, and prosecution of misconduct. Having the OLPR continue to provide what is considered a highly valuable service will be a factor in developing appropriate time guidelines (Recommendation 8). While the Regulation Committee is not recommending that this service be eliminated, which would be consistent with ABA policy and the rules in other jurisdictions,<sup>183</sup> the Court should, in consultation with the Director and Executive Director of the Minnesota State Bar Association, consider whether this function would be better performed by the Bar.

In addition, even with the limitations and disclaimer placed on these opinions, there are risks to lawyers in the OLPR providing them. Even though non-binding, the opinion risks creating a defense for a lawyer to a later disciplinary charge. The practice of providing informal ethics advice risks OLPR lawyers being recused or called as a witness in proceedings against lawyers who relied, or claim to have relied, on such ethics advice, especially since the opinions seem to be provided by telephone.

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<sup>181</sup> *Supra* note 68.

<sup>182</sup> *Supra* note 18.

<sup>183</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 4(C).

### **Recommendation 3: The Court Should Retain the District Ethics Committees for Now, But With Increased Efficiencies.**

#### Commentary

As noted above, Minnesota remains one of a few jurisdictions that uses volunteers to investigate complaints. It uses both lawyers and public members who serve on the DEC's. Unless exceptional circumstances warrant, matters are assigned to the DEC where the respondent lawyer's principal office is located. The DEC's are responsible for investigating complaints alleging lawyer misconduct and for making reports to the Director setting forth the Committee's recommended course of action. That these volunteers contribute to the system and the protection of the public is laudable.

The system's July 2022 Annual Report stated that the average monthly number of files being investigated by the DEC's was 86. From January to April 2022, the average number of files was 87. In 2021, DEC's completed 220 investigations.<sup>184</sup>

DEC reports must be completed within 90 days from receipt of the complaint unless good cause is shown.<sup>185</sup> Information provided to the Consultation Team indicates that in 2021, the number of days it took the 18 DEC's to complete an investigation where there was a recommendation that discipline was not warranted ranged from a low of 54 days to a high of 346 days. As noted above, the Consultation Team was also advised that there exist inconsistencies in the quality of DEC investigations and reports.

The Professional Regulation Committee is not recommending that the Court sunset the DEC's at this time. However, the Committee observed that the reasons why volunteers should not be used to investigate complaints are present in Minnesota. Volunteers simply cannot devote the time and lack the resources to investigate complaints in the same manner as paid, professional disciplinary counsel. This is not a negative reflection on these volunteers and their commitment to the system and the public, but rather just factual.

As discussed in Recommendation 12 below, enhanced, consistent, and required training should help address inconsistencies in investigations and reports. If it does not, the new Administrative Oversight Committee should first work with the DEC Chair to address concerns and may need to advise the Court of continued problems so that the Court may determine whether to continue using some or all of the DEC's.

The Court also may wish to amend the Rules relating to the DEC's to set forth specific criteria that the Director should consider when referring matters to them. The OLPR has internal criteria for doing so, but formalizing them may be helpful. The Consultation Team was advised that currently the Director's Office considers a number of factors, including the complexity of the matter and degree of seriousness of the alleged misconduct, which if true, would result in public discipline. The Professional Regulation Committee suggests matters that can be identified as more complex at the outset, or that involve mishandling of funds or property, should be handled by the OLPR

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<sup>184</sup> *Supra* note 18.

<sup>185</sup> *Supra* note 91.

and not the DEC. In addition, if a lawyer has open files in the OLPR or has been subject to investigation or prosecution, any new matters should be investigated by OLPR and not a DEC. Similarly, politically or topically sensitive matters are currently kept within the OLPR for investigation, and that should continue.

## IV. RESOURCES

The Professional Regulation Committee supports the Court's efforts to ensure its disciplinary system is adequately funded. Several of the Professional Regulation Committee's recommendations have budgetary implications. The Committee is sensitive in making recommendations that result in increased spending for the system given the judicial branch's budgetary constraints, the recent deficit spending by the system and increases in lawyer registration fees currently being implemented. Further, these Recommendations should not be read or interpreted as criticism of system spending to date. The system has undergone necessary modernization from a technology standpoint that has resulted in additional savings, while items such as insurance regularly increase.

The Professional Regulation Committee views these additional resources as necessary to optimizing the efficiency and effectiveness of the system as well as to ensuring appropriate separation between the administrative, adjudicative, and investigative and prosecutorial components of the system. It is important to note that in addition to its investigation/prosecution responsibilities, the OLPR performs several resource-intensive administrative functions including handling of trusteeships, operating the probation department for the supervision of approximately 90 lawyers per year, overseeing registration in accordance with the Professional Firms Act, serving as administrative staff for the Client Security Fund, and handling the trust account overdraft program.<sup>186</sup>

In determining whether and how to implement these Recommendations and to ensure that the system has a reserve going forward, the Court, with the new Administrative Oversight Committee and the Director, should conduct a real needs assessment addressing system resources for a period of at least five years into the future. This assessment may necessitate future increases in lawyer registration fees.

### **Recommendation 4: The New Administrative Oversight Committee and LPRB Should Have a Shared Staff Person, and Referees Require Staff Assistance.**

#### Commentary

Currently, the OLPR provides staff support for the LPRB. Interviewees expressed to the Consultation Team that the staffing of the LPRB by the OLPR has led to concerns of insufficient separation between the administrative and adjudicative part of the system and its investigative and prosecutorial role. The Professional Regulation Committee agrees and recommends that the Court create a shared administrative staff position for the new Administrative Oversight Committee and the LPRB. In addition to alleviating concerns about appropriate separation of functions, the creation of this staff position will allow the OLPR to reallocate resources spent on the LPRB to its investigation and prosecution of allegations of misconduct and other duties.

In determining whether this needs to be a full-time position, the Court should consult with the Director and the Chair of the LPRB to determine how much time is spent by the OLPR on LPRB

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<sup>186</sup> Minnesota Judicial Branch 2022-2023 Budget Narrative for the MN Lawyers Prof. Responsibility Board (LPRB) and Office of Lawyers Professional Responsibility (OLPR).

administrative support, and what the actual administrative needs will be going forward. One resource consideration for this position is whether it can be fully remote, with a need to attend in-person meetings when necessary. If not, and it makes economic sense to have this individual have their office in the OLPR, care needs to be taken to ensure that any paper and electronic files are not accessible to OLPR staff and vice versa. In addition, this new position should have access to technology allowing for the Administrative Oversight Committee and LPRB to perform their duties efficiently and confidentially from the OLPR.

As noted above, Referees, who are senior status judges, do not have a clerk to assist them with their duties. Referees have to conduct their own legal research and draft their own reports and recommendations. It was unclear whether they had Court-supplied access to Westlaw or Lexis-Nexus. While they may order the parties to provide post-trial memoranda, this is not a sufficient substitute for the services normally provided by a clerk, including bench memos on issues relating to admissibility of evidence and other matters.

The Professional Regulation Committee recommends that Referees be provided with a clerk to assist them in the performance of their duties. This will enhance the efficiency of this stage of the process, and the need for such assistance will increase if the Court agrees with the recommendation that Referees should also act as trier of fact for Reinstatement Petitions. This resource could be fully remote, other than attending hearings, and could take the form of a full-time, part-time, or even contract attorney, depending on the volume of cases heard by Referees.

**Recommendation 5: The OLPR Needs an Additional Investigator and May Need to Hire an Additional Paralegal.**

Commentary

Trained professional investigators interview witnesses, undertake review and analysis of documents, and help counsel develop investigative strategy and theories of the case, all of which increases the efficiency and effectiveness of investigations and trial preparation. The OLPR currently retains the services of one investigator. This individual is experienced and working with staff at all levels of the OLPR to ensure that tasks assigned to the position are appropriate for an investigator to conduct. The current investigator has had a positive impact on case processing. The Consultation Team heard from interviewees at varying levels of the system that the hiring of the investigator was needed. The Professional Regulation Committee agrees.

The investigator position is non-exempt, and there is too much work appropriate for an investigator to be done by one person (the auditor and paralegal roles are properly separate) in the Committee's experience, especially given the investigator's work on reinstatement cases, which require significant investigative time. Whether that position should be part-time or full-time will need to be determined by the Director in consultation with her senior lawyers, the current investigator, and senior paralegal in the Office. The Director also will need to consult with the Court and the State Court Administrator.

The Consultation Team also heard that there may be a need to hire an additional paralegal. In addition to their case duties supporting the lawyers, paralegals assist the probation department, work on trusteeships, help to staff the Client Security Board, and provide staff support for the Professional Firms Department. Paralegals in the OLPR are each assigned "project weeks" on a rotating basis, where they undertake additional administrative tasks, including the handling of returned mail, locating addresses for complainants and respondents, and phone duty to assist the receptionist. The Consultation Team was advised by a number of interviewees that, while it is necessary for this work to be done, it is disruptive to case work and perhaps not appropriate for paralegals, but rather administrative staff.

The Director should discuss with senior lawyers in the OLPR and the senior paralegal whether there is a need for an additional paralegal or whether there is a way to better manage and allocate the existing paralegal workload with current staffing at the paralegal and administrative staff levels. For example, are paralegals paired with teams of counsel, instead of working with all counsel in the office on projects? It may be that instead of an additional paralegal, the OLPR needs additional administrative support staff. Recommendation 7, urging the creation of a searchable, online precedent library for the system also will require additional staff time at varying levels, some of which is appropriate for paralegals.



## **Recommendation 6: The Minnesota Lawyer Disciplinary System Should Have Enhanced Technology Tools.**

### Commentary

Effective use of technology to investigate and prosecute cases, to track their progress through the system, and for document creation, retention, and management, improves efficiency at all stages of the proceedings. It optimizes resource allocation and saves time and money. The Court, the Director, and her staff deserve recognition for their commitment to enhancing the use of technology, including a move to a “paperless office” to increase efficiency. The effort to have a robust website is also important, and Minnesota’s website has many helpful resources for the public and lawyers. The enhanced use of technology served the system and the public well during the Covid-19 pandemic when staff was working remotely.

The OLPR makes available to its staff a good number of technology resources to facilitate their work. All lawyers, paralegals, and the investigator can access PACER. The OLPR has a library of template documents to assist new employees, and it should be regularly updated. They have full, no-cost access to all Minnesota State Court records because they are judicial branch employees. A couple of OLPR paralegals have Westlaw CLEAR access to conduct broader public records searches. The OLPR investigator has a government LEXIS account that permits her to conduct more in-depth public records searches than available through Westlaw CLEAR.

As mentioned above, the OLPR uses a new custom-built, electronic case management system called LDMS. The Consultation Team was advised that some functionalities of LDMS are cumbersome and time consuming. The Consultation Team was able to use LDMS during its onsite visit and agreed with those interviewees. All new systems, especially custom-built ones, require adaptation as users engage with it, and the OLPR is working hard to address these issues, including enhancement to report functions and having the system track how long cases are open at varying stages. This is a critical functionality for caseload management and helping to identify where there are “pinch points” in the system that may need to be addressed. The Consultation Team understands that LDMS is being updated to permit this type of reporting.

The manual for training employees on LDMS is voluminous. Hopefully, the updates and enhancements to LDMS functionalities will allow for simplification of instructions for system use.

