

NORTH DAKOTA

Report on the Lawyer Discipline System

June 2014

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline



**NORTH DAKOTA LAWYER DISCIPLINE SYSTEM
CONSULTATION TEAM**

Nancy L. Cohen
Denver, CO

Dolores Dorsainvil
Washington, D.C.

Charles B. Plattsmier
Baton Rouge, LA

Ellyn S. Rosen, Reporter
Chicago, IL

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE**

Arnold R. Rosenfeld, Chair
Boston, MA

Hon. Leonardo Castro
St. Paul, MN

Nancy L. Cohen
Denver, CO

Dolores Dorsainvil
Washington, DC

Linda A. Gosnell
Lexington, KY

James A. Kawachika
Honolulu, HI

Kellyn O. McGee
Atlanta, GA

Cleaveland D. Miller
Baltimore, MD

Margaret D. Plane
Salt Lake City, UT

Ellyn S. Rosen
Deputy Director ABA Center for Professional Responsibility
Chicago, IL

Theresa Gronkiewicz
Deputy Regulation Counsel
Chicago, IL

NORTH DAKOTA LAWYER DISCIPLINE SYSTEM	2
CONSULTATION TEAM.....	2
AMERICAN BAR ASSOCIATION.....	3
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE	3
I. INTRODUCTION.....	7
A. Regulation of the Legal Profession by the Judicial Branch of Government.....	7
B. The Lawyer Discipline System Consultation Program	8
C. Persons Interviewed and Materials Reviewed.....	9
II. OVERVIEW.....	10
A. Strengths of the North Dakota Lawyer Discipline System	10
B. Description of the North Dakota Lawyer Discipline System.....	11
1. Funding of the North Dakota Lawyer Discipline System	11
2. Location of Lawyer Discipline System and Facilities.....	13
3. Component Entities of the Discipline System	13
4. Complaint Filing and Summary Dismissal Procedures	17
5. Investigation and Action by District Inquiry Committees.....	19
6. Formal Proceedings.....	21
III. PUBLIC ACCESSIBILITY AND OUTREACH.....	23
Recommendation 1: The North Dakota Lawyer Discipline System Should be More Accessible and Visible to the Public	23
A. The Court Should Utilize an Open and Transparent Appointment Process to Fill Disciplinary Board Vacancies.....	23
B. Disciplinary Counsel’s Office Should Have More Publicly Accessible Office Space That Is Suitable for Its Purpose	24
C. The Board and Disciplinary Counsel Should Develop a Stand-Alone Website for the System With A Downloadable Complaint Form.....	26

D. The Disciplinary Board Should Publish A User-Friendly Annual Report About the System.....	28
E. Disciplinary Board Members and Disciplinary Counsel Should Engage in More Public Outreach	29
IV. STRUCTURE	30
Recommendation 2: The Complaint Filing and Management Process Should Be Streamlined and Technologically Enhanced	30
A. Complaints Should Be Filed With Disciplinary Counsel.....	30
B. Disciplinary Counsel Must Have a Technology-Driven Caseload Management System and Other Enhancements to Its Technology.....	31
Recommendation 3: The Disciplinary System Should Be Restructured to Better Leverage the Strengths of Each Component Entity	33
A. Disciplinary Counsel Should Be Responsible for Screening, Investigation, and Dismissal of Complaints.....	35
B. The District Inquiry Committees Should Continue to Be Responsible for Making Probable Cause Determinations.....	39
Recommendation 4: All Professional Staff and Volunteers in the Disciplinary System Should Receive Formal Training on a Regular Basis	41
V. PROCEDURES	44
Recommendation 5: There Should Be Increased Separation Between Investigative/ Prosecutorial and Adjudicative Functions.....	44
Recommendation 6: Prehearing Conferences Should Be Mandatory and a Hearing Panel Chair Appointed to Conduct Them.....	46
Recommendation 7: The Board Should Develop a Policy About Whether Disciplinary Counsel Can Use Previously Undisclosed Investigative Reports to Attempt Impeach Respondents With Prior Inconsistent Statements.....	48
VI. SANCTIONS.....	49
Recommendation 8: The Court Should More Clearly Distinguish Between Probation and Diversion, and Enhance Its Probation Rule to Include Provisions Specifying Terms for Monitoring and Revocation of Probation	49

Recommendation 9: Rule 6.6 of the North Dakota Rules for Lawyer Discipline Should be Further Tailored to Clarify the Scope of Diversion, and Programmatic Opportunities For Diversion Should Be Enhanced..... 53

Recommendation 10: The Court Should Amend Rule 4.1 to Provide for Interim Suspension Upon a Finding of Guilt..... 57

Recommendation 11: Discipline on Consent Should Be Encouraged 58

Recommendation 12: The Court Should Adopt Procedures for Addressing Continued Misconduct by Disbarred Lawyers..... 60

VII. CONCLUSION 62

I. INTRODUCTION

A. 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 the regulation of lawyers after they have been admitted to the bar. Since the thirteenth century, lawyers have been held accountable for their professional conduct by the judges before whom they practiced.¹ By the late 1800's, the courts were claiming their inherent and exclusive power to regulate the legal profession.² Today, in each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.³

The judicial branch of government is better suited to regulate the legal profession than the legislative and executive branches because the other two branches of government are more subject to political influence. Regulation by either the legislative or executive branch thus jeopardizes the independence of the legal profession. 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.⁴

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate and more effective. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee), chaired by former U.S. Supreme Court Justice Tom Clark, issued its Report containing findings from a three-year comprehensive review of lawyer discipline in the United States.⁵ The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."⁶ The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory authority, should legislatures attempt to intervene.⁷ In doing so, the Clark Committee stressed that,

¹ 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).

² 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.

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

⁴ MODEL RULES OF PROF'L CONDUCT pmb1. (2011), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

⁵ SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT* xii (1970), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

⁶ *Id.* at 1-2.

⁷ *Id.* at 10-18.

because of its political nature, the legislative process was “a far less desirable forum” for such reform to occur.⁸

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), chaired initially by Robert B. McKay, examined the implementation of the Clark Committee Report.⁹ The McKay Commission also studied the advantages and disadvantages of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.¹⁰ The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.¹¹ The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.¹² 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. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer regulation in the world.

B. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline (“Discipline Committee”) initiated a national program to confer with United States lawyer disciplinary agencies, upon invitation by a jurisdiction’s highest court, and to make recommendations to increase the efficiency and effectiveness of their disciplinary systems. To date, as a result of this program, the Discipline Committee has conducted 60 such consultations. Some jurisdictions have retained the Committee’s services multiple times.

The Discipline Committee sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations, and procedures of a host jurisdiction’s lawyer discipline system. At the conclusion of its examination the team develops recommendations for adoption by the full Discipline Committee. Upon approval of those recommendations the Committee issues a confidential report setting forth its findings and suggestions for improvement of the system to the highest court. The consultation process allows participants in the lawyer disciplinary system to understand the operation of their system in the context of model disciplinary procedures that have been developed by the American Bar Association, and conversely, provides an opportunity for the Standing Committee to learn about additional or alternative procedural mechanisms that may be considered for incorporation into Association models.

⁸ *Id.* at 12.

⁹ MCKAY REPORT, *supra* note 2. Raymond R. Trombadore chaired the McKay Commission following the death of Robert McKay.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4-5.

¹² *Id.*

In examining the jurisdiction's lawyer regulatory system the Committee uses as a guide criteria adopted from the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The MRLDE were adopted by the ABA House of Delegates in August 1989, and were amended in February 1999 and 2002. 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.¹³ In addition to considering national practices, the Committee carefully examines local factors and characteristics and then makes recommendations that are tailored to meet the specific or unique needs and goals of the jurisdiction. In this Report, those Recommendations appear at pages 23 through 62.

C. Persons Interviewed and Materials Reviewed

At the invitation of the North Dakota Supreme Court, the Discipline Committee sent a team to Bismarck to conduct the on-site portion of the consultation from January 20 through January 24, 2014. The team interviewed members of the Disciplinary Board, the Operations Committee, the Hearing Panels and the District Inquiry Committees. The team also interviewed Court staff, Disciplinary Counsel and his staff, complainants, respondents, and lawyers who represent complainants and respondents in lawyer disciplinary matters. Other interviewees included current and incoming leadership of the State Bar Association of North Dakota and staff. On the final day of its consultation, the team met with members of the North Dakota Supreme Court.

Documents reviewed by the team included, but were not limited to:

- (1) the North Dakota Rules for Lawyer Discipline;
- (2) the Bylaws and Constitution of the State Bar Association of North Dakota;
- (3) the North Dakota Rules of Professional Conduct;
- (4) Rules on Arbitration of Fee Disputes;
- (5) Client Protection Fund Procedural Rules;
- (6) relevant statutes;
- (7) available caseload information;
- (8) administrative and financial reports relating to disciplinary functions;
- (9) statistics and reports compiled by Disciplinary Counsel regarding the disciplinary system; (10) job descriptions of Disciplinary Counsel and related staff;
- (11) the State Bar Association and North Dakota Supreme Court websites;
- (12) case files; reports and recommendations of the Inquiry Committees and Hearing Panels; (13) the North Dakota Standards for Imposing Lawyer Sanctions; and
- (14) North Dakota Supreme Court disciplinary opinions.