LDMS is not a document management system, although it stores documents using SharePoint. The OLPR is in the process of updating the version of SharePoint used, as SharePoint 2013 will no longer be supported in 2023.

The Consultation Team was advised that the OLPR does not have trust account auditing software or document production software for discovery management. The auditor uses Excel. Documents in discovery are “bates stamped” using Adobe. Records are provided to respondents and their counsel on a flash drive. The Professional Regulation Committee recommends that the OLPR investigate the purchase of such discovery management software, using a secure cloud provider, to further optimize case handling efficiency. Many disciplinary agencies use such software, and

the National Organization of Bar Counsel listserv would be a good place for the Director to start inquiries.

**Recommendation 7: Disciplinary Precedent At All Levels Should Be Available Online to System Employees and Volunteers, and the Public.**

Commentary

The public and lawyers should have access to all disciplinary decisions resulting in the imposition of public discipline and all reinstatement and readmission decisions. While the LPRB and OLPR website has many resources available for the public and the bar, missing is an online, searchable library of all public discipline precedent, including summaries of admonitions. Some of this information is available on the website under the “lawyer search” tab. There is currently an admonition index, but the Consultation Team was advised it is not an optimal resource and is not publicly available.

Optimally, the discipline system’s website would have a searchable library of the Court’s disciplinary opinions, public reports and recommendations of other system adjudicators, and summary descriptions of private sanctions.<sup>187</sup> Making available to the public and profession a searchable library of public disciplinary decisions and orders and summaries of private discipline enhances transparency, shows that the Court’s disciplinary system is accountable, helps improve uniformity in the imposition of sanctions, and provides lawyers facing disciplinary charges with the precedent necessary to adequately prepare their defense or respond to complaints.

The Professional Regulation Committee recommends that the OLPR, working with the new Administrative Oversight Committee, develop this resource. This online searchable library will need to be kept current and will not only serve as an excellent resource for OLPR staff, but for DEC’s, Referees, lawyers, respondents, and respondents’ counsel. Putting this resource together will take time and staff resources. The OLPR employs two law clerks who may be able to assist in the development of this resource, and the OLPR may wish to explore whether and how law students may be able to assist, under the supervision of an OLPR lawyer.

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<sup>187</sup> See, e.g., ILL. ARDC CASE RESEARCH, <https://www.iardc.org/DisciplinarySearch> (last visited Aug. 31, 2022); LA. ATT’Y DISCIPLINARY BD., <https://www.ladb.org/DR/?tab=SC&DocID=9816> (last visited Aug. 31, 2022).

## V. DEVELOPING NEW CASE PROCESSING METRICS

### **Recommendation 8: The Court, in Consultation With the Director, Administrative Oversight Committee, and State Court Administrator's Office, Should Develop Case Processing Guidelines.**

Commentary

#### **A. Introduction**

For decades, the case processing goal for the OLPR has been to have no more than 500 files open at any given time, and no more than 100 files open that exceed one year old. As noted above, concerns about a backlog and about aging files in the system long predate the current Director's tenure. For example, this issue was addressed in the 2008 Report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System.

The Consultation Team was not able to determine the basis for this 500/100 file metric. Nor was the Team able to get optimal clarity relating to the continuance of it over the decades as the system evolved, including the growth of the responsibilities of the OLPR, changes in staffing and technology resources, and other changes relating to the investigation and prosecution of cases.

The Consultation Team reviewed historical data relating to case processing, and some of that is discussed earlier in this Report. For example, in 2020, the OLPR opened 1,038 files, which included complaints alleging lawyer misconduct, overdraft notifications that were converted to disciplinary matters, reinstatements, resignations, and trusteeships. Of that number, 930 were complaints alleging misconduct. At the beginning of calendar year 2021, there were 442 open files pending, 58 below the goal of having fewer than 500 open files.<sup>188</sup> During the course of 2021, the OPLR opened 1,044 files, of which 946 were complaints alleging lawyer misconduct.<sup>189</sup> At the end of that year, 479 files remained open, again meeting the fewer than 500 open files metric.

At the end of December 2020, there remained open 125 files whose age was one year or older; that number was 122 at the end of December 2021.<sup>190</sup> These numbers exceed the 100 files open for more than one year metric. The impact on the lawyers who are the subject of those older investigations, and on complainants is noteworthy.

The efficient completion of investigations is one of fairness to respondents and complainants, and critical to public trust and confidence in the system. For these reasons, the Court asked the Professional Regulation Committee to provide guidance on the development of case processing metrics. Interviewees at all levels of the system expressed concerns related to the time that it takes for investigations to be completed. The Director and her staff, new and experienced, have been working hard to address these older cases. The LPRB has contributed positive guidance as well as criticism. There were also concerns expressed about the time that matters pend at other levels of

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<sup>188</sup> *Supra* note 77.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

the system, including the Court. Other recommendations in this Report for streamlining procedures and reorganizing roles and responsibilities will help improve efficiency at all levels.

Some interviewees suggested that because there has been a drop in the number of complaints alleging misconduct received by the OLPR, consistent with what is happening nationally, that investigation times should fall given that there are fewer matters to investigate. The Professional Regulation Committee does not agree that reduction in investigation times necessarily follows. There are many factors that impact how and how quickly cases move through any system, not just the number of complaints received.

The Professional Regulation Committee agrees that the development of updated case processing metrics will be helpful to the OLPR as the Director continues her work to address this issue. At the outset of this recommendation, the Professional Regulation Committee notes that it will not be recommending specific time guidelines or caseload processing metrics. Those are appropriate for the Court to develop in consultation with the Director, the new Administrative Oversight Committee, and the State Court Administrator's Office.

This Recommendation is intended to provide to the Court a sound basis for developing any realistic metrics or guidelines, and for the Director to implement them. Of importance, such guidelines or metrics should be directory. The failure to abide by them should not impact whether a matter proceeds, as a statute of limitations would. Rather, they are a means by which to gauge the efficiency of the system, identify systemic problems, and develop solutions that will allow for optimal caseload processing. Improving report generation functionality in LDMS will help, as suggested in Recommendation 6.

In the Professional Regulation Committee's experience, once caseload metrics are developed, appropriate flexibility in their implementation and "enforcement" is key, because of the varying nature and complexity of complaints (e.g., multiple files for one lawyer; ancillary litigation; document intensive matters), and because there are actions that are not within the control of the OLPR. These actions include time for entities to produce necessary documents, even if subpoenaed, and delays by respondents or witnesses. These factors must be taken into account when developing metrics, but they also will remain relevant for the times when, as in any system, a metric cannot be met, and an explanation must be offered.

**B. The Professional Regulation Committee Does Not Recommend Including Case Processing Metrics or Guidelines in the Rules on Lawyers Professional Responsibility.**

Only a small number of jurisdictions include case processing metrics in their disciplinary procedural rules. In the Professional Regulation Committee's experience, most jurisdictions have internal time standards and guidelines (formal or informal) to address performance or system metrics. The OLPR has internal guidelines that will be discussed in more detail below.

Internal time guidelines allow for necessary flexibility and discretion by chief regulation counsel in determining whether and how a matter may require reasonable additional time or resources to investigate due to complexity or other factors. Lack of rules-based time standards does not mean

a disciplinary system is less strong or effective in meeting its mission of protecting the public. There are myriad factors, other than the timely handling of files, that impact the effective and efficient operation of any disciplinary system in the public interest. They include technology, staffing, use of volunteers at differing stages of the process, training, the nature and extent of the procedural rules that disciplinary agencies must follow, sophistication of the central intake function, use of alternatives to discipline programs, and use of interim suspensions and staying of cases due to ongoing civil or criminal matters.

For the reasons discussed above, the Professional Regulation Committee urges the Court not to incorporate time metrics or guidelines into its Rules on Lawyers Professional Responsibility. In case the Court determines that it would like to include any time standards in the Rules on Lawyers Professional Responsibility, the Professional Regulation Committee offers examples from the few jurisdictions that do so. The Rules Governing the Courts of the State of New Jersey, Rule 1:20-8 states in relevant part:

**(a) Investigations.** The Disciplinary system shall endeavor to complete all investigations of standard matters within six months, and of complex matters within nine months, the time period commencing on the date a written grievance is docketed and concluding on the date a formal complaint is filed, the grievance is dismissed, or other authorized disposition is made.

...

**(e) Effect of Goals.** The time periods herein prescribed are not jurisdictional and shall not serve as a bar or defense to any disciplinary investigation or proceeding.

**(f) Accountability.** Analysis of compliance by the disciplinary system of the time periods herein prescribed shall be made annually and at such intervals as the Disciplinary Oversight Committee may direct, and an analysis published showing how the respective caseloads compare with these goals.

**(g) Priority of Disciplinary Matters.** Generally, disciplinary matters shall take precedence over administrative, civil and criminal cases. All courts and tribunals shall make reasonable accommodations for the attendance of counsel, witnesses, and other participants. Every participant in a disciplinary proceeding shall be obligated to give reasonable advance notice of potential litigation conflicts to the assignment judge or to the particular judge or officer in charge of the litigation. The same advance notice also shall be given to the presenter, respondent, counsel, and the panel chair or special ethics master in the disciplinary matter.

According to the New Jersey system's 2021 Annual Report, the yearly average investigative time goal compliance for the Office of Attorney Ethics decreased by 11% during 2021, from 73% in 2020 to 62% in 2021. The system's District Ethics Committees' yearly average time goal compliance for 2021 decreased by 4%, from 61% in 2020 to 57% in 2021. Like Minnesota, the number of requests for investigation filed has been decreasing. In 2019 there were 1227, while in 2020 that number was 869, and in 2021 there were 768 requests.

Ohio, like Minnesota, also uses volunteers in some capacity to investigate complaints. Rule 5, Section 9 of the Ohio Rules for the Government of the Bar relating to the filing and investigation of complaints against lawyers states, in relevant part:

**(D) Time for Investigation.** The investigation of grievances by Office of Disciplinary Counsel or a certified grievance committee shall be concluded within two hundred seventy days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

**(1) Extensions of Time.** Upon written request of disciplinary counsel or a certified grievance committee, the director of the Board may extend the time to complete an investigation beyond two hundred seventy days in the event of pending litigation, appeals, unusually complex investigations, including the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses, or for other good cause shown. Disciplinary counsel or the certified grievance committee shall provide notice of an extension request to the respondent or respondent's counsel. No investigation shall be extended beyond one year from the date of receipt of the grievance. If an investigation is not completed within two hundred seventy days from the date of filing the grievance or a good cause extension of that time, the director may refer the matter either to a geographically appropriate certified grievance committee or disciplinary counsel.

**(2) Time Limits not Jurisdictional.** Time limits set forth in this rule are not jurisdictional. No investigation or complaint shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

Maryland Court Rule of Procedure 19-711, relating to investigations, states in relevant part:

**(d) Time for Completing Investigation.**

(1) *Generally.* Subject to subsection (b)(5) of this Rule or unless the time is extended pursuant to subsection (d)(2) of this Rule, Bar Counsel shall complete an investigation within 120 days after docketing the complaint.

(2) *Extension.*

(A) Upon written request by Bar Counsel and a finding of good cause by the Commission, the Commission may grant an extension for a specified period. Upon a separate request by Bar Counsel and a finding of good cause, the Commission may renew an extension for a specified period.

(B) The Commission may not grant or renew an extension, at any one time, of more than 60 days unless it finds specific good cause for a longer extension.

(C) If an extension exceeding 60 days is granted, Bar Counsel shall provide the Commission with a status report at least every 60 days.

(3) *Sanction.* For failure to comply with the time requirements of section (d) of this Rule, the Commission may take any action appropriate under the circumstances, including dismissal of the complaint and termination of the investigation.

Research did not reveal any instances where the Maryland Grievance Commission used this sanction. The Professional Regulation Committee is not aware of other jurisdictions where failure to meet time metrics can result in the dismissal of a matter, and does not agree with or support such a provision.

### **C. Development of Case Processing Metrics and Guidelines in Minnesota**

The Professional Regulation Committee recommends that the Court, Director, new Administrative Oversight Committee, and the State Court Administrator work together to develop case processing metrics for the investigation of complaints. The Committee believes that it is important for the Court to set these goals. The Director will then be responsible for implementing them consistent with her responsibilities for the day-to-day operation of the OLPR. The State Court Administrator can include compliance with the time guidelines as part of the Director's performance metrics. The Director can do the same for her staff. The Administrative Oversight Committee will work with the Director to identify areas where improvement in meeting the guidelines may be needed, and the case reports provided by the Director to that entity will assist with that, in addition to helping identify areas where additional time to investigate a matter is appropriate for any number of valid reasons.

As noted earlier, the Director has established internal case processing goals, and as described in Recommendation 11, those goals should be incorporated into the training regimen for OLPR staff. It is more than the lawyers whose work impacts whether these goals are met. Paralegals, the investigators, and administrative staff all contribute as part of the OLPR team.

The existing internal case processing goals should be shared with the Court, Administrative Oversight Committee, and the State Court Administrator to facilitate the development of the new guidelines. The Consultation Team did not find the internal case processing goals to be unreasonable given the additional responsibilities of the OLPR. These goals include recommended times for DEC's to complete their investigations and submit reports, but the Director's office has minimal control over their meeting those goals. By way of additional guidance and supplementing the rules cited above, the ABA Model Rules for Lawyer Disciplinary Enforcement have long suggested that evaluation, investigation, and the filing and service of formal charges for less complicated matters generally should be accomplished within 6 months; more complicated matters should generally reach this stage within 12 months.<sup>191</sup> The resolution of formal charges generally should take no longer than 6 months (less time for matters that are not complex or are resolved by consent) from their filing to issuance of reports and recommendations.

The timelines set forth in the Model Rules have not been updated recently, and whether they make sense for Minnesota will depend on a number of factors unique to the system. Those factors and

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<sup>191</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 11 & cmt. These time standards are based upon the recommendations of the National Organization of Bar Counsel.



accompanying data, spanning at least a five-year period, that should be considered in development of new and realistic time guidelines include:

- 1) Appropriate resourcing, including staffing and technology, and stability in staffing;
- 2) Complexity of investigations (this is an area where chief regulation counsel must have discretion to determine);
- 3) Number of matters involving ancillary litigation;
- 4) Availability and use of effective and prompt interim remedies;
- 5) Analysis of screening procedures and identification of “pinch points” and areas for refinement;
- 6) Average time spent from receipt of complaint to screening dismissal;
- 7) Analysis of investigation procedures and identification of “pinch points” and areas for refinement;
- 8) Average time spent from receipt of complaint to dismissal for discipline not warranted;
- 9) Analysis of risk levels (e.g., high-risk cases may include those involving vulnerable victims, significant risk of loss or other harm, or recidivist lawyers);
- 10) Time spent prosecuting Petitions for Disciplinary Action and Petitions for Reinstatement, including briefing and oral argument before the Court;
- 11) Time spent on responsibilities other than investigations and prosecutions;<sup>192</sup> and
- 12) Instances of delay attributable to respondents and others, including DEC’s and LPRB Panels.

The Court also may wish to decide whether investigations, for purposes of time metrics, can and should be prioritized by categories such as: 1) high risk and low complexity; 2) high risk and high complexity; 3) low risk and low complexity; and 4) low risk and high complexity. Further, are there investigations that should be excluded from the time guidelines, such as those where a matter has been stayed due to pending civil or criminal litigation?

The Court should consider tasking the Director with researching internal case processing guidelines from other jurisdictions to assist in the development of metrics for Minnesota. The Professional Regulation Committee is confident that other chief regulatory counsel would be willing to assist the Director.

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<sup>192</sup> The Director has computed the average times that OLPR staff devotes to other responsibilities, such as advisory opinions, trusteeships, administration of the overdraft notification program, collecting judgments, and compliance with the Professional Firms Act, among others. That the Director has developed this data as part of her ongoing efforts to improve caseload management is praiseworthy. Some of this data is cited in this Report.

## VI. PUBLIC ACCESS AND OUTREACH

### **Recommendation 9: The LPRB and OLPR Should Have Their Own Websites**

#### Commentary

The purpose of lawyer discipline is to protect the public and the administration of justice. To accomplish these goals, the lawyer disciplinary system must be easy to find and accessible to the public, physically and electronically. That is the case in Minnesota. The following recommendations are made to further enhance that process and to reinforce the separation of the administrative and adjudicative components of the system and help avoid misperceptions.

Currently, the LPRB and the OLPR share a website. The Professional Regulation Committee suggests that the Court consider separating them into two stand-alone sites. Some information on the sites will overlap, such as the searchable online precedent library. But others will not. In addition, the websites should be mobile friendly, which the Consultation Team understands the current site is not. The Consultation Team was advised that there is an outstanding request for proposals for purposes of retaining a vendor to update the website.

The Professional Regulation Committee recommends that the Director and the new Administrative Oversight Committee should evaluate how the separate site for the OLPR might better serve the public. For example, the OLPR website could have on its home page concise text about its purpose and what it can and cannot do, what to expect in terms of timeframes for the processing of complaints, and major benchmarks in the process. Much of that information is already in the complaint brochure but making it immediately available to the public would be helpful. Having that information up front may help a complainant realize that the OLPR is not the appropriate place to raise their concerns, and to assist them in locating the proper place to do so. This introductory text also may hyperlink to a list of other entities or committees, such as bar association fee arbitration or mediation programs.<sup>193</sup> Each website should also have on its homepage information for applicants for volunteer positions in the system so those interested can easily locate that information.

Given the already robust content on the joint website, the Professional Regulation Committee suggests that separating and reorganizing the websites should not take significant resources. New shared Administrative Oversight Committee and LPRB staff should be responsible for keeping that website current, while the OLPR should be responsible for keeping its website up to date and also for maintaining and updating the precedent library.

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<sup>193</sup> See, e.g., RAMSEY COUNTY BAR ASS'N FEE ARBITRATION COMM. RULES & PROCEDURES FOR ARBITRATION OF ATTORNEY FEE DISPUTES, available at [https://www.mnbar.org/docs/default-source/rcba/fee-arbitration-procedures.pdf?sfvrsn=4cef8021\\_2](https://www.mnbar.org/docs/default-source/rcba/fee-arbitration-procedures.pdf?sfvrsn=4cef8021_2).

## **Recommendation 10: Outreach to the Public Should Be Enhanced.**

### Commentary

Prior to its visit, the Consultation Team reviewed information relating to the significant outreach and educational programs for the bar conducted by the OLPR. Due to the pandemic, most of those were still online. It is notable that this outreach by the OLPR reached lawyers throughout the Minnesota, including specialty bars such as African Diaspora Attorneys in Minnesota, legal aid providers, and the public defender's office. In addition, the Director, and sometimes her staff and LPRB members, publish articles in bar publications which are available on the website. These efforts are commendable and should continue with the volunteers engaging more in such outreach and expanding presentations to more specialty bar associations.

The Professional Regulation Committee also recommends that the OLPR and the system volunteers undertake increased efforts to better inform the public about the disciplinary system. The OLPR has done some outreach in this regard, including to several Rotary Clubs. The new Administrative Oversight Committee and OLPR should, for example, try to schedule presentations to some of the entities identified in the list provided to DEC's to help them recruit public members. If time exists, the members of the Court also may wish to participate in such presentations as a way of demonstrating to the public that they take seriously their responsibilities by seeking input from those whom the system is designed to protect.

## VI. TRAINING

### **Recommendation 11: The Professional Staff Should Continue to Receive Mandatory and Regular Training**

#### Commentary

The Consultation Team observed that training of OLPR staff is a priority, and the process by which staff is trained continues to evolve. The Team was impressed by the Director's commitment to improving and formalizing the process. Some training is necessarily decentralized and dependent on supervisory staff training supervisees. Other training occurs "on the job," but with supervision. Required training includes "duty" training and weekly question and answer sessions for the duty team, monthly "lunch and learn sessions" for all staff and required trial skills training for junior attorneys. The Consultation Team learned, for example, that the two most junior OLPR lawyers will attend the National Organization of Bar Counsel trial skills training in October 2022. The Minnesota Judicial Branch also requires 15 hours annually of job relevant training. Only five of those hours can be continuing legal education.

The OLPR lacks an all-inclusive training manual for procedures, which creates challenges due to the considerable process in the system, in addition to OLPR office procedures. The Professional Regulation Committee understands that developing this manual will take time and resources, and that other case-related priorities will impact the time available to develop the manual. The Director should develop a plan for the creation of this manual so that it can be completed as soon as possible. All training materials, including this manual, should be available electronically to staff.

Disciplinary investigations and prosecutions involve increasingly complex and sophisticated issues, and that translates into increased pressure on current system resources in terms of skill and efficiency. In addition, many disciplinary agencies are seeing a rise in complaints involving lawyers who are struggling with substance use, mental health, and age-related impairment. The Consultation Team heard that this also is true in Minnesota. OLPR staff and system volunteers need to be educated and otherwise equipped to address these cases, as well as cases that implicate technological advances impacting the practice of law. Individuals with expertise in these fields should be invited to speak at OLPR training sessions, where necessary by video conference. The Director should seek to include respondents' counsel in training sessions, where appropriate.

As financially feasible, OLPR lawyers should continue to attend the ABA National Conference on Professional Responsibility. The National Conference is the preeminent educational and networking opportunity in the field of ethics and professional responsibility. Attendees can formally and informally collect information and discuss current issues and problems in the area of professional responsibility and disciplinary enforcement with leading experts, scholars and practitioners from across the globe. Conference programs address trends and developments in legal ethics, professional discipline for lawyers and judges, professionalism and practice issues, and are intended to be informative on a level appropriate to a group with considerable knowledge of and familiarity with the subject area. The National Conference is held annually in conjunction with the

National Forum on Client Protection, which offers programs on fee arbitration and an array of other client protection mechanisms.<sup>194</sup>

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<sup>194</sup> *See*

[https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standingcommitteeonclientprotection/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/) (last visited Aug. 30, 2022).

## **Recommendation 12: All System Volunteers Should Receive Mandatory and Regular Training.**

### Commentary

The Consultation Team heard from a number of interviewees serving in volunteer roles that while some training of system volunteers exists, much of the training takes place “on the job.” The LPRB’s Training, Education, and Outreach Committee is responsible for training LPRB members. The Consultation Team received information showing that, like the Director, the LPRB is committed to more consistent and organized training. For example, that Committee worked to complete an updated LPRB reference manual. Between February and July 2022, the Committee hosted six training sessions for the two newest LPRB members.<sup>195</sup> A number of experienced LPRB members joined the trainings. Training of DEC’s is conducted at the individual DEC level. Referees, while not volunteers, receive no formal training on discipline-related subjects.