The Discipline Committee is grateful to all of the consultation participants for their time, candor, and generous effort in preparing for and participating in this study. The strong commitment of the Court and its staff, Disciplinary Counsel and his staff, the system's volunteers, and the leadership and staff of the State Bar Association of North Dakota to maintain and improve an

¹³ *Supra* note 2.

effective system for protecting and advancing the public's interest in a well-regulated bar is laudable.

II. OVERVIEW

A. Strengths of the North Dakota Lawyer Discipline System

This Report is designed primarily to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in lawyer regulation issues. It generally will exclude from discussion those areas of the system that are operating effectively. However, in order to provide a balanced assessment of North Dakota's lawyer disciplinary system, it is important to recognize its strengths. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note will be described elsewhere in this Report.

With a recently appointed Disciplinary Counsel (he previously served as Assistant Disciplinary Counsel) and a new Assistant Disciplinary Counsel, the time for an overarching review of the system's operations and effectiveness was optimal. It is clear to the Discipline Committee that the North Dakota Supreme Court and its Clerk's office, Disciplinary Counsel, volunteers of the component entities of the system, and the professional and volunteer leadership of the State Bar Association of North Dakota are all committed to maintaining an effective and fair lawyer disciplinary system.

The North Dakota Standards for Imposing Lawyer Discipline, based upon the ABA Standards for Imposing Lawyer Sanctions, have served as an effective structure to assist the Hearing Panels and the Court in determining the appropriate sanction for lawyer misconduct. In addition they provide appropriate guidance to respondent lawyers and their counsel, and facilitate negotiations for agreed dispositions.

The State Bar Association's Lawyer Assistance Program works hard to serve lawyers and judges in the State, and is an important component of the diversion program. The relationship between the Lawyer Assistance Program and Disciplinary Counsel's office is productive and the consultation team was pleased to see that each entity is eager to work together to ensure that the diversion program is used optimally and appropriately. This Report will provide suggestions in that regard.

Like most other jurisdictions, publicly disciplined lawyers in North Dakota are responsible for reimbursing the costs of investigations and prosecutions. Unlike a number of other jurisdictions, however, the North Dakota system does an impressive job recovering these costs and fees. Information provided to the consultation team indicates that over the years the system has collected \$288,443.71, and efforts continue. This money is paid into the General Revenue Fund.

B. Description of the North Dakota Lawyer Discipline System

The North Dakota Supreme Court possesses the inherent, constitutional and statutory authority to regulate the legal profession in North Dakota.¹⁴ Article VI. Section 3 of the North Dakota Constitution states that: “The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; and, unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law.”¹⁵ All lawyers admitted to or engaged in the practice of law in North Dakota are subject to the disciplinary jurisdiction of the Court.¹⁶

The Court has adopted the North Dakota Rules for Lawyer Discipline which set forth the structural entities that comprise the lawyer disciplinary system and the procedures for the investigation, prosecution and adjudication of disciplinary complaints, as well as provisions addressing lawyer disability and incapacity issues. In addition to the Supreme Court, the component parts of the North Dakota lawyer discipline system are the Disciplinary Board, Operations Committee, Hearing Panels, District Inquiry Committees, and Disciplinary Counsel. Disciplinary Counsel serves not only the lawyer discipline system, but also the Judicial Conduct Commission. Additionally, the Clerk of the North Dakota Supreme Court serves as the *ex officio* Secretary of the Disciplinary Board. Her office has a role in processing complaints and retaining records of disciplinary matters.¹⁷

1. Funding of the North Dakota Lawyer Discipline System

North Dakota is a unified bar. The State Bar Association of North Dakota is the oldest unified state bar association in the United States.¹⁸ In 2013, there were 2731 lawyers licensed to practice law in North Dakota. Of that number, 1610 lawyers were located in North Dakota and 1121 lawyers were located outside the state.¹⁹

Each lawyer pays annually a licensure fee between \$200 and \$380 depending on the number of years that lawyer is admitted to practice.²⁰ Those funds are paid to the State Board of Law Examiners, which then remits the monies to the State Bar Association.²¹ Out of each lawyer’s annual licensure fee, \$75 is allocated to fund the lawyer disciplinary system.²² The consultation team was advised that the State Bar Association retains a portion of \$75 per lawyer allotment to pay for the Lawyers Assistance Program (\$20,000 per year) and for the expenses of the Inquiry

¹⁴ See e.g., The Constitution of North Dakota, Article VI, § 3 as amended; N.D.C.C. § 27-11-02 & § 27-14-01.

¹⁵ See also, *Lamb v. State Bd. of Law Examiners*, 777 N.W.2d 343 (N.D. 2010), where the North Dakota Supreme Court discusses its inherent authority over the legal profession in the state and the meaning, in Article VI, § 3 of the phrase “unless otherwise provided by law.”

¹⁶ N.D.R. Lawyer Discipl. R. 1.1(C).

¹⁷ N.D.R. Lawyer Discipl. R. 2.1(D).

¹⁸ See, e.g., <https://www.sband.org/default.aspx> (last viewed April 7, 2014).

¹⁹ This information was provided to the consultation team by Disciplinary Counsel’s office.

²⁰ See, N.D.C.C. § 27-11-22 & § 27-12-02.

²¹ N.D.C.C. § 27-11-22.

²² N.D.C.C. § 27-12-04.

Committees.²³ Information provided to the consultation team shows that in 2012, expenses for the Inquiry Committees totaled \$10,579.92. On a monthly basis the State Bar Association remits to the Disciplinary Board \$14,500 for a total of \$174,000 annually. The system also receives monies from the General Revenue Fund of the State as Disciplinary Counsel is responsible for the investigation and prosecution of Judicial Conduct Commission matters.²⁴ The disciplinary budget per biennium was \$ 889,955 for 2011 - 2013 and \$1,020,874 for 2013 - 2015.²⁵

In addition to funding, the system benefits from the resources of the office of the Clerk of the North Dakota Supreme Court. As set forth above, the Clerk serves *ex officio* as the Secretary to the Disciplinary Board. Her office receives, docket, and disseminates to Disciplinary Counsel and the District Inquiry Committees complaints against North Dakota lawyers and maintains related records. This includes reproducing complaints and accompanying responses. Information provided to the team from several sources estimated that the contributions from the Clerk's office are significant in terms of staff time and salary.

As noted above, the North Dakota lawyer disciplinary system also works to recover from disciplined lawyers the costs and fees incurred during the system's investigation and prosecution of matters.²⁶ Over the years \$288,443.71 has been collected and paid into the General Revenue Fund.

The Operations Committee, whose three members are appointed by the Court, is responsible for "the fiscal management of the lawyer disciplinary system, including all issues related to personnel management."²⁷ The State Court Administrator serves as an *ex officio* member. The Executive Director of the State Bar Association serves as the Committee's Secretary and is responsible for maintaining the permanent financial records regarding the system.²⁸ The Committee meets at least four times per year, and more often if necessary. Disciplinary Counsel assists in developing the budget for his office for submission to the Committee. In doing so, Disciplinary Counsel consults with the Committee and the State Court Administrator. The Committee receives financial statements from the State Bar Association and the Court. The team was advised that, to date, the Operations Committee has not engaged in long range planning for the system.

When bills are received by Disciplinary Counsel, he forwards them to the office of the State Court Administrator for payment. Disciplinary Counsel does not have the ability to directly pay any bills for the operation of the system.

²³ N.D.R. Lawyer Discipl. R. 2.4(G) provides that all expenses of the District Inquiry Committees are to be paid from Association funds.

²⁴ N.D.R. Jud. Conduct Comm. 4.

²⁵ *Supra* note 19.

²⁶ N.D.R. Lawyer Discipl. R. 1.3(A)(9).

²⁷ N.D.R. Lawyer Discipl. R. 2.2(A) & (E). Part of the Oversight Committee's duties with regard to personnel include the hiring of Disciplinary Counsel.

²⁸ N.D.R. Lawyer Discipl. R. 2.2(C).

2. Location of Lawyer Discipline System and Facilities

The Discipline Committee visits Disciplinary Counsel's physical office space because it represents the face of the Court and there are security issues inherent in this line of work. Disciplinary Counsel's Office is located at 515½ East Broadway Avenue, Suite 102, in downtown Bismarck. The building, known as the Bismarck Parkade, is an older structure and at the time of the consultation team's visit was undergoing some construction work. The actual space comprising Disciplinary Counsel's office is small, approximately 700 square feet, and has not been updated. Someone entering the office immediately encounters the open work space of the administrative staff. Additional space includes two offices (for Disciplinary Counsel and the Assistant Disciplinary Counsel), a small file room for paper files as well as equipment, including that for the office's computers and a copy machine. At the time of the team's visit disciplinary files and records were maintained in file cabinets in the space occupied by the administrative staff in addition to the small single file room. There is no room for expansion to meet future needs of the office for the lawyer and judicial disciplinary systems. As noted above, Disciplinary Counsel is responsible for the investigation and prosecution of judicial disciplinary matters too.

In the same area as the work space for the administrative staff there is also a small "waiting area" for guests. The office lacks a conference room. It is crowded and there are no security mechanisms other than the locks on the entry door to the office space. Those are not kept engaged during work hours. Signage advertising the location of Disciplinary Counsel's office is minimal.