The Professional Regulation Committee recommends that the Court require training for all the discipline system’s volunteers, and that the new Administrative Oversight Committee should coordinate and oversee these trainings as noted in Recommendation 1A. The Committee suggests that the Referees will benefit from participating in training relating to the discipline process, as well as on matters described below, including substance use, gambling, physical and mental impairments, aging lawyers, and technology. A separate orientation session should be mandatory for all new appointees, with at least one full day of ongoing training for all volunteers per year required.

The recommended required training should include education about the disciplinary process, its purpose, and the role the professional staff and volunteers serve in the system. For example, regarding the LPRB’s role in making probable cause determinations, training should emphasize how at that stage of the proceedings the volunteers do not determine the merits of a case. In the Professional Regulation Committee’s experience, volunteer lawyers and nonlawyers who perform the probable cause finding role often confuse the probable cause finding function with adjudicating the merits of a case, and the Consultation Team did receive information to that effect.

Regular training is vital to the effective and efficient operation of the disciplinary system. Training helps to ensure consistency in, and the expeditious resolution of, disciplinary matters. Training also provides a forum for volunteers, staff, and respondents’ counsel to discuss problems and exchange information about how to enhance the effectiveness and efficiency of this level of the process. As with OLPR training, these sessions should include medical experts to educate volunteers about substance abuse, gambling, mental health, and aging lawyers. Training also should address issues relating to the use of technology in the practice of law, including marketing.

All training materials should be made available to the volunteers electronically and should be updated regularly. Training materials should include all rules, statutes, policies and procedures of the disciplinary system, an organizational chart clearly identifying the volunteer members’ roles within the system, samples of exemplary reports, applicable time guidelines, and relevant court cases. In addition, as noted at page 50, an electronic and searchable precedent library should be

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<sup>195</sup> *Supra* note 18.

created and publicly accessible. System volunteers should receive training regarding the new searchable library of disciplinary precedent so that they can use it effectively.

When financially feasible, system volunteers should attend National Organization of Bar Counsel meetings. Many jurisdictions send their system volunteers to these meetings for training, and this provides them with an excellent opportunity to learn first-hand from other regulatory counsel and volunteers who perform like functions.

## VII. PROCEDURES

### **Recommendation 13: The Court Should Amend Rule 18 to Streamline Reinstatement Proceedings.**

#### Commentary

Rule 18 of the Rules on Lawyers Professional Responsibility sets forth the procedures for handling petitions for reinstatement. Rule 18(e) sets forth the general requirements for reinstatement. Lawyers who have been disbarred may not apply for reinstatement without first passing the written examinations required of those applying for admission to the practice of law in Minnesota, unless the Court waives the examination requirement.<sup>196</sup> Suspended lawyers or lawyers who were on disability inactive status and who have applied for reinstatement may be ordered reinstated, but the reinstatement is not effective until they pass the written examination on professional responsibility required for admission to practice law in Minnesota.<sup>197</sup>

Lawyers who have been suspended for 90 days or less, and lawyers who have been suspended, but for whom the Court has waived the reinstatement petition process requirements under paragraphs (a) through (d) of Rule 18 (reinstatement petitions, investigations, and hearings), must take and pass, within one year from the date of the suspension order, the professional responsibility examination required for admission to practice law in Minnesota.<sup>198</sup> If the lawyer does not pass the professional responsibility examination as required, the lawyer is automatically suspended effective one year after the date of the original suspension order.<sup>199</sup> The Court may waive the exam requirement.

Any lawyer who has been disbarred, suspended, placed on disability inactive status, or resigned cannot be reinstated until they have met applicable continuing legal education requirements and satisfied any “subrogation claim against the lawyer by the Client Security Board.”<sup>200</sup>

Lawyers suspended for ninety days or less and lawyers for whom the Court has waived the requirements of paragraphs (a) through (d), may apply for reinstatement via affidavit.<sup>201</sup> The affidavit must attest to their compliance with Rules 24 and 26, currency with continuing legal education requirements, and any other conditions of reinstatement. The OLPR must file an affidavit affirming the lawyer’s compliance or noncompliance with this Rule, along with a proposed order for the Court.<sup>202</sup> Until the Court orders reinstatement, the lawyer cannot resume the practice of law.

Lawyers required to file a Petition for Reinstatement must first serve the Petition on the Director, then file the Petition and proof of service with the Court and pay the required fee.<sup>203</sup> The Director

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<sup>196</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(e)(1).

<sup>197</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(e)(2).

<sup>198</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(e)(3).

<sup>199</sup> *Id.*

<sup>200</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(e)(4).

<sup>201</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(f).

<sup>202</sup> *Id.*

<sup>203</sup> Minn. Rules on Law. Prof’l Responsibility R. 18(a).



is required to announce the filing of the Petition for Reinstatement via publication, seeking comments regarding whether the petitioner should or should not be reinstated, and such comments are privileged.<sup>204</sup>

The OLPR must investigate the Petition and report its conclusions to a LPRB Panel, which may conduct a hearing prior to making its findings of fact, conclusions, and recommendation regarding reinstatement. The Panel's recommendation is served on the Court and becomes conclusive unless the Director's Office or petitioner orders a transcript of the Panel proceeding and notifies the Court.<sup>205</sup> If a transcript is ordered, either party may challenge the Panel's findings and, in an initial brief, set forth which of the Panel's findings, conclusions, and recommendations are contested.<sup>206</sup>

The Court will hold a hearing on the matter unless otherwise ordered.<sup>207</sup> If the Court finds that additional consideration is needed, it may refer the matter to a Referee for a hearing that proceeds in the same manner as a Petition for Disciplinary Action.

The Consultation Team heard from many interviewees at all levels that reinstatement proceedings are among the more time-consuming and resource intensive matters handled by the OLPR. This is generally the case nationally. Data provided to the Consultation Team indicates that, in 2020, the average time from receipt of the Petition for Reinstatement to the completion of the Director's investigation report was 335 days. There were four Petitions for Reinstatement filed that year. In 2021, that time was 294 days.

The Professional Regulation Committee believes that the reinstatement process in Minnesota can be streamlined consistent with public protection, and that the Rule should also provide guidance to petitioners regarding the substance of their Petitions. Generally, a lawyer who has been suspended for six months or less should not have to apply for reinstatement and should be automatically reinstated at the end of the suspension by simply filing with the Court and serving on the OLPR an affidavit attesting to compliance with the order of suspension.<sup>208</sup> Requiring lawyers who are suspended for short periods of time to undergo the complete reinstatement process often results in the unfair and unnecessary extension of the period of suspension. The Professional Regulation Committee suggests that lawyers qualifying for automatic reinstatement not have to take and pass the Multistate Professional Responsibility Examination, and that the Court should amend the Rule accordingly, if it agrees.

Those disbarred or suspended more than six months should have to petition for reinstatement. Rule 18 does not inform petitioners of the extent or type of information necessary to support their reinstatement applications or what is sufficient to demonstrate that they are fit to resume the practice of law. The Professional Regulation Committee believes that petitioners who apply for reinstatement should be given as much guidance as possible with respect to what is required to be in the petition and what they will bear the burden of proving by clear and convincing evidence. Requiring this detailed information will help the OLPR conduct a prompt, but thorough

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<sup>204</sup> Minn. Rules on Law. Prof'l Responsibility R. 18(b).

<sup>205</sup> Minn. Rules on Law. Prof'l Responsibility R. 18(c).

<sup>206</sup> *Id.*

<sup>207</sup> Minn. Rules on Law. Prof'l Responsibility R. 18(d).

<sup>208</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 24.

investigation, and appropriately places the burden on the petitioner to provide that data. Petitions for Reinstatement should be signed under oath, and the petitioner should have to specify with particularity how they meet each of the criteria required for reinstatement. Those criteria include:<sup>209</sup>

- 1) the lawyer has fully complied with the terms and conditions of all prior disciplinary orders;
- 2) the lawyer has not engaged in the unauthorized practice of law during the period of discipline and has fully complied with the Rule setting forth the duties of disciplined lawyers;
- 3) any physical or mental disability experienced by the lawyer at the time of the imposition of discipline, including alcohol or other substance use, has been removed. If substance use was a causative factor in the lawyer's misconduct, the lawyer must demonstrate that appropriate rehabilitative treatment was pursued, there has been abstention from the substance for at least one year and that continued abstention is likely;
- 4) the lawyer recognizes the wrongfulness and seriousness of the misconduct for which discipline was imposed;
- 5) the lawyer has not engaged in any other professional misconduct since the imposition of discipline;
- 6) the lawyer, notwithstanding the conduct for which discipline was imposed, currently possesses the requisite honesty and integrity to practice law;
- 7) the lawyer has kept informed about recent developments in the law and is competent to practice; and
- 8) in the case of disbarred lawyers, the lawyer has retaken and passed the bar examination and Multistate Professional Responsibility Examination.

Petitioners should provide with their petition any documents or other evidence supporting that pleading. Petitioners who have been disbarred should have to wait a minimum of five years after the effective date of disbarment to petition for reinstatement.<sup>210</sup> To enhance the efficiency of these proceedings, petitioners should be allowed to file their petitions with the OLPR six months prior to the expiration of that five years. The Model Rules for Lawyer Disciplinary Enforcement provide that no lawyer may petition for reinstatement until six months before the period of suspension expires.<sup>211</sup> Six months is in brackets, meaning this is a suggested period, but that the Court may provide for a different time. For example, for suspensions slightly over six months (some jurisdictions impose suspensions that are between six and nine months), the Court may wish to provide for a shorter period to avoid unfairly prolonging the suspension.

Finally, the Professional Regulation Committee recommends that the Court eliminate the LPRB's involvement in reinstatement matters, and, if necessary, have the matter proceed to one hearing before a Referee, akin to hearings on Petitions for Disciplinary Action. This is consistent with Recommendation 1B, limiting the LPRB to a probable cause finding and complainant appeal role, and with national practice.

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<sup>209</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 25(E).

<sup>210</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 25(A).

<sup>211</sup> *Id.*

The OLPR should be permitted a reasonable time to complete the investigation and advise the Court of any objections to the petition. If the OLPR does not object and will stipulate to reinstatement, the matter can be submitted directly to the Court for a decision.<sup>212</sup> If the OLPR objects to the petition, the matter can proceed to a hearing before the Referee, who will file their report with the Court to make its decision. If the Court does not reinstate the petitioner, that individual should not be able to apply for reinstatement again for one year following that adverse judgment.<sup>213</sup>

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<sup>212</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 25(F).

<sup>213</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 25(H).

**Recommendation 14: Procedures for Amending Petitions on Disciplinary Action to Conform to the Proof.**

Commentary:

The Professional Regulation Committee was asked for its view whether it is an optimal process for the OLPR to have to seek the approval of a Panel Chair or the LPRB Chair/Vice Chair to amend a Petition for Discipline to include additional charges based on conduct committed before or after the it was filed. The Model Rules for Lawyer Disciplinary Enforcement do not address this issue, other than to note that a jurisdiction's rules of civil procedure should apply unless otherwise noted. Further, there are few disciplinary procedural rules that address this issue directly, and the process is dependent upon the structure of a jurisdiction's system.

Generally, as a matter of due process, the Committee suggests that if there are additional charges, whether or not they relate directly to the subject matter of the pending Petition for Discipline, the OLPR should be required to submit the matter for a probable cause finding to an LPRB Panel, like other matters. The Panel must act expeditiously. The Regulation Committee has learned that this happens in other states, including Arizona, Georgia, and Louisiana.

It may be that due to the nature of the allegations in a new complaint filed with the OLPR during the pendency of a Petition for Disciplinary Action, that the OLPR should seek an interim suspension for immediate threat of harm while proceeding with the prosecution of the Petition. There will be instances where this is appropriate. But, if it is not, the process set forth in Rule 10(e) makes sense in the Committee's view, and the prosecution of the Petition should not be delayed.

**Recommendation 15: The Court Should Study the Frequency with which It Appoints the Director's Office as Trustee Under Rule 27.**

Commentary

Rule 27 allows the Court to appoint a trustee to inventory and take other necessary and appropriate action relating to the files of lawyers who have died, abandoned their practices, or have not otherwise provided for succession in representing their clients. This happens in other jurisdictions and is done to protect clients' interests. The Consultation Team was advised, and the Annual Reports for the system indicate, that in many instances the Court appoints the OLPR as trustee.

The handling of these matters by the OLPR takes significant staff time and resources and, as described in the July 2022 Annual Report, the OLPR is responsible for a sizable number of these matters. The Consultation Team received information that, in 2021, the OLPR spent an estimated average of twenty hours each month of lawyer and paralegal time on trusteeships. That time varies depending on the number of files. For example, one matter with close to 100 bankers' boxes of files took approximately 475 staff hours to complete an inventory and communicate with clients. Others took significantly less time. As the Court considers the development of case-processing metrics, the Professional Regulation Committee recommends that the Court consider alternatives to assigning these matters to the OLPR. The Court may wish to engage with the Minnesota State Bar Association and other bar associations in the State to determine if there is a way in which they can assist in these matters.

**Recommendation 16: The Court Should Consider Updating Rule 28 of the Rules on Lawyers Professional Responsibility.**

Commentary

Consistent with national practice, the Minnesota Rules on Lawyers Professional Responsibility should include a rule relating to disability inactive status and for the immediate transfer of a lawyer to that status, when appropriate. Disability inactive status is not discipline and these matters should be confidential, with the exception of the order placing the lawyer on disability inactive status.<sup>214</sup> The Court may wish to clarify this in Rule 20 (Confidentiality), as well as in Rule 28.

In addition, the Court should consider updating the terminology used in Rule 28. For example, the Court may wish to use the term “judicially declared incompetent,” instead of “found in a judicial proceeding to be a mentally ill, mentally deficient, incapacitated or inebriate person.” In addition, reference to mental or physical incapacity or a mental or physical impairment may be optimal. The Director and Lawyers Concerned for Lawyers can assist in developing more current terminology for the Rule, including illegal substance use or addiction.

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<sup>214</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 23(C) & (D).

**Recommendation 17: The Court Should Consider Amending the Rules to Provide for Discretionary Review of Referee’s Reports.**

Commentary

After the filing of the Referee’s report, the Respondent and Director may order the transcript of proceedings. If they do not do so within ten days of the issuance of the Referee’s report and recommendation, the Referee’s findings of fact and conclusions are deemed conclusive.<sup>215</sup> The ordering of the transcript by either party triggers their ability to challenge that report before the Court. The party appealing the Referee’s report is required to set forth, in an initial brief to the Court, the disputed findings, conclusions, and recommendations.<sup>216</sup>

Regardless of whether any party orders the transcript or files objections, the Consultation Team was advised that the Court issues a briefing order and will thereafter calendar the matter for oral argument upon the completion of briefing on the next available oral argument calendar.<sup>217</sup> For purposes of enhancing efficiency, the Professional Regulation Committee recommends that the Court amend Rule 14 to provide instead that the Court may, in its discretion, review matters where the OLPR, respondent, or both parties file objections to the Referee’s report or if a majority of the Court, absent objections, votes to do so.<sup>218</sup> Full review by the Court should not be mandatory. Where there are no objections by either party, and unless there is a vote by a majority of the Court to hear the matter, the Court should impose the Referee’s recommended sanction. This allows matters to be disposed of at the earliest stage and is consistent with due process and public protection. It also will reduce the burden on the Court.

If either or both parties file objections and the Court decides to review the matter, then briefing and oral argument can be scheduled.

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<sup>215</sup> *Supra* note 101.

<sup>216</sup> *Supra* note 103.

<sup>217</sup> Minn. Rules on Law. Prof’l Responsibility R. 14(g).

<sup>218</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 11(F).

**Recommendation 18: The Court Should Review Rule 19 to Determine if Clarifications Are Appropriate.**

Commentary

Rule 19 of the Rules on Lawyers Professional Responsibility addresses the effect of prior proceedings. Paragraph (b) of the Rule addresses the admissibility of conduct in prior disciplinary proceedings in any jurisdiction. Paragraph (b)(1), consistent with national practice, provides that conduct considered in other disciplinary proceedings in any jurisdiction is inadmissible if it was found that discipline was not warranted for that conduct, except to evidence a pattern of related conduct, the cumulative effect of which is a violation of the professional conduct rules. There is an exception to this inadmissibility in the next paragraph. Paragraph (b)(2) provides that conduct in prior disciplinary proceedings in any jurisdiction is admissible, even if it was determined in those prior proceedings, without investigation, that discipline was not warranted.

The Professional Regulation Committee is not clear why, given the limitation on the admissibility of evidence in Paragraph (b)(1), that the type of evidence described in (b)(2) would be admissible, especially given the lack of investigation in the latter circumstance. The Committee suggests that additional explanation would offer better guidance to the OLPR and lawyers when the use of such information is at issue.



## VIII. DIVERSION

### **Recommendation 19: The Minnesota Supreme Court Should Adopt a Diversion Rule .**

#### Commentary

Consistent with purposes of lawyer discipline of protecting the public and the integrity of the profession, an effective regulatory system should be holistic, and include components in addition to the investigatory and prosecutorial functions. In Minnesota, there currently exists, outside of private probation, no formal mechanism for addressing matters involving lesser and remediable misconduct via referral to programs like law practice management, lawyer assistance programs (Minnesota has an excellent one), ethics or trust accounting school or treatment programs. The Consultation Team was advised that there are cases where, because no alternative exists and public protection merits some action other than dismissal, a lawyer who has engaged in an isolated instance or a few instances of non-serious misconduct receives an admonition or enters into a private probation agreement.<sup>219</sup> Both admonitions and private probation are disciplinary sanctions and count as prior discipline in subsequent proceedings. In Recommendation 23, the Professional Regulation Committee suggests eliminating private probation and explains the reasons for doing so.

Interviewees involved at all levels of the system unanimously supported the idea that the Court should adopt a diversion (sometimes called alternatives-to-discipline) program. They recognized that such programs benefit both lawyers and clients, which is in the public interest, result in a better use of disciplinary system resources, and provide an opportunity for state and local bar associations to deliver enhanced member services. Given the success of diversion programs nationwide, the Professional Regulation Committee urges the Court to enact a Rule creating such a mechanism in Minnesota. The Court should note in the new Rule creating diversion that it is confidential and should make necessary amendments to Rule 20.

For decades nationwide, a majority of complaints made against lawyers allege instances of lesser misconduct. Minnesota is no exception. Data provided in Minnesota's July 2022 Annual Report is instructive. Some of the top areas of misconduct where lawyers received admonitions involve communication, declining or terminating representation, safekeeping property (not conversion), diligence, and fees.<sup>220</sup> The data provided in that Annual Report for areas of misconduct resulting in probation (a combination of public and private) showed an analogous concentration in these areas of misconduct. The 2020 and 2021 Annual Reports included similar information, with some expected variances from year to year.<sup>221</sup>

While technically violations of the Rules of Professional Conduct, a single instance or few instances of non-serious misconduct, such as neglect and lack of communication, rarely justify the

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<sup>219</sup> *Supra* note 128.

<sup>220</sup> *Supra* note 18, Table V.

<sup>221</sup> See MINN. ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD (July 2020), available at <https://lprb.mncourts.gov/AboutUs/Documents/2020%20Annual%20Report.pdf>. See also MINN. ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD (July 2021), available at <https://lprb.mncourts.gov/AboutUs/Documents/2021%20Annual%20Report.pdf>.

resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction, whether public or private. While these matters should be “removed” from the disciplinary system, they should not be simply dismissed. These matters, if remediable, should be handled via a diversion program.

Participation in diversion should not be used as an alternative to discipline in cases of serious misconduct. Additionally, diversion should not be used in cases that factually present little hope that participation will achieve program goals of avoiding repetition of the conduct in the future and helping the lawyer improve their skills or overcome future problems. Further, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanctions would be less than disbarment, suspension, or probation.<sup>222</sup> The existence of one or more aggravating factors does not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

Factors indicating a respondent should be ineligible for participation include evidence of dishonesty or selfish motive, bad faith, submission of false evidence, or obstruction of the disciplinary process. Prior disciplinary offenses usually do not make a lawyer ineligible for diversion. The Court should consider crafting a Rule that considers whether the lawyer’s prior offenses are of the same or similar nature, whether the lawyer has been placed in the diversion program for similar misconduct previously, and whether it is reasonably foreseeable that the lawyer's participation in the program will be successful.<sup>223</sup> Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

The Court should consider adopting a Rule with the following components:

- 1) In matters involving non-serious (the term used in Minnesota) misconduct, as defined by the Court, prior to the referral of a matter to an LPRB Panel for a probable cause determination, the Director may refer the respondent to the diversion program. Acts involving the misappropriation of funds, conduct causing, or likely to cause, substantial prejudice to clients or others, criminal conduct and conduct involving dishonesty, fraud, deceit, or misrepresentation are not the type of conduct for which matters should be diverted. The Court should not require that the Director receive approval of an LPRB Panel or the LPRB Panel Chair to refer a matter for diversion. That should be left to the Director’s discretion;
- 2) The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record. Complainants should not be able to appeal a decision to divert a matter;

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<sup>222</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 11(G).

<sup>223</sup> *Id.*

- 3) The Director should consider the following factors in deciding whether to refer a respondent to the program:
  - a) whether the presumptive sanction for the alleged misconduct is likely to be no more severe than a reprimand;
  - b) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;
  - c) whether aggravating and mitigating factors exist; and
  - d) whether diversion has already been tried;
- 4) The Director and respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by both parties, should set forth with specificity the terms and conditions of the plan, and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to the Director. A practice and/or recovery monitor should be identified, where necessary, and the monitor's duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so necessary disclosures can be made to the OLPR. The contract should include an acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original allegations of misconduct that were the subject of the contract. The contract should be amendable upon agreement of the respondent and the Director. The agreement should also provide that the respondent pay all costs incurred in connection with the contract;
- 5) The lawyer should have the right not to participate in the program. If a respondent does not agree to diversion, the matter should proceed as if no referral had been made. While a respondent should suffer no adverse consequences for refusing to participate, that refusal is a factor that may be considered in determining whether to recommend the filing of formal charges. The Director may recommend a Petition for Disciplinary Action even if the original grievance alleged lesser misconduct, issue an admonition, or recommend dismissal (which would be appealable by the complainant);
- 6) After an agreement is reached, the matter should be dismissed pending successful completion of the terms of the contract. The Minnesota State Bar Association or local bar association should provide verification of successful completion of the program, if that is where the respondent has been referred to complete the terms of the contract. Otherwise, the assigned practice and/or recovery monitor should provide that information to the Director;
- 7) The contract should be terminated automatically upon successful completion of its terms. This constitutes a bar to further disciplinary proceedings based upon the same allegations; and
- 8) A material breach of the contract terminates the respondent's participation in the program and disciplinary proceedings may be resumed or reinstated.