Disciplinary Counsel's office does not have its own website. Information about the disciplinary system can be found on the websites of the Court and the State Bar Association.

3. Component Entities of the Discipline System²⁹

a. The Disciplinary Board

The Disciplinary Board has administrative as well as adjudicative duties. The Board consists of ten members (seven lawyers and three nonlawyer public members) appointed by the North Dakota Supreme Court. North Dakota has seven judicial districts. The Court appoints a lawyer from each judicial district to serve on the Board.³⁰ The nonlawyer members are appointed from the state at large. Candidates for appointment are submitted to the Court in the following manner: the State Bar Association's Board of Governors submits a list of three practicing lawyers from each judicial district; each public member is appointed from a list of three individuals' names submitted by a committee comprised of the President of the State Bar Association, the Attorney General of North Dakota, and the Chair of the North Dakota Judicial Conference.³¹

²⁹ The Operations Committee is discussed at page 12 above.

³⁰ N.D.R. Lawyer Discipl. R. 2.1(A).

³¹ N.D.R. Lawyer Discipl. R. 2.1(B).

Board members serve three-year terms and may not serve for more than two consecutive terms except when filling the unexpired term of another member.³² Board members elect the Chair and Vice Chair of the Board at the first Board meeting each calendar year.³³

Six members of the Board constitute a quorum. Concurrence of a majority of the entire Board is required for action except on administrative matters. With regard to administrative matters a simple majority of a quorum of the Board is required.³⁴ The Board's adjudicative duties include handling appeals of District Inquiry Committee dispositions and conducting disciplinary hearings through Hearing Panels.³⁵ The Board is also responsible for informing the public about the system, annually reviewing the system with the Court, Disciplinary Counsel and the Inquiry Committees, and proposing amendments to the Rules for Lawyer Discipline for Court approval.³⁶

Board members are not compensated for their service. However, reasonable expenses are reimbursed for Board members and members of the Hearing Panels.³⁷ This is consistent with national practice.

b. The Hearing Panels

The Hearing Panels serve as triers of fact when petitions for discipline are filed alleging violations of the North Dakota Rules of Professional Conduct. At the conclusion of the hearings the Panels prepare reports and recommendations for discipline for submission to the Court, along with the record of the proceedings.³⁸ A Hearing Panel may also impose discipline in the form of a reprimand or probation.³⁹

The Chair of the Disciplinary Board appoints the members of a Hearing Panel. The Panels consist of three members comprised of two lawyers and one public member. Hearing Panel members are drawn from the pool of existing or former Disciplinary Board members, or the Board Chair may appoint a Hearing Officer who is a district court or surrogate judge.⁴⁰ Members of Hearing Panels are required to recuse themselves from matters where a judge, similarly situated, would be required to do so.⁴¹

c. The District Inquiry Committees

While North Dakota is divided into seven judicial districts from which Disciplinary Board members are appointed, there exist three disciplinary districts for purposes of defining the

³² *Supra* note 30.

³³ N.D.R. Lawyer Discipl. R. 2.1(C).

³⁴ N.D.R. Lawyer Discipl. R. 2.1(E).

³⁵ N.D.R. Lawyer Discipl. R. 2.1(H).

³⁶ *Id.*

³⁷ N.D.R. Lawyer Discipl. R. 2.1(F).

³⁸ N.D.R. Lawyer Discipl. R. 2.3(B)(2) & 3.1(F).

³⁹ N.D.R. Lawyer Discipl. R. 1.3(A)(4) & (6).

⁴⁰ N.D.R. Lawyer Discipl. R. 2.3(A).

⁴¹ N.D.R. Lawyer Discipl. R. 2.3(C).

jurisdiction of the three District Inquiry Committees—Inquiry Committee East, Inquiry Committee West and Inquiry Committee Southeast.⁴²

Unlike the Disciplinary Board, the Court does not appoint the members of the District Inquiry Committees. The President of the State Bar Association of North Dakota appoints the Inquiry Committee members.⁴³ A District Inquiry Committee is comprised of six lawyers and three nonlawyer public members from their respective disciplinary district.⁴⁴ Members serve three-year terms and may not serve more than two consecutive terms. An Inquiry Committee member who has served two consecutive terms may be reappointed after one year of non-service.⁴⁵ The members of each District Inquiry Committee elect their Chair and Vice Chair at the beginning of each calendar year.⁴⁶

The President of the State Bar Association may also, if necessary, appoint special members to an Inquiry Committee at the request of a Committee Chair.⁴⁷ These special members assist in the investigation of complaints and preparation of investigative reports. They serve three-month terms, but if necessary, their terms can be extended an additional nine months.⁴⁸

The District Inquiry Committees investigate complaints filed against North Dakota lawyers upon receipt of those complaints from the Clerk of the North Dakota Supreme Court serving in her capacity as Secretary of the Board.⁴⁹ The Committees may refer a complaint to Disciplinary Counsel for investigation or have Disciplinary Counsel assist in the investigation. Upon completion of the investigative report the Inquiry Committee is required to act on the complaint in the manner described at page 18 below. According to the Rules for Lawyer Discipline, the failure of an Inquiry Committee member to timely complete their assigned investigative report may be grounds for replacing that member or for reassigning the investigation.⁵⁰ The State Bar Association is required to fund the operations of the District Inquiry Committees. As noted above, the consultation team was advised that the State Bar Association retains a portion of \$75 per lawyer allotment to pay for the expenses of the Inquiry Committees.

d. Disciplinary Counsel and Staff

As described above, the Operations Committee hires Disciplinary Counsel and the Assistant Disciplinary Counsel, who also serve as judicial disciplinary counsel. Recently, a new Disciplinary Counsel was chosen after the ascension to the bench of the previous Disciplinary Counsel, who served in that position for 14 years (and served an additional 6 years as Assistant Disciplinary Counsel before that). The new Disciplinary Counsel served as the Assistant Disciplinary Counsel from 2004 through August 2013, and before that was engaged in practice

⁴² N.D.R. Lawyer Discipl. R. 2.4(A).

⁴³ N.D.R. Lawyer Discipl. R. 2.4(B).

⁴⁴ *Id.*

⁴⁵ N.D.R. Lawyer Discipl. R. 2.4(C).

⁴⁶ N.D.R. Lawyer Discipl. R. 2.4(D).

⁴⁷ *Supra* note 43.

⁴⁸ *Id.*

⁴⁹ N.D.R. Lawyer Discipl. R. 2.4(E) and R. 3.1(A) & (B).

⁵⁰ N.D.R. Lawyer Discipl. R. 2.4(F).

with the state fund provider of workers' compensation insurance and private practice. The new Assistant Disciplinary Counsel came to the agency from private practice. Disciplinary Counsel and the Assistant Disciplinary Counsel may not engage in the private practice of law while serving in those positions.⁵¹

Disciplinary Counsel's office employs two individuals who serve as legal secretaries/legal assistants. The office does not employ a paralegal or investigator. One secretary/assistant has been with the office since 1989; the other moved from a position at private law firm in 2011. Each handles correspondence and general office duties including answering the telephone, greeting visitors, maintaining office files, and assisting Disciplinary Counsel and the Assistant Disciplinary Counsel in the preparation of documents and pleadings. These individuals handle the scheduling of hearings before the Hearing Panels and budget matters as necessary, including reimbursement requests.

The office lacks a technology-driven case management system. The bulk of case related records are maintained in print form. The team was advised that there exists a longstanding handwritten ledger of files. Administrative staff has created an Excel spreadsheet relating to completed cases to track the nature of discipline imposed. The office has developed another spreadsheet to track the status of pending cases. Much of the exchange and maintenance of information throughout the system is done via physical documents. There are sets of files for the Inquiry Committees as well as for Disciplinary Counsel. This is in addition to documents retained by the Clerk of the Supreme Court. This requires staff in Disciplinary Counsel's office (and the Clerk's office) to spend significant time reproducing files, reports and other documents.

Disciplinary Counsel's office recently started using shared email and Outlook for scheduling. The office does have electronic access to state court records and files. Word processing is done via Word, but sometimes also still in Word Perfect. The office does not use trust account software. The Court and Disciplinary Counsel are interested in improving the office's technological capabilities.

As referenced above, the volunteer members of the District Inquiry Committees bear primary responsibility for investigating complaints against North Dakota Lawyers. Disciplinary Counsel may be asked to assist the Inquiry Committees in the investigation of matters or the Inquiry Committees may refer cases to Disciplinary Counsel to conduct the investigation. The latter most often occurs in complex matters. Disciplinary Counsel does not have the authority to screen complaints for summary dismissal or to dismiss matters after investigation. That authority belongs to the Inquiry Committees, regardless of whether a Committee member or Disciplinary Counsel conducts the investigation.⁵²

Once it is determined that a petition for discipline should be filed, Disciplinary Counsel is responsible for preparing the petition and prosecuting the matter before Hearing Panels and the Court.⁵³ This includes conducting discovery, preparing necessary pleadings, conducting

⁵¹ N.D.R. Lawyer Discipl. R. 2.5(A)(2).

⁵² N.D.R. Lawyer Discipl. R. 2.4(E)(3) & R. 3.1(C).