The Court, the OLPR, and state and local bar associations, including specialty bars, each have distinct and important roles to play in successfully implementing a diversion program. The organized bar's active role in this process via programming to which the lawyer can be referred is vital to the success of the diversion process and will enhance the public's perception of the profession and the disciplinary system.

## IX. SANCTIONS

### **Recommendation 20: The Court Should Amend Rule 16 to Streamline the Temporary Suspension Process.**

#### Commentary

Rule 16 of the Minnesota Rules on Lawyers Professional Responsibility sets forth the process for the Director to file with the Court a petition for suspension of a respondent pending final determination of the Petition for Disciplinary Action. The Rule states that the Director may do so in cases where the Director “files or has filed” a Petition for Disciplinary Action and it appears that a “continuation of the lawyer’s authority to practice law pending final determination of disciplinary proceedings poses a substantial threat of serious harm to the public.”<sup>224</sup> The petition must include facts supporting the request, and may include additional evidence, such as LPRB Panel transcripts, court records, affidavits or other documents.<sup>225</sup>

The Director must serve the Petition for Temporary Suspension on the respondent in the same manner as a Petition for Disciplinary Action.<sup>226</sup> After service, the respondent has 20 days to answer, or a shorter period of time if the Court orders, and they may similarly append evidence supporting the answer.<sup>227</sup> The respondent’s answer must include proof of service on the OLPR. If the respondent fails to answer, the Court may deem the allegations in the Director’s Petition for Disciplinary Action admitted and enter the temporary suspension order.<sup>228</sup>

If the Court, after a hearing, finds that the continued practice of law by the respondent constitutes a substantial threat of serious harm to the public, it may suspend the respondent pending the final outcome of the pending disciplinary proceedings.<sup>229</sup>

The Consultation Team heard concerns that the temporary suspension process in Minnesota takes too long and that, in the interest of the public, the Court should amend the Rules and streamline it. The Team received information indicating that it may take between four to six months for the issuance of a temporary suspension order.

The Professional Regulation Committee agrees that the Court should streamline the process to afford appropriate due process while promptly addressing emergent situations.<sup>230</sup> The first way in which the Committee recommends that the Court do so is to amend Rule 16 to eliminate the requirement that the OLPR file or have filed a Petition for Disciplinary Action. By the time that occurs, a lawyer who poses an immediate and substantial threat of harm could have remained in practice to the detriment of clients and the public. Interim (temporary) suspensions for threat of harm are intended to be summary proceedings in which the system is able to act nimbly to quickly protect the public. This procedure is intended to be like those for civil temporary restraining orders,

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<sup>224</sup> Minn. Rules on Law. Prof’l Responsibility R. 16(a).

<sup>225</sup> *Id.*

<sup>226</sup> Minn. Rules on Law. Prof’l Responsibility R. 16(b).

<sup>227</sup> Minn. Rules on Law. Prof’l Responsibility R. 16(c).

<sup>228</sup> *Id.*

<sup>229</sup> Minn. Rules on Law. Prof’l Responsibility R. 16(d).

<sup>230</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 20.

except that they require a motion for dissolution or modification and do not expire automatically.<sup>231</sup>

The Professional Regulation Committee recommends that the Court amend Rule 16 to provide that, upon the receipt of sufficient evidence that a lawyer subject to the Court's jurisdiction has violated a professional conduct rule or is under a disability and poses a substantial threat of harm to the public, the Director provide that information to the Court along with a proposed interim suspension order. At the same time, the Director must make a reasonable effort to serve notice on the respondent.<sup>232</sup>

The Court should promptly review that evidence, and any rebuttal evidence submitted by the respondent prior to the Court's ruling. When appropriate, the Court should issue an order immediately suspending the lawyer pending final disposition of a disciplinary proceeding that is based upon the conduct causing the substantial threat of harm.<sup>233</sup> The Court should not hold a hearing, but a respondent should be able to seek dissolution or modification on an expedited basis. For this reason, the Professional Regulation Committee recommends that Rule 16 be amended to allow the respondent to, upon two days' notice to the OLPR, request that the Court modify or dissolve the interim suspension order.<sup>234</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

## **Recommendation 21: The Court Should Streamline the Admonition Process.**

### Commentary

As noted above, upon completion of an investigation by the OLPR or a DEC, the Director may issue an admonition. Admonitions are private discipline issued in lieu of presenting a matter to an LPRB Panel.<sup>235</sup> The standard for issuing an admonition is whether the lawyer's conduct was "unprofessional but of an isolated and non-serious nature."<sup>236</sup> Absent a respondent's appeal demanding the Director present the matter to an LPRB Panel or instructing the Director to file a Petition for Disciplinary Action with the Court, the Director issues the admonition. Complainants may appeal the Director's admonition to the LPRB. That appeal is considered by a single LPRB member.

When the LPRB Panel considers a respondent's appeal of an admonition, it makes an evidentiary determination, rather than a probable cause determination.<sup>237</sup> Clear and convincing evidence is the standard of proof the LPRB uses to determine whether to affirm or reverse the Director's admonition.<sup>238</sup> If an LPRB Panel rules on the appeal without a hearing and affirms the admonition, the respondent has the right to a hearing *de novo* before a different Panel.<sup>239</sup> If an LPRB Panel holds a hearing, Rule 9(i)(ii) provides that the Panel Chair must explain at the outset that the purpose of the hearing is to determine whether to affirm the admonition as being supported by clear and convincing evidence, reverse it, or, if there is probable cause for public discipline, proceed with a Petition for Disciplinary Action. A respondent may appeal to the Court an LPRB affirmance of a Director's admonition after a hearing.<sup>240</sup> The complainant also may appeal an LPRB Panel's decision to issue an admonition.<sup>241</sup>

In 2021, there were 89 admonitions issued and 9 complainant appeals; all were affirmed. Respondents appealed admonitions three times, and the LPRB Panels reversed one of those appeals. In 2020, there were 83 admonitions issued, with two appeals; one was affirmed, and one was reversed. The number of admonitions issued from 2017 through 2019 was 90, 116, and 109, respectively. During that time, the highest number of times admonitions were appealed by the respondent was 6, in 2019. Data provided to the Consultation Team indicates that, in 2019, the LPRB affirmed the issuance of the admonition two times, reversed twice, and there was one affirmance and one reversal by the Court.

In the Consultation Team's experience, Minnesota issues a high number of admonitions compared to jurisdictions with similar lawyer populations that have private sanctions, and that the adoption of a diversion program will likely reduce these numbers in appropriate cases. The Professional Regulation Committee further finds that the process by which admonitions are appealed should be

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<sup>235</sup> *Supra* note 119.

<sup>236</sup> *Id.*

<sup>237</sup> *Supra* note 123.

<sup>238</sup> *Id.* The LPRB Panel Manual notes that "the level of gravity of unprofessional conduct" in these admonition appeals "is far lower than that considered at a probable cause hearing; the issue at an admonition appeal hearing is whether there was unprofessional conduct of an 'isolated and non-serious nature.'"

<sup>239</sup> *Supra* note 125.

<sup>240</sup> *Supra* note 126.

<sup>241</sup> *Supra* note 127.

streamlined. Given the nature of an admonition as a private sanction for unprofessional conduct of an isolated and non-serious matter, the low numbers of appeals, and the rare instances where the issuance of an admonition is reversed, the current process set forth in the Rules is overly complex and results in an inefficient use of system resources when appeals do take place.

The Professional Regulation Committee recommends that the Court amend Rules 8 and 9, and any other Rules where changes may be needed to align with this Recommendation, to provide that, upon completion of an investigation by an OLPR lawyer or a DEC, the Director may, with the respondent's consent and the approval of an LPRB Panel Chair, impose an admonition.<sup>242</sup> As discussed above, the Professional Regulation Committee recommends that the Court eliminate the LPRB's role in issuing admonitions.

Admonitions should only be issued in cases of minor misconduct where diversion is not appropriate, there is little or no injury caused by the misconduct, and the admonition will result in little likelihood of repeated misconduct.<sup>243</sup> An admonition is not appropriate where a respondent has received prior admonitions for similar misconduct spanning a period to be determined by the Court. Those earlier admonitions constitute prior discipline. That the respondent continues to engage in misconduct for which they have already been disciplined, albeit low level misconduct, indicates the prior private sanctions did not serve their purpose and that lawyer should be subject to a Petition for Disciplinary Action. Allowing a respondent to accumulate multiple private sanctions does not protect the public.

When the Director determines an admonition is appropriate, the respondent should be notified and given 14 days to request that the matter proceed to a Petition for Disciplinary Action instead.<sup>244</sup> The respondent's failure to request formal disciplinary proceedings constitutes consent to the admonition.<sup>245</sup> If the respondent demands that the matter be resolved by a Petition for Disciplinary Action, the Director may file that petition with the Court. The Court should not require a probable cause determination by a LPRB Panel. Approval by an LPRB Panel Chair provides a sufficient check on the Director's decision to proceed with formal proceedings. The refusal is akin to the situation where a settlement offer is rejected in a civil matter, or a plea bargain in a criminal matter, and the case proceeds to trial.<sup>246</sup> Admonitions should continue to constitute prior discipline in subsequent proceedings.

The requirement that a LPRB Panel Chair approve the admonition, a form of discipline, provides appropriate due process. In addition to eliminating the respondents' appeal rights, the Professional Regulation Committee, as discussed above, recommends that complainants no longer have the ability to appeal an admonition. However, the OLPR must continue notifying complainants of the disposition and explain in a relatable way why that decision was made.

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<sup>242</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 10(A)(5).

<sup>243</sup> *Id.*

<sup>244</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 11(C).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*



Admonitions must be in writing and should not be imposed after the filing of a Petition for Disciplinary Action.<sup>247</sup> Because proceedings on Petitions for Disciplinary Action are public, any discipline imposed as a result of those proceedings should be public, along with dismissals of such matters. The imposition of private discipline after a matter has been made public causes suspicion and undermines the public's trust and confidence in the system.

The OLPR regularly should use bar association publications and other media outlets aimed at lawyers to publish summaries of the conduct for which admonitions are issued, with the name of the lawyer omitted. Currently, only some admonitions are described in articles written by the Director or OLPR lawyers. Summaries of admonitions, absent the respondent's identity, also should be available in a searchable repository on the OLPR website. These summaries not only demonstrate to the public that the system is meeting its goals but serve as an excellent educational tool for lawyers to help them avoid misconduct and adds transparency to ensure consistency in sanctions for similar misconduct.