⁵³ N.D.R. Lawyer Discipl. R. 2.5(B)(3) & R. 3.1(E)(1).

examinations of witnesses, and engaging in oral argument before the Court. Disciplinary Counsel may negotiate discipline on consent. Disciplinary Counsel is also responsible for prosecuting reinstatement matters, contested reciprocal discipline and disability cases.⁵⁴

Disciplinary Counsel advises complainants of the disposition of their complaints at all stages of the process and keeps respondent lawyers apprised of the status of cases.⁵⁵ According to the North Dakota Rules for Lawyer Discipline, Disciplinary Counsel advises the Board, Hearing Panels and Inquiry Committees on legal issues relating to their duties and the system.⁵⁶ He and the Assistant Disciplinary Counsel teach ethics-related CLE courses, publish articles, and engage in outreach about the system to the bar.

4. Complaint Filing and Summary Dismissal Procedures

Persons wishing to file complaints about North Dakota lawyers must send them to the Secretary of the Disciplinary Board (Clerk of the Supreme Court).⁵⁷ The Board and District Inquiry Committees may also initiate complaints on their own motion.⁵⁸ The Board Secretary is charged with maintaining the permanent records of the discipline system, compiling relevant statistics to help administer the system and expunging files as required under the North Dakota Rules for Lawyer Discipline.⁵⁹ Pursuant to those Rules, the Board Secretary must keep a single log of all complaints received, any investigative files, transcripts of proceedings, summaries of docket processing and case dispositions.⁶⁰ The Rules provide that the Secretary may delegate to Disciplinary Counsel the recordkeeping duties to avoid duplication and to increase efficiency.

There exists no “complaint form” to be completed and submitted by complainants. Information about how to file a complaint is located on the websites of the Court and State Bar Association. Complainants must submit their complaints in writing (signed and dated) to the Secretary of the Board.⁶¹ The telephone number for the Secretary’s office is provided on the Court’s website as the contact number for information about the complaint filing process.⁶² Disciplinary Counsel’s telephone number is provided on the State Bar Association’s website as the contact for those who have questions about filing a complaint.⁶³

Upon receipt of a complaint the Clerk’s Deputy reviews it to make sure that it is not a duplicate filing by the same person. If it is not a duplicate, the Deputy opens a new file in the Board’s electronic docket system (not a case management system) and the matter is assigned a file

⁵⁴ *Id.*

⁵⁵ N.D.R. Lawyer Discipl. R. 2.5(B)(5) & R. 3.1(D)(8).

⁵⁶ N.D.R. Lawyer Discipl. R. 2.5(B)(2).

⁵⁷ N.D.R. Lawyer Discipl. R. 3.1(A).

⁵⁸ *Id.*

⁵⁹ *Supra* note 17.

⁶⁰ *Id.*

⁶¹ *Supra* note 57, see also, https://www.ndcourts.gov/court/Committees/disc_brd/information.htm; and <https://www.sband.org/Resources%20for%20Lawyers/FileComplaint.aspx>.

⁶² See, https://www.ndcourts.gov/court/Committees/disc_brd/information.htm.

⁶³ See, <https://www.sband.org/Resources%20for%20Lawyers/FileComplaint.aspx>.

number.⁶⁴ The matter is then assigned to the appropriate District Inquiry Committee, and a form letter acknowledging receipt of the complaint is sent to the complainant.⁶⁵ This letter advises the complainant of the file number, to which Inquiry Committee it has been assigned, and provides the name and contact information for the Inquiry Committee Chair. The Inquiry Committee Chair and Disciplinary Counsel receive copies of the letter. The Secretary's office reproduces the complaint and any accompanying materials and sends a paper copy each to the Inquiry Committee and to Disciplinary Counsel's office. The Secretary's office conducts no screening of complaints to determine whether they fall under the jurisdiction of the disciplinary system or whether the allegations, if true, would not be a basis for discipline.

Next, the Chair of the assigned Inquiry Committee reviews the complaint to first determine whether the lawyer is subject to the Court's jurisdiction. If not, the Chair refers the matter to the appropriate disciplinary agency in the jurisdiction in which the lawyer is licensed.⁶⁶ The team understands that next, in practice, the Chair of an Inquiry Committee reviews the matter and either identifies the case as appropriate for summary dismissal or assigns an investigator. If the case is assigned to an investigator, summary dismissal is no longer considered. If the Chair has a conflict, the Vice Chair reviews the matter for summary dismissal or assignment of an investigator. Pursuant to the North Dakota Rules for Lawyer Discipline, summary dismissal is appropriate when a complaint alleges facts that, even if true, are not a basis for discipline.⁶⁷

Only an Inquiry Committee can summarily dismiss a case. The Chair or Vice Chair does not have the authority to do so.⁶⁸ The team was advised that the Inquiry Committees decide whether to summarily dismiss complaints at their quarterly meetings. As a result, it could take up to three months for a complaint to be summarily dismissed, perhaps longer. In 2012 the average time from the filing of the complaint to summary dismissal was 78 days; in 2013 it took an average of 87 days. Summary dismissals are not subject to appeal.⁶⁹

Upon the summary dismissal of a complaint, the Chair of the Inquiry Committee is required to promptly notify the complainant and the lawyer of the decision and to provide the lawyer with a copy of the complaint.⁷⁰ No response from the lawyer is required. The consultation team was advised that while this is what the Rules for Lawyer Discipline provide, in practice there are two steps to notifying the lawyer and complainant. First, when an Inquiry Committee Chair identifies a case as appropriate for summary dismissal, he or she sends a letter to the lawyer with a copy of the complaint, and advises the lawyer that because it appears to the Chair that there is no ethical violation, the matter will be set on the Inquiry Committee's agenda for possible summary dismissal at the Committee's next meeting. The lawyer is advised that no further action

⁶⁴ The consultation team was advised that the Court's information and technology staff are working to develop a system with case management and report derivation capabilities for the Board Secretary.

⁶⁵ *Supra* note 57. The appropriate Inquiry Committee is that which is in the Disciplinary District where the lawyer resides or has an office.

⁶⁶ N.D.R. Lawyer Discipl. R. 3.1(B).

⁶⁷ N.D.R. Lawyer Discipl. R. 3.1(C).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

is necessary unless the lawyer hears otherwise from the Inquiry Committee. The Chair also sends a letter to the complainant advising that the complaint has been referred to the Inquiry Committee for review and handling and will be considered at the Committee's next meeting. The complainant is further advised that he or she will receive notice of the disposition of the matter after that meeting and will be contacted if additional information is necessary. The second step takes place after summary dismissal and involves Disciplinary Counsel sending notification letters to the complainant and lawyer regarding the decision of the Inquiry Committee to summarily dismiss the complaint. The Secretary of the Disciplinary Board receives a copy of that dismissal letter.

In 2012, of the 228 complaints received against lawyers, 68 were summarily dismissed and 160 were investigated. In 2013, 204 complaints were received, out of which 74 were summarily dismissed and 130 proceeded to investigation. In 2012, the Inquiry Committees disposed of 105 cases and in 2013, the Inquiry Committees reached dispositions on 156 matters. In 2012, 95 matters resulted in dismissal after investigation, and 146 matters were dismissed by the Inquiry Committees after investigation in 2013.

5. Investigation and Action by District Inquiry Committees

If a matter is not summarily dismissed, the Inquiry Committee Chair assigns an investigator who is a volunteer lawyer or nonlawyer member of the Committee or Disciplinary Counsel. The team was advised that in determining whether to assign a matter to a nonlawyer investigator the Chair considers the nature of the allegations. Similarly, if a matter is particularly complex or requires significant investigation, the Chair will often refer the matter to Disciplinary Counsel to investigate.

Upon assignment of an investigator, the Chair of the Inquiry Committee sends a copy of the complaint to the lawyer, who is required to provide the investigator with a response within 20 days of service.⁷¹ If the lawyer fails to provide a response, the facts alleged by the complainant are deemed admitted for purposes of Inquiry Committee proceedings.⁷² The respondent lawyer is required to serve upon the complainant a copy of his or her response, including all attachments.⁷³ The complainant may submit a reply. The complainant's reply is sent to the lawyer by the Inquiry Committee investigator. The investigator is then required to complete whatever further steps need to be taken in order to make a recommended disposition to the full Inquiry Committee. This may include obtaining and reviewing court files and bank records, interviewing witnesses or obtaining information from other sources. Disciplinary Counsel has the authority to issue subpoenas during the course of an investigation.⁷⁴ It is not clear from the Rules whether that authority extends to the Inquiry Committees or whether the Committees would have to request that Disciplinary Counsel issue the subpoena. The consultation team was advised that in practice, the Committee requests that Disciplinary Counsel issue the subpoena.

⁷¹ N.D.R. Lawyer Discipl. R. 3.1(D)(3).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ N.D.R. Lawyer Discipl. R. 3.3(B)(2).

At any time during the Inquiry Committee's consideration of a matter, it may refer the lawyer to the Lawyer Assistance Program for screening to determine whether the lawyer should participate in the program, or the lawyer may request such screening himself or herself.

Investigators are required by the Rules for Lawyer Discipline to act promptly and file their investigative reports within 60 days of receiving the assigned case unless the Chair grants an extension.⁷⁵ Disciplinary Counsel's office does not employ an investigator to assist in the investigation of cases, nor do the Inquiry Committees.