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<sup>247</sup> *Id.*

## **Recommendation 22: The Court Should Incorporate the ABA Standards for Imposing Lawyer Sanctions.**

### Commentary

The Minnesota Supreme Court has not adopted the ABA Standards for Imposing Lawyer Sanctions (Sanctions Standards), and the Rules on Lawyers Professional Responsibility do not require their use or consideration. When determining an appropriate level of discipline, the framework that the Minnesota Supreme Court uses is to consider: “(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession.”<sup>248</sup> The Court looks to analogous cases as part of its analysis,<sup>249</sup> and includes any mitigating or aggravating circumstances in determining which disciplinary sanction to impose.<sup>250</sup>

The Consultation Team was advised that the Director encourages OLPR lawyers to consult the Sanctions Standards for guidance when the Court’s precedent does not squarely control, and similarly encourages them to consider other jurisdictions’ caselaw. The OLPR occasionally has cited the Sanctions Standards in briefs to the Court. Referees do not use the Sanctions Standards. The Court infrequently references them. When it does, the Sanctions Standards are not used as the primary basis for determining an appropriate disciplinary sanction.<sup>251</sup>

The Sanctions Standards provide a framework for ensuring consistency in the recommendation and imposition of lawyer disciplinary sanctions. That framework, as in Minnesota, requires consideration of the rule violated. However, the Sanctions Standards framework includes consideration of the nature of the duty violated (for example, to a client, the legal system, the profession, or the public), the lawyer’s mental state, the actual or potential injury caused by the lawyer’s misconduct, and aggravating and mitigating circumstances. The Sanctions Standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered.

The Professional Regulation Committee recommends that the Court adopt the Sanctions Standards or, at a minimum, require their use by Referees in the adjudication of matters and citation in reports and recommendations to the Court, and in any post-trial submissions by the parties, in addition to other authority. The Committee believes that their adoption or required use would enhance the framework currently used by the Court in imposing appropriate discipline. The Annotated ABA Standards for Imposing Lawyer Sanctions provides a national perspective and can assist the OLPR and system volunteers in enhancing the consistency with which they recommend sanctions.<sup>252</sup>

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<sup>248</sup> See, e.g., *In re Hansen*, 868 N.W. 2d 55 (Minn. 2015) (citing *In re Nelson*) 733 N.W.2d 458, 463 (Minn. 2007)).

<sup>249</sup> See, e.g., *In re Bishop*, 582 N.W.2d 261, 263 (Minn. 1998).

<sup>250</sup> See, e.g., *In re Perez*, 688 N.W.2d 562, 567 (Minn. 2004) (citing *In re Koss*) 611 N.W.2d 14, 16 (Minn. 2000)).

<sup>251</sup> See, e.g., *In re Pugh*, 710 N.W. 2d 285 (Minn. 2006); *In re Ganley*, 549 N.W. 2d 368 (Minn. 1996).

<sup>252</sup> See ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2019). This book is available for purchase at the ABA Web Store at: <https://www.americanbar.org/products/inv/book/364918410/>.

**Recommendation 23: The Court Should Amend the Rules to Eliminate the Sanction of Stipulated Private Probation and Adopt a Separate Rule for the Imposition, Monitoring, and Revocation of Probation.**

Commentary

Rule 8(d)(3) allows for the imposition of private probation where the Director concludes a lawyer's conduct was unprofessional, the LPRB Chair or Vice Chair approves, and the respondent consents. Rule 15(a) of the Rules on Lawyers Professional Responsibility provides for the imposition of public probation by the Court. The Court may place a lawyer on public probation for a stated time or until further order, with conditions it deems appropriate.<sup>253</sup> It is laudable that the Court recognizes that placing a lawyer on probation protects the public and aims to prevent future misconduct by addressing the problem(s) that led to the filing of disciplinary charges. Probation allows a lawyer who can still perform legal services to do so, while being treated and/or monitored. Probation is only an appropriate sanction where there is little likelihood that the lawyer will harm the public during the period of treatment, rehabilitation, and/or monitoring.

First, the Professional Regulation Committee recommends that the Court amend Rule 8 to eliminate the private sanction of stipulated probation. With the adoption of a Rule providing for diversion, the Committee believes there is no need for private probation. As noted above, there are instances where stipulated private probation is currently used that would be appropriate for diversion. If a lawyer has engaged in conduct that is not appropriate for diversion, but merits probation, whether imposed consensually prior to the filing of a Petition for Disciplinary Action or by the Court after, it should be public.<sup>254</sup>

To provide enhanced guidance and clarity as to when probation is appropriate, its conditions, and when revocation is necessary, the Professional Regulation Committee recommends that the Court adopt a Rule for the imposition, monitoring, and revocation of public probation,<sup>255</sup> with a cross reference in Rule 15(a)(4). Adopting a separate, more detailed Rule relating to probation will help achieve the Court's goals of successful rehabilitation of lawyers and the protection of the public.

The Committee recommends that, similar to the current provisions of stipulated probation under Rule 8(d)(3), the Court include in this new Rule that the probation should not exceed two years, but that the Court may extend that time upon a showing by the Director of a continued need for supervision.<sup>256</sup> Consistent with national practice, it is most often regulation counsel who recommends the extension because that office is responsible for monitoring probation.

To provide guidance to the OLPR and the profession with respect to the types of cases for which probation is appropriate, the Professional Regulation Committee suggests that it set forth, in general terms, the requirements for imposition of probation. These include whether:

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<sup>253</sup> Minn. Rules on Law. Prof'l Responsibility R. 15(a)(4).

<sup>254</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 10(D)(3).

<sup>255</sup> See, e.g., Colo. R. Governing Lawyer Discipline & Disability Proceedings, R. 242.18; Ill. Sup. Ct. R. 772.

<sup>256</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 10(A)(3).

- 1) the respondent can perform legal services without causing the Court or profession to fall into disrepute;
- 2) the respondent is unlikely to harm the public during the period of rehabilitation;
- 3) necessary conditions of probation can be formulated and adequately supervised;
- 4) the respondent has a temporary or minor disability that does not require transfer to disability inactive status; and
- 5) the respondent has not committed misconduct warranting disbarment.<sup>257</sup>

The Rule should provide that the order placing a respondent on probation must unambiguously state each condition of probation. Placing the conditions of probation in the Court's order lets the respondent know exactly what is expected and what will constitute a lack of compliance that could lead to a revocation of probation and the imposition of suspension. The conditions should consider the nature and circumstances of the misconduct and the history, character, and condition of the respondent. Specific conditions may include:

- 1) supervision of client trust accounts, as the Court may direct;
- 2) limitations on practice;
- 3) psychological counseling and treatment;
- 4) abstinence from drugs, alcohol, or gambling;
- 5) random substance testing;
- 6) restitution;
- 7) successful completion of the Multistate Professional Responsibility Examination;
- 8) successful completion of a course of study;
- 9) regular, periodic reports to the OLPR; and
- 10) the payment of disciplinary costs associated with the imposition and enforcement of the probation.

The probation order should require periodic review of compliance and provide a means to supervise the progress of the probationer. The OLPR should develop procedures for screening and selecting probation monitors, to the extent those monitors are not part of the OLPR or the Minnesota Lawyers Concerned for Lawyers Program.

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. Consistent with national practice, the Professional Regulation Committee recommends that this new Rule provide for the continued administration of probation under the control of the OLPR, and for the selection and appointment of appropriate monitors. The Lawyers Concerned for Lawyers Program can assist with identifying proper monitors and with developing qualifications and procedures for supervising them. The Committee believes promulgating a policy for the screening and selection of a regular roster of qualified probation monitors will better serve the system, the public, and respondents.

The monitor's only role should be to supervise the lawyer according to the terms of probation and to report compliance or noncompliance with the Court's order to the OLPR. The monitor is not a counselor or sponsor for the probationer. The new Rule should provide that the probationer must sign a release authorizing the monitor to provide information to the OLPR.

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<sup>257</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 10(A)(3) & cmt.

Adequate and regular training of probation monitors is vital to the successful use of probation. The Director should work with Lawyers Concerned for Lawyers, the Minnesota State Bar Association, and other appropriate professionals to develop the training program. All probation monitors should be required to attend training at least bi-annually.

Probation monitors should be required to immediately report to the OLPR any instances of noncompliance. The new Rule should provide that, upon receipt of such a report, the OLPR may, in its discretion, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation, and requesting an order to show cause why probation should not be revoked, and any stay of suspension vacated. The OLPR should not need approval to do so from the LPRB. The Court should provide the probationer with a short period, 14 to 21 days, in which to respond to the order to show cause. After consideration of the response to the order to show cause, the Court may take whatever action it deems appropriate, including revocation of the probation and the imposition of the stayed suspension or modification of the terms of the probation. This summary proceeding will save time and resources, and promptly remove the risk to the public and the profession posed by a lawyer who is not complying with the terms of probation.

Additionally, the Professional Regulation Committee commends the Court for including probation monitors in Rule 21 of the Rules on Lawyers Professional Responsibility, which provides them with immunity for conduct in the course of their professional duties.

**Recommendation 24: The Court Should Amend Rule 11 of the Rules on Lawyers Professional Responsibility to Align with Caselaw Prohibiting Resignations in Lieu of Discipline and to Provide for Discipline on Consent.**

Commentary

Rule 11 of the Rules on Lawyers Professional Responsibility provides that, at any time, with or without a hearing or with conditions, the Court may allow a lawyer's petition to resign from the practice of law in Minnesota. If the Director objects to the petition, they must advise the Court and submit the matter to an LPRB panel for hearing. The Panel then makes a recommendation to the Court.

Rule 11 does not address whether lawyers who are currently subject to disciplinary proceedings may petition for resignation or whether resignation is appropriate in lieu of discipline. Precedent of the Minnesota Supreme Court addresses this issue. The Court has held that it "will not entertain petitions for resignation while disciplinary petitions alleging serious misconduct are pending. When a lawyer's flagrant violations of professional responsibilities justify disbarment, resignation will not be allowed. To permit a lawyer to resign when disbarment is clearly called for would not serve the ends of justice nor deter others from legal misconduct."<sup>258</sup>

Information available on the OLPR website provides further explanation, including reference to caselaw.<sup>259</sup> Specifically, the FAQ document on the subject of resignations states that, consistent with the Court's precedent, the OLPR has taken the position that to resign, a lawyer must be in good standing (i.e., not suspended or subject of a pending disciplinary investigation).<sup>260</sup>

The Professional Regulation Committee recommends that the Court amend Rule 11 to align with Minnesota precedent and make clear that lawyers with pending disciplinary matters are prohibited from resigning in lieu of discipline. A lawyer who commits misconduct that is serious enough to warrant suspension or disbarment should not be allowed to claim later that they voluntarily resigned their license to practice law. Allowing them to do so is not protective of the public and creates the perception that the system does not view such misconduct as serious. It also creates problems in reciprocal disciplinary enforcement, with the vast majority of jurisdictions that have eliminated the option of resigning with charges pending in favor of adopting rules for disbarment or discipline on consent.

While the OLPR and respondents may seek to resolve Petitions for Disciplinary Action via stipulation, which is appropriate and laudable, the Professional Regulation Committee suggests that the Court further amend Rule 11 to include procedures for discipline on consent after the filing of a Petition for Disciplinary Action. The Director should continue to retain prosecutorial discretion to determine when consensual discipline is appropriate. A request for discipline on consent should be filed with the Referee before whom the petition is pending. The LPRB should

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<sup>258</sup> See *In re McCoy*, 447 N.W.2d 887, 891 (Minn. 1989). See also *In re Davison*, 773 N.W.2d 791 (Minn. 2009); *In re Perez*, 688 N.W. 2d 562 (Minn. 2004).

<sup>259</sup> See FREQUENTLY ASKED QUESTIONS ABOUT RESIGNING YOUR MINNESOTA LAW LICENSE, available at <http://lprb.mncourts.gov/LawyerResources/ResignationDocuments/Resignations%20FAQs.pdf>.

<sup>260</sup> *Id.*

not be involved. The request should be filed in the form of a joint petition by the Director and the respondent. While this process differs from that in the Model Rules for Lawyer Disciplinary Enforcement,<sup>261</sup> the Professional Regulation Committee suggests that requiring the Director and respondent to submit a joint pleading will help ensure that the Referee and Court get the necessary information with which to make their decisions.

Requests for discipline on consent must contain sufficiently detailed information and citation to authority to allow the Referee to decide whether to approve its submission to the Court and for the Court to make a prompt decision on the matter. Along with the petition, the respondent should be required to file an affidavit affirming their consent to the recommended discipline is freely and voluntarily made, they are aware of the pending proceedings, and that if the matter proceeded to a hearing, they could not successfully defend themselves.<sup>262</sup>

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<sup>261</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 21.

<sup>262</sup> *Id.* Examples of other jurisdictions' discipline on consent rules include Ill. Sup. Ct. R. 762, available at <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/d6338256-c74c-44bb-801d-c1cf15e29910/Rule%20762.pdf>; <https://www.ladb.org/DR/?tab=SC&DocID=XIX#>; N.D. Rules for Lawyer Discipline, R. 4.2, available at <https://www.ndcourts.gov/legal-resources/rules/ndrlawyerdiscipl/4-2>.

## **Recommendation 25: The Court Should Amend Rule 24 to Provide Enhanced Clarity on “Taxable” Disbursements.**

### Commentary

Rule 24 of the Rules on Lawyers Professional Responsibility provides that, unless the “Court orders otherwise or specifies a higher amount, the prevailing party in any disciplinary proceeding or revocation of conditional admission proceeding decided” by the Court recovers costs in the amount of \$900. The Rule allows the prevailing party to recover all disbursements necessarily incurred after the filing of a Petition for Disciplinary Action or Petition for Revocation of Conditional Admission. Such disbursements are defined as those normally assessed in appellate proceedings before the Court, plus those recoverable by a prevailing party in civil actions. Minnesota statutes and caselaw provide guidance on disbursements.<sup>263</sup>

The Court requested input from the Professional Regulation Committee as to what items, distinctive to disciplinary proceedings should be included in “taxable disbursements” (the term used in Minnesota). That is a difficult question because the answer depends on the unique nature of each case. Generally, disbursements are not different from those encountered in civil or criminal cases. In the Professional Regulation Committee’s experience, items typically include the cost of investigation, witness fees, mileage, necessary outside auditor or forensic accountant fees, process service fees, court reporter’s fees (except as otherwise provided for in the Rules), cost of translators, independent medical examinations, and fees for the production of records by banks and other entities.<sup>264</sup> A review of jurisdictions’ Rules indicated that the Rules most frequently refer to such amounts as “costs,”<sup>265</sup> while some differentiate between costs and “expenses.”<sup>266</sup> To provide enhanced clarity and guidance to lawyers, the Professional Regulation Committee suggests that the Court include in Rule 24 a non-exclusive list of what constitutes “taxable disbursements.” The Court should retain the discretion to include other reasonable costs and expenses not otherwise defined in the Rule.

The Professional Regulation Committee understands that the OLPR, in seeking recovery of disbursements, prepares and files a motion with receipts or affidavits evidencing disbursements. That practice should continue so that the Court may have sufficient evidence to exercise its discretion in ordering reimbursement.

The Model Rules for Lawyer Disciplinary Enforcement do not provide a cap on costs, but other states have done so.<sup>267</sup> Given the increasing complexity of certain disciplinary matters, the Professional Regulation Committee does not recommend capping the amount as long as the Court ultimately determines the disbursements were necessary and reasonable. Under Rule 24, the respondent has an opportunity to object to a request for an order awarding taxable disbursements.

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<sup>263</sup> See, e.g., MINN. STAT. § 357.09 & 549.04 (2018).

<sup>264</sup> ABA Model Rules for Lawyer Disciplinary Enforcement R. 10(A)(7).

<sup>265</sup> See, e.g., Ill. Sup. Ct. R. 773; N.D. Rules for Lawyer Discipline, R. 1.3.

<sup>266</sup> See, e.g., La. Sup. Ct. Rules for Lawyer Disciplinary Enforcement, R. XIX; N.J. Sup. Ct. Rules, R. 1:20-17; Wash. Rules for the Enforcement of Lawyer Conduct, ELC 13.9.

<sup>267</sup> Ill. Sup. Ct. R. 773.



Because the purpose of discipline is to protect the public and not punish the lawyer, the Court may wish to make clear in the Rule that objections to the order awarding taxable disbursements can be based on factors, including the reasonableness of the disbursements (for example, the respondent prevailed on some charges of misconduct) or financial hardship. The Court also may allow the respondent to enter into a payment plan with the OLPR. In both circumstances, the burden must be on the respondent to demonstrate such hardship.<sup>268</sup>

The Professional Regulation Committee also suggests that the Court consider eliminating the “prevailing party” language and provide that, upon the imposition of public discipline, the Court may assess costs and expenses of the proceedings against the disciplined respondent.<sup>269</sup> This is consistent with most jurisdictions.<sup>270</sup> Disciplinary proceedings are *sui generis*. They are considered to be quasi criminal in nature. Akin to defendants in criminal proceedings who are not entitled to reimbursement from the state for the costs of prosecution, the Committee believes that the OLPR should not be required to reimburse respondents.<sup>271</sup>

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<sup>268</sup> See, e.g., N.J. Sup. Ct. Rules, R. 1:20-17(d).

<sup>269</sup> *Supra* note 282.

<sup>270</sup> In the small number of states where a prevailing respondent may recover costs, that recovery against the disciplinary agency is most often limited to circumstances where the respondent was completely exonerated or where there was no basis for the discipline charges. Examples include California, Florida, and Oregon.

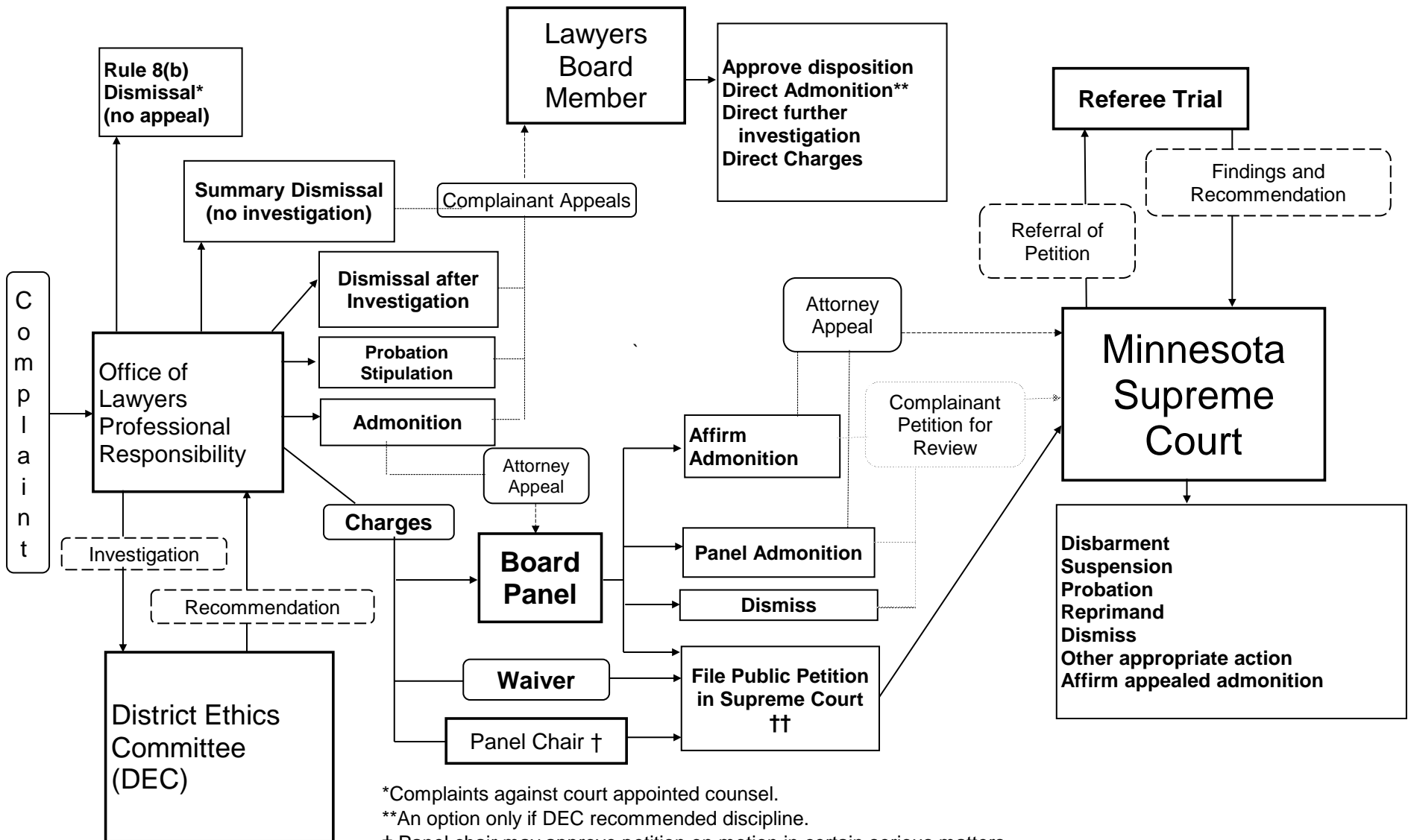
<sup>271</sup> The Professional Regulation Committee is aware that other states, in addition to Minnesota, allow a prevailing respondent to recover costs. Examples include Florida and Arizona.

## **X. CONCLUSION**

The Standing Committee on Professional Regulation hopes that the recommendations contained in this Report will assist the Minnesota Supreme Court in its efforts to enhance its lawyer discipline system's accountability, effectiveness, and efficiency. The members of the Committee and the Consultation Team thank the Court for the opportunity to provide these consultation services. The Committee and Team are grateful to all who participated in the consultation, and to the OLPR for its hospitality. The Committee and Consultation Team appreciate the assistance of the LPRB and the OLPR in ensuring that the Consultation Team had access to all the information it needed to perform its study. As part of the discipline system consultation program, the Committee is available to provide further assistance to the Court.

# **APPENDIX A**

# MINNESOTA ETHICS COMPLAINT FLOW CHART



\*Complaints against court appointed counsel.  
 \*\*An option only if DEC recommended discipline.  
 † Panel chair may approve petition on motion in certain serious matters.  
 †† Board Chair may authorize petition if attorney convicted of a serious crime.  
 If attorney is on public probation, petition may be filed without preliminary procedures.

# **APPENDIX B**