At the conclusion of the investigation a paper copy of the investigator's report⁷⁶ and recommended disposition, along with a copy of the entire file is provided to each Inquiry Committee member. Disciplinary Counsel's office copies the files and provides them to the Committee members. Disciplinary Counsel assists the Inquiry Committees in preparing their meeting agendas and attends the Committee meetings, but is not a voting member of the Committee. The complainant and lawyer are provided an opportunity to appear before the Inquiry Committees prior to a decision being rendered on a complaint. Notice of the right to appear must be provided to the complainant unless the matter is subject to summary dismissal, the lawyer is subject to diversion or the Chair of the Committee believes that the complainant poses a threat of harm to the Committee.⁷⁷ The lawyer must be given an opportunity to appear before any referral of a case for formal proceedings, before the entry of any discipline by the Inquiry Committee or before referral to diversion.⁷⁸ The Rules do not provide that the Chair may refuse to permit the lawyer an opportunity to appear if the Chair believes that the lawyer poses a threat of harm to the Committee.

The Inquiry Committees can resolve a complaint in the following ways: (1) dismissal; (2) referral for formal proceedings by directing Disciplinary Counsel to file a petition for discipline with the Disciplinary Board; (3) referral of the lawyer to diversion; (4) issuance of an admonition; and (5) imposition of probation with the lawyer's consent.⁷⁹ After an Inquiry Committee renders its decision, Disciplinary Counsel must promptly notify the complainant of the disposition and the reasons for it.⁸⁰ The team was advised by multiple interviewees that sometimes, due to the nature of the Inquiry Committees' deliberations, it is difficult to discern the reasons for the disposition of a matter, and therefore difficult to explain those reasons to the complainant and respondent lawyer.

Within 30 days from Disciplinary Counsel's mailing of a notice of Inquiry Committee disposition, a complainant, lawyer or Disciplinary Counsel may appeal any Inquiry Committee decision to the Disciplinary Board, except an Inquiry Committee's decision that probable cause exists to file a petition for discipline or diversion.⁸¹ The appeal must be in writing and submitted

⁷⁵ N.D.R. Lawyer Discipl. R. 3.1(D)(5).

⁷⁶This investigator's report must ultimately be provided to the Secretary of the Board at the conclusion of proceedings before the Inquiry Committee. *See*, N.D.R. Lawyer Discipl. R. 3.1(D)(9).

⁷⁷ N.D.R. Lawyer Discipl. R. 3.1(D)(6).

⁷⁸ N.D.R. Lawyer Discipl. R. 3.1(D)(7).

⁷⁹ N.D.R. Lawyer Discipl. R. 2.4(E)(3).

⁸⁰ N.D.R. Lawyer Discipl. R. 3.1(D)(8).

⁸¹ *Id.*

to Disciplinary Counsel, who then makes a copy of the file for the Disciplinary Board. The Board may approve, disapprove or modify the Inquiry Committee's disposition or return the matter to the Committee for further investigation.⁸² The team was advised that, in practice, the Board Chair refers the matter to one Board member to review and make a recommendation to the full Board for action. Pursuant to the Rules, the full Board must vote on the appeal.⁸³ The Board's decision is appealable to the Court, but such appeal will not be granted absent a showing that the Board acted "arbitrarily, capriciously or unreasonably."⁸⁴ If the Court grants the appeal, its standard of review is de novo.⁸⁵

After the Inquiry Committees have acted on the complaints scheduled for consideration at their meetings, Disciplinary Counsel collects the paper files and brings them back to his office for destruction or for the Disciplinary Board's further consideration in the event of an appeal to the Board.

6. Formal Proceedings

Formal disciplinary proceedings are initiated by Disciplinary Counsel's preparing and filing a petition for discipline with the Board within 60 days of an Inquiry Committee's direction.⁸⁶ The petition must be "sufficiently clear and specific to inform the lawyer of the alleged misconduct."⁸⁷ Once the petition is filed the matter becomes public and the Chair of the Board assigns the matter to a Hearing Panel.⁸⁸

Disciplinary Counsel serves the respondent lawyer with the petition. Service must be accomplished personally or by certified mail at the lawyer's last address noted on the roster maintained by the Clerk of the Court.⁸⁹ The respondent is required to file an answer within 20 days.⁹⁰ If the respondent lawyer fails to file an answer the allegations in the petition are deemed admitted.⁹¹ Discovery may take place for 60 days following the service of the petition in accordance with the North Dakota Rules of Civil Procedure.⁹² Prehearing conferences are not required, but may be held at the direction of the Hearing Panel or at the request of either party.⁹³ The Hearing Panel resolves discovery disputes. Discovery orders by the Hearing Panel are interlocutory and cannot be appealed until entry of the final order.⁹⁴

Hearings are to be held in a judicial district (not disciplinary district) where the respondent resides, has an office or is employed. The North Dakota Rules of Evidence apply at disciplinary

⁸² *Supra* note 35.

⁸³ *Supra* note 34.

⁸⁴ *Supra* note 80.

⁸⁵ *See e.g., Toth v. Disciplinary Bd. of the Supreme Court*, 562 N.W. 2d 744 (1997).

⁸⁶ *Supra* note 53.

⁸⁷ *Id.*

⁸⁸ *Id.* and N.D.R. Lawyer Discipl. R. 6.1(A) & (B).

⁸⁹ N.D.R. Lawyer Discipl. R. 3.2.

⁹⁰ N.D.R. Lawyer Discipl. R. 3.1(E)(2).

⁹¹ *Id.*

⁹² N.D.R. Lawyer Discipl. R. 3.3(C).

⁹³ N.D.R. Lawyer Discipl. R. 3.5(E).

⁹⁴ *Supra* note 92.

hearings except as otherwise provided in the Rules for Lawyer Discipline and “insofar as appropriate.”⁹⁵ Disciplinary Counsel bears the burden of proof and must prove the allegations in the petition by clear and convincing evidence.⁹⁶ The respondent is entitled to counsel and the notice of hearing must advise the respondent of this as well as his or her right to cross-examine witnesses and present evidence. A record must be made of hearings. At the conclusion of the presentation of the evidence and arguments, Disciplinary Counsel and the respondent may submit proposed findings of fact, conclusions of law and proposed recommended dispositions to the Hearing Panel.⁹⁷

Within 60 days after the record closes, the Hearing Panel must file with the Board Secretary its order of dismissal, consent probation or reprimand.⁹⁸ The respondent, complainant and Disciplinary Counsel receive service of this order and any of these may appeal the Hearing Panel’s order.⁹⁹ The appeal must allege that the Hearing Panel acted unreasonably, arbitrarily or capriciously.¹⁰⁰ If the Court accepts the appeal it may permit briefing and oral argument.¹⁰¹

In cases where the Hearing Panel recommends other dispositions, it must file with the Court a report and recommendation for discipline.¹⁰² The Rules require that the report set forth mitigating and aggravating evidence that impacts the nature of the sanction recommended.¹⁰³ The respondent and Disciplinary Counsel may file with the Court objections to the Hearing Panel’s report and recommendation and file briefs limited to the subject of those objections.¹⁰⁴ The consultation team understands that briefing by the parties is simultaneous. Either party may request oral argument or the Court may order it.¹⁰⁵

At each stage of disciplinary proceedings where an entity may impose discipline, the North Dakota Standards for Imposing Lawyer Discipline are used.

⁹⁵ N.D.R. Lawyer Discipl. R. 3.5(B).

⁹⁶ N.D.R. Lawyer Discipl. R. 3.5(C) and (d). Respondents bear the burden of proof in reinstatement matters or in matters seeking transfer back to active status from disability or incapacitated status.

⁹⁷ N.D.R. Lawyer Discipl. R. 3.1(E)(4).

⁹⁸ N.D.R. Lawyer Discipl. R. 3.1(F)(1).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² N.D.R. Lawyer Discipl. R. 3.1(F)(2).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

III. PUBLIC ACCESSIBILITY AND OUTREACH

Recommendation 1: The North Dakota Lawyer Discipline System Should be More Accessible and Visible to the Public

Commentary

The primary purpose of lawyer discipline is to protect the public and the administration of justice. The consultation team heard universally that members of the public are generally unaware of the existence of Disciplinary Counsel's office and lack an understanding of how the disciplinary process works to protect them. The Discipline Committee strongly urges the Court, Disciplinary Board, Operations Committee, Disciplinary Counsel, and the State Bar Association of North Dakota to take steps to increase public awareness of the system's existence and processes, and of the Court's responsibility for lawyer discipline in the State.

A. The Court Should Utilize an Open and Transparent Appointment Process to Fill Disciplinary Board Vacancies

Currently, the North Dakota Supreme Court appoints a lawyer from each judicial district to serve on the Disciplinary Board.¹⁰⁶ The nonlawyer members are appointed from the state at large. The State Bar Association's Board of Governors submits a list of three practicing lawyers from each judicial district to the Court from which appointees are selected. A committee comprised of the State Bar Association President, the Attorney General of North Dakota, and the Chair of the North Dakota Judicial Conference submits to the Court a list of three nonlawyers for appointment.¹⁰⁷ This means that the lawyers and nonlawyers recommended for appointment to the Disciplinary Board are identified by State Bar Association leadership or other governmental officials with no apparent system in place to publicly announce that such volunteer positions may be available.

Although the expertise and judgment of State Bar Association leadership and others designated to make recommendations to the Court for appointments to the Board undoubtedly helps to ensure that chosen volunteers will be qualified, the current process risks being perceived by members of the public as creating or perpetuating an insular system. In fact, some interviewees (lawyers and nonlawyers) advised the consultation team that such a perception exists. The Discipline Committee therefore recommends that the Court adopt an open, well-publicized nomination process for identifying individuals interested in serving the system, and a transparent process for evaluating their capabilities and experience. For example, the availability of volunteer positions at all levels of the lawyer discipline system should be announced on the Court's website, the proposed stand-alone website for Disciplinary Counsel discussed later in this Recommendation, and the State Bar Association's website, as well as in relevant media.

The Discipline Committee also suggests that the Court consider appointing a small nominating committee comprised of lawyers, judges, and nonlawyers to review applications for appointment

¹⁰⁶ *Supra* note 30.

¹⁰⁷ *Supra* note 31.

to the Board and to make recommendations to the Court. The use of this nominating committee will reinforce both for the public and for the profession, the Court's commitment to maintaining the independence and quality of the system, as well as the Court's leadership role. The Committee suggests that the Court could, prior to making any appointments recommended by this nominating committee, offer to the State Bar Association President and other officials currently recommending appointees an opportunity to comment on those potential appointees. The nominating committee should develop criteria, approved by the Court, for evaluating candidates for each vacant position the Court is seeking to fill. The Discipline Committee recommends that the nominating committee consult with Disciplinary Counsel, the State Bar Association President, and others currently responsible for recommending individuals for appointment to the Board, as well as the lawyer and nonlawyer members of the Board in developing these criteria.

B. Disciplinary Counsel's Office Should Have More Publicly Accessible Office Space That Is Suitable for Its Purpose

Disciplinary Counsel's office should be the "front line" face of the lawyer discipline system in North Dakota, as it is in other jurisdictions. This is true not only for the professionals who comprise the staff of the office, but also for the physical facility in which it resides. The consultation team was impressed with the professionalism and dedication of Disciplinary Counsel and his staff. When asked, interviewees advised the team that Disciplinary Counsel's office is well respected and represents the Court, the system and the profession well. Regrettably, the same cannot be said about Disciplinary Counsel's physical office space, which does not adequately convey to the public and the bar the importance that the Discipline Committee knows that the Court places on its regulatory system for lawyers.¹⁰⁸

As noted above, Disciplinary Counsel's office is located in an older building called the Bismarck Parkade. There is access to the interior offices of the building from its lobby, from the parking ramp, and from a walkway attached to the neighboring Radisson Hotel. At the time of the team's visit the Parkade was undergoing some construction work, which the Discipline Committee understands is intended to improve the building's lobby, to replace two elevators and to enhance some safety (as distinct from security) features.¹⁰⁹

Disciplinary Counsel's office is approximately 700 square feet. There is little room for maneuvering given the space and equipment for administrative staff and paper file storage. There are no conference rooms within the office space. There is no room for expansion to meet future needs of the lawyer and judicial disciplinary systems.

¹⁰⁸ Disciplinary Counsel is responsible for the investigation and prosecution of complaints against judges. However, the Discipline Committee did not review the North Dakota judicial disciplinary process.

¹⁰⁹ See e.g., http://bismarcktribune.com/news/local/bismarck/parking-ramp-to-help-ease-downtown-crunch/article_de586260-da97-11e2-92c3-001a4bcf887a.html; and http://bismarcktribune.com/news/local/govt-and-politics/parking-authority-might-seek-city-loan-for-parkade-elevators/article_405d35dc-6376-11e3-804f-0019bb2963f4.html.

In the opinion of the consultation team, the current office space poses security concerns. Someone entering the office immediately encounters the open work space of the administrative staff. There is no physical separation between administrative staff, counsel, and the small “waiting area” the office has created to welcome guests. Security consists of the lock on the main door to the office space, which is not engaged during office hours. The consultation team heard concerns expressed about office safety from a wide range of interviewees.

The Discipline Committee is highly sensitive to resource concerns, but strongly recommends that the Court work with the Operations Committee and Disciplinary Counsel to relocate Disciplinary Counsel’s office to an affordable, more publicly accessible and modern building with appropriate security. The space should be sufficient to meet current as well as future needs in terms of staffing, storage, meeting space, and technology (not just physical equipment).¹¹⁰ In determining these needs, the Operations Committee and Disciplinary Counsel will need to take into account the judicial disciplinary system.¹¹¹

In terms of storage space, Disciplinary Counsel and the Operations Committee should consider how this Report’s suggestions for enhancing Disciplinary Counsel’s technological capabilities and for revising the complaint filing and investigation processes will impact storage needs. There should be a conference room within Disciplinary Counsel’s office space. Development of a forward looking, true-needs assessment for the office will help. North Dakota is a growing state and the population increase will continue to include lawyers as well as those in need of legal services.

The consultation team observed that the North Dakota Rules for Lawyer Discipline provide that right of a complainant to appear before a District Inquiry Committee can be foregone if the Chair of the Committee believes that the complainant poses a threat of harm.¹¹² The inclusion of this “threat of harm” language in the Rule indicates to the Discipline Committee that the Court is cognizant of the potential risks inherent in this “line of work,” risks that certainly extend to Disciplinary Counsel and his staff. In Recommendation 3(B), the Committee will urge elimination of appearances before the Inquiry Committees for other reasons. For purposes of this Recommendation, the Committee flags this provision of the Rules to highlight the security concerns inherent in the disciplinary process and the current lack of adequate security for Disciplinary Counsel’s office space. Office space must include necessary interior security measures for Disciplinary Counsel and his staff, as well as for the confidential information about North Dakota lawyers and judges retained there. There should be sufficient space within the office to accommodate a small, but separate and welcoming, waiting area for the public and lawyers.

¹¹⁰ The Discipline Committee is aware that an analysis of the space needs of the North Dakota court system has been conducted, and while it does not address Disciplinary Counsel’s office specifically, the Court’s forward thinking about space needs for the justice system and its essential functions is notable.

¹¹¹ Information provided to the team indicates that in 2013 there were 84 new complaints filed against judges in North Dakota. With the 19 matters that carried over from previous years, there were a total of 103 files pending consideration in 2013. Of that number, there were 94 dispositions including 91 summary dismissals, one consent admonition and 2 formal proceedings.

¹¹² *Supra* note 77.

available in any other languages reflective of the growing North Dakota population.¹¹⁴ Information sought in the complaint form should include, but not be limited to, the following: name, address, telephone number and email address of the individual filing the complaint; the name, address, telephone number and email address of the lawyer against whom the complaint is being filed; an indication of whether the lawyer currently represents the complainant, whether the lawyer no longer represents the complainant or whether the lawyer never represented the complainant; the nature of the legal work involved; whether there is a pending court case and the case number if known; the amount of any fee paid to the lawyer and whether there exists a written fee agreement; a general checklist of the area of law that the complaint involves; a general checklist of the nature of the alleged misconduct; a request that relevant documentation supporting the complaint be provided; and space for the complainant to describe the allegations.

The website should also have a number of other features that the Discipline Committee believes should not be technologically difficult to include, but will take staff time to develop. Links to the Rules of Professional Conduct, Rules for Lawyer Discipline, rules and forms of the North Dakota Client Protection Fund, and to other North Dakota legal resources and publications should be included on the website. The website should have a searchable library of the Court's disciplinary opinions and of public Hearing Panel reports and recommendations relating to petitions for discipline and reinstatement matters. The public should be able to conduct a search to determine if a North Dakota Lawyer is or has been subject to public discipline, and to access the relevant orders, opinions and reports. Consideration should be given to including rosters of just the names of Inquiry Committee (see Recommendation 3 regarding creation of one statewide Inquiry Committee) and Disciplinary Review Board members, public hearing schedules, e-news alerts, summaries of recent cases of interest and import, and information about available continuing legal education programs relating to the system, and ethics and professional responsibility generally.

The Discipline Committee recommends that in the near future the Inquiry Committee, Hearing Panels and Disciplinary Board members should be provided each with a separate password protected and secure web-accessible site to conduct more of their business electronically with the requisite confidentiality. This resource should allow Disciplinary Counsel's office the ability to send files and materials electronically to these volunteers, but not have electronic access to the portions of the site where the volunteers communicate about cases. Coupled with the Recommendations below regarding revision of the complaint filing and investigation process, this will ultimately reduce time currently spent copying and printing materials for meetings. The Disciplinary Board Chair, Operations Committee Chair and Disciplinary Counsel may want to explore the creation of this tool with the Clerk of the Supreme Court and the State Court Administrator.

¹¹⁴ For example, Minnesota's complaint form is available in Spanish, Somali, Hmong, and Russian. *See, e.g.*, <http://lprb.mncourts.gov/complaints/Pages/default.aspx>. In the District of Columbia complaint forms are available in English, Chinese, Vietnamese, Korean, Spanish, Italian, and Farsi. *See, e.g.*, <http://www.dcbbar.org/attorney-discipline/for-the-public/file-an-attorney-complaint.cfm>.

D. The Disciplinary Board Should Publish A User-Friendly Annual Report About the System

Rule 2.1(H)(5) of the North Dakota Rules for Lawyer Discipline require the Disciplinary Board to annually review the operations of the discipline system with the Court, District Inquiry Committees and Disciplinary Counsel. There is no provision requiring the Board to publish for the Court and public an annual report about the activities of the system, its budget, outreach efforts to the bar and the public, and other accomplishments. The Operations Committee is required to make an annual written report to the Court, the State Bar Association Board of Governors, the Disciplinary Board, the Judicial Conduct Commission, and State Board of Law Examiners.¹¹⁵ The North Dakota Rules for Lawyer Discipline do not identify the substance of that report, but given the Operations Committee's role in the system, it appears that it would be limited to the fiscal management of the system and personnel issues.

The Discipline Committee recommends that the Court amend Rule 2.1(H)(5) to direct the Board, with the assistance of Disciplinary Counsel, to submit to the Court and publish on the proposed stand-alone website a comprehensive annual report detailing the operations and activities of the discipline system.¹¹⁶ Adopting this provision will align North Dakota with the majority of jurisdictions that require its lawyer disciplinary agency to prepare and file such an annual report. Providing information about the lawyer discipline process to the public and the bar ensures accountability, allows the public and the bar to evaluate the performance of the discipline system, and promotes increased public confidence in the system and the Court. The annual report also offers an opportunity for the Court to detail the accomplishments of its agents, identify improvements in the system, and explain any new initiatives.

Disciplinary Counsel should be responsible for compiling the statistical information for inclusion in the annual report.¹¹⁷ The annual report should contain information explaining how the discipline process works, describe the functions and duties of the agency, offer comprehensive statistical information about the disciplinary caseload (e.g., the nature and number of complaints received and resolved and the number of cases that resulted in the imposition of disciplinary sanctions), outline the system's budget and highlight how Disciplinary Counsel's office and component entities of the system are meeting their goals of serving the public and the profession. The report should include a description of speaking events, CLE presentations, and articles published by Disciplinary Counsel, in addition to identifying significant developments and trends in professional responsibility and lawyer regulatory law.

¹¹⁵ N.D.R. Lawyer Discipl. R. 2.2(E).

¹¹⁶ See, e.g., <http://www.coloradosupremecourt.com/pdfs/Regulation/2013%20Annual%20Report.pdf>; <http://www.iardc.org/AnnualReport2012.pdf>; and http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2012%20Annual%20Report.ashx.

¹¹⁷ The technology driven caseload management system described in Recommendation 2 will allow Disciplinary Counsel to easily derive these and more specialized reports.

E. Disciplinary Board Members and Disciplinary Counsel Should Engage in More Public Outreach

Another important way that the Disciplinary Board and Disciplinary Counsel can demonstrate the system's accountability to the public is to engage in more outreach. This outreach should be in the form of in-person presentations by Board members (lawyers and nonlawyers), by Disciplinary Counsel, and via electronic and print publications. For example, Disciplinary Counsel and the Disciplinary Board should work together to develop, publish and widely disseminate up-to-date pamphlets describing the lawyer discipline system. Currently, the pamphlets describing the system are published by the State Bar Association and not by any entity within the system. This can create confusion about who is responsible for lawyer discipline and contribute to misperceptions that the system is protective of lawyers. The new pamphlets should be updated regularly and disseminated to locations frequented by the public such as public libraries, consumer organizations, and courthouses.

The consultation team was advised that Disciplinary Counsel and the Assistant Disciplinary Counsel already speak to the bar and present continuing legal education programs. Disciplinary Counsel and the Board should also seek invitations to speak to civic organizations and consumer groups to promote the agency and publicize its accomplishments. These engagements enhance the visibility of and accessibility to the system while highlighting how it protects the public and maintains the integrity of the courts and the legal profession. Consideration should be given to inviting local media to such events.

Another form of public outreach that may be considered is surveying participants in the system, particularly complainants, to gather information about their experiences. A number of interviewees suggested this and the Discipline Committee agrees that it could be a productive form of outreach if done in a considered way. Accompanying this Report are samples of such surveys from Texas and Wisconsin.

Other recommended changes to the complaint processing and investigation procedures described below will provide further opportunities to enhance public confidence in the system, including improvement in communication between the system and complainants. Because of the system's current structure, complainants receive information from multiple sources, leaving the impression that the system is not cohesive and risking confusion.

IV. STRUCTURE

Recommendation 2: The Complaint Filing and Management Process Should Be Streamlined and Technologically Enhanced

Commentary

As noted above, persons wishing to file complaints about North Dakota lawyers must send them to the Secretary of the Disciplinary Board (Clerk of the Supreme Court). The Board Secretary keeps a log of all complaints received, maintains files and keeps summaries of docket processing and case dispositions. The complaint initiation process requires the Clerk's Deputy to review the complaint to ensure it is not a duplicate, enter the matter into the Board's electronic docketing system, assign the matter a file number, and send it to the appropriate District Inquiry Committee. The Deputy Clerk then sends a form letter to the complainant acknowledging receipt of the complaint, and advising the complainant of the file number and to which Inquiry Committee it has been assigned. That letter also provides the name and contact information for the Inquiry Committee Chair. The Inquiry Committee Chair and Disciplinary Counsel receive copies of this letter. The Secretary's office reproduces the complaint and any accompanying materials and sends a paper copy to the Inquiry Committee Chair and to Disciplinary Counsel's office. When the file arrives at Disciplinary Counsel's office it is entered into the handwritten ledger of files and the Excel spreadsheet the office has developed to track the status of pending cases.

Much of the exchange and maintenance of information throughout the system is done via physical documents. There exists no technology-driven case management system. Print copies of files are maintained in Disciplinary Counsel's office for the Inquiry Committees as well as for Disciplinary Counsel. As a result, the current process requires a significant allocation of resources by the Clerk of the Court (including staff time and salary, supplies and other resources) as well as by Disciplinary Counsel.¹¹⁸ The Rules for Lawyer Discipline provide that the Secretary may delegate to Disciplinary Counsel the recordkeeping duties to avoid duplication and to increase efficiency, but the consultation team was told that this has not yet happened. The Discipline Committee believes that the time is now right for that transition to take place, coupled with more responsibility for Disciplinary Counsel in the investigation of cases.

A. Complaints Should Be Filed With Disciplinary Counsel

In order to centralize the intake process for complaints and enhance the efficiency of resource allocation for the system, the Discipline Committee recommends that the Court amend the North Dakota Rules for Lawyer Discipline to provide that complaints against North Dakota lawyers be filed with Disciplinary Counsel's office, docketed and processed there.¹¹⁹ The creation and implementation of the downloadable complaint form and the new stand-alone website will help

¹¹⁸ This was true in 1983, when the Discipline Committee conducted its first consultation regarding the North Dakota lawyer discipline system, and the tasks appear to continue to be assumed by existing personnel.

¹¹⁹ This is already the case with regard to complaints against judges in North Dakota. *See*, N.D. SUP. CT. R. JUD. CONDUCT COMM. R. 10.

facilitate this centralization for filing and processing complaints. It will also relieve what the Discipline Committee believes is an unnecessary resource drain on the already busy Clerk's office. The Supreme Court Clerk's office should remain responsible for the processing of disciplinary matters that come before the Court, as is also consistent with national practice.

Disciplinary Counsel should also be responsible for maintaining the permanent records of discipline and disability matters, for expunction of such records as required, and for compiling statistics to assist in the administration of the system.¹²⁰ Such a change is consistent with national practice, including for a jurisdiction the size of North Dakota. Coupled with other technology related recommendations in this Report, this change will eliminate redundancies, including in communication with complainants, and reduce the number of files that the system maintains in different locations for each matter.

B. Disciplinary Counsel Must Have a Technology-Driven Caseload Management System and Other Enhancements to Its Technology

Centralizing the filing of complaints with Disciplinary Counsel will require additional technology resources for the office. At a minimum, Disciplinary Counsel must have a technology-driven caseload management system tailored to the unique functions of the office.¹²¹ The Discipline Committee strongly urges the Court to ensure that Disciplinary Counsel has the necessary resources to purchase one or to have the Judicial Branch Information Technology department develop one for its use.

The availability of appropriate and up-to-date technologies, including caseload management software, greatly facilitates the efficient operation of any disciplinary agency, and helps to ensure that performance standards and other metrics are met. Proper and consistent use of these technologies by agency personnel optimizes resource allocation and saves the agency time and money that would otherwise be spent having individuals do certain tasks manually (for example, the handwritten complaint log). It also allows the agency to promptly identify and address caseload management and resource allocation problems. An appropriate caseload management system will increase the ease with which the annual report recommended above can be produced to show the public and profession that the system is doing its job and is accountable.

A comprehensive technology-driven caseload management system will maintain information that includes, but is not limited to:

- (1) a single, up-to-date database with information about all complaints received, the identity of respondents and complainants, and the number of investigations they are each associated with over time;
- (2) the nature of complaints against North Dakota lawyers;

¹²⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(11) and (12). The use of such the same system by Disciplinary Counsel for the handling of judicial disciplinary complaints, with appropriate firewalls, could also be explored if such a system is needed there.

¹²¹ This is a resource that Disciplinary Counsel's office should have regardless of whether the Court adopts the Discipline Committee's recommendation to move the filing and processing of complaints from the Clerk's office to Disciplinary Counsel.

- (3) information about how long and where in the system a case has been pending;
- (4) the identity and number of cases assigned to an Inquiry Committee, the Board and Hearing Panels, where each case is pending and how long it has taken to complete each stage of the process by the volunteers in the system;
- (5) the number of new cases coming into the system each year, the aging of those cases, and the total for the agency;
- (6) the identity of cases that are particularly complex; and
- (7) the dates that correspondence is received and sent, and the dates and nature of other actions taken.¹²²

The system should have diary and tickler functions, allow easy access to pleadings and correspondence related to a particular case, and should allow the Disciplinary Counsel to derive necessary and varied statistical reports.

The Committee recommends that Disciplinary Counsel contact other disciplinary agencies to investigate the types of systems they use and report this information to the Board and Operations Committee. South Carolina, Louisiana and Colorado may be optimal starting places. The Discipline Committee is aware that a number of jurisdictions, including Colorado, Missouri, Texas and Maryland use a system called Justware.¹²³ It appears that Oklahoma, Arizona and Nevada have also recently begun using Justware. Other jurisdictions use Time Matters®.¹²⁴ The Discipline Committee recommends that Disciplinary Counsel should be provided with direct and secure “read-only” electronic access to the master directory of licensed North Dakota lawyers maintained. It would be useful for Disciplinary Counsel to have direct “read-only” access to this information to ensure currency of contact information for lawyers and other information on annual registration forms relevant to its duties. This access will also eliminate the need for Disciplinary Counsel to contact the Clerk’s office to have that information looked up.

Disciplinary Counsel’s office should also have available up-to-date investigative software, including programs to analyze lawyers’ client trust accounts. Given the current lack of an investigator or paralegal, ensuring that Disciplinary Counsel has the necessary software and access to other necessary databases will enhance the speed at which investigations and discovery are conducted. The Discipline Committee believes that Disciplinary Counsel would greatly benefit from the services of an investigator or paralegal, especially in light of this Recommendation and Recommendation 7.

¹²² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(11).

¹²³ See, <http://newdawn.com>. The reference to Justware in this Report is intended to assist the Court and Disciplinary Counsel in the research process. The reference does not constitute a recommendation of Justware over other software providers by the Discipline Committee or the American Bar Association, nor is it an endorsement of any Justware or Newdawn product.

¹²⁴ See, <http://support.lexisnexis.com/timematters> . As with Justware, the reference to Time Matters® in this Report is intended to assist the Court and Disciplinary Counsel in the research process. The reference does not constitute a recommendation of Time Matters® over other software providers by the Discipline Committee or the American Bar Association, nor is it an endorsement of any Time Matters® or any LexisNexis product.

Recommendation 3: The Disciplinary System Should Be Restructured to Better Leverage the Strengths of Each Component Entity

Commentary

Contrary to national practice, North Dakota Disciplinary Counsel does not have the primary responsibility for investigating complaints against lawyers. As described earlier in this Report, the volunteer lawyer and nonlawyer members of the District Inquiry Committees are charged with summarily dismissing complaints, investigating complaints, and determining whether petitions for discipline should be filed. The Committees may assign a matter to Disciplinary Counsel for investigation if they need assistance.

The consultation team determined through interviews, review of the Rules, and study of other related materials, including caseload processing information and files, that the current system of using volunteers to screen and investigate cases results in inconsistencies in the quality of investigations and handling of like cases within the system, redundancy of certain tasks, less than optimal communication with complainants, delay, and unnecessary use and duplication of paper files.

The use of volunteer investigators has led to the perception by some complainants that the system is “pro lawyer.” When they appear before the Inquiry Committees, some complainants leave that experience feeling unheard or not understood. The consultation team heard from a variety of interviewees that the appearance of a complainant before a nine-member Inquiry Committee is an intimidating process, even for sophisticated individuals. That the members of the Inquiry Committees continue to be appointed by the President of the State Bar Association, a process that dates back to at least the time of the Discipline Committee’s 1983 consultation, adds to misperceptions that the system favors lawyers.¹²⁵

There are a number of factors that contribute to the lack of consistency in the quality of investigations. One factor is the lack of training afforded to members of the Inquiry Committees. For the most part these individuals learn on-the-job. They lack guidelines for conducting a competent and complete investigation and regarding the drafting of proper investigative reports. As a result, there exist inconsistent investigatory practices among the three Committees and also among members of each individual Committee. Inconsistencies also exist among the Inquiry Committees with regard to the appearance of complainants and respondents. Training for all of the disciplinary system’s volunteers is discussed in Recommendation 4.

Inquiry Committee members, both lawyer and nonlawyer, while dedicated to achieving the goals of the system, are not professionals trained to investigate allegations of ethical misconduct by lawyers. This is not to say that lawyers generally do not have a level of competence in

¹²⁵ The Discipline Committee notes that at the time of its 1983 consultation there were no public members serving on Inquiry Committees. That is not the case today, and there was unanimous feeling by those interviewed that the nonlawyer participants in the system add significant value, both at the Inquiry Committee and Disciplinary Board levels.

investigating the truth of allegations as part of their law practices, but this is a specialized area of law. Nationally, the investigation and prosecution of complaints against lawyers has evolved into a complex, professionally staffed enterprise. Professional Disciplinary Counsel and their staff have the necessary expertise in the rules of professional conduct, including the applicable rules relating to confidentiality of client information.

The consultation team was also advised by many interviewees that there exist geographic inconsistencies in the outcome of investigation of complaints involving like allegations of misconduct. Certain Inquiry Committees are considered harsher than others with regard to certain types of cases. Whether that is true or not the consultation team was unable to determine. However, even the perception that such is the case is problematic for the public and the bar.

Another reason for inconsistency in the quality of investigations is the time required for volunteers to properly attend to their disciplinary caseloads, particularly the Chairs of the Inquiry Committees who have additional responsibilities for corresponding with complainants and lawyers. The interviewing of witnesses, obtaining necessary records, analyzing them and preparing investigative reports is time-consuming work. It is not uncommon or unexpected that the demands of a volunteer lawyer's law practice must take precedence. Investigative duties for the system can be particularly challenging for a sole practitioner or a small firm lawyer. The same is true of the demands on nonlawyer Committee members.

The current system of using the volunteer Inquiry Committees to summarily dismiss and investigate complaints has led to delay, including in the completion of investigations. For example, if an Inquiry Committee Chair determines that a matter should be summarily dismissed, that dismissal does not take place immediately. Instead, a copy of the complaint is made for each Inquiry Committee member to review and determine whether they agree with the Chair's recommendation. The Inquiry Committees meet quarterly. Statistics provided to the team showed that in 2012 the time from the filing of the complaint to summary dismissal was 78 days; in 2013 it took an average of 87 days to summarily dismiss a complaint.

The process for communicating effectively with complainants and lawyers is unnecessarily complicated by the structure of the current system. First, complainants receive a letter from the Secretary of the Disciplinary Board. Then they receive a letter from the Chair of the Inquiry Committee. Upon the conclusion of the summary dismissal process or completion of an investigation into the complaint, Disciplinary Counsel sends a letter to the complainant and lawyer explaining the disposition by the Inquiry Committee. Complainants' and lawyers' receipt of communications from at least three or more individuals from different entities within the disciplinary system risks creating unnecessary confusion. It also creates a risk that conflicting information may be provided, although the team was not advised of any instances where that had happened.

The team was also advised from varied sources that because of the varying extent to which the Inquiry Committees explain at their meetings the basis for the dismissal of a case after investigation, Disciplinary Counsel frequently lacks the necessary information to adequately explain the reasons for the dismissal. Complainants should be provided with this information in writing in every case, and Disciplinary Counsel should not be required to take extra time to

review the investigation files of an Inquiry Committee in order to provide that information.¹²⁶ That would not be an effective use of Disciplinary Counsel's time or resources.

As noted throughout this Report, under the current system there exist multiple paper files relating to each matter. Disciplinary Counsel maintains a file as does the Inquiry Committee investigator assigned to conduct the investigation. Prior to each Inquiry Committee, Disciplinary Counsel reproduces and provides to each member of the Inquiry Committee the paper materials for each case. After the Inquiry Committees have acted on the complaints scheduled for consideration at their meetings, Disciplinary Counsel collects the paper files and brings them back to his office for destruction or for the Disciplinary Board's further consideration in the event of an appeal to the Board. If a dismissal is appealed to the Disciplinary Board, each Board member receives a copy of the appealed matter, as the entire Board must act on these matters.¹²⁷ At the conclusion of the Board's consideration of an appeal, those files must be collected and destroyed.

A. Disciplinary Counsel Should Be Responsible for Screening, Investigation, and Dismissal of Complaints

In the Discipline Committee's experience, the difficulties described above with regard to the use of volunteer investigators are longstanding and occur universally in the very few jurisdictions that still do not use professional disciplinary counsel to investigate complaints.¹²⁸ However, these issues in no way reflect on the commitment and dedication of these volunteers or their good intentions. These individuals rightfully take great pride in their contributions to the system and their contributions are important. That does not mean, however, that it is appropriate for them to continue to perform the particular duties with which they are currently charged.

The Discipline Committee believes that the time is right to restructure how complaints of misconduct against North Dakota lawyers are investigated in a way that better leverages the strengths of each component of the system. Times have changed in terms of caseload, resources, professionalization of Disciplinary Counsel's office, the complexity of disciplinary matters, and technology. The North Dakota system has evolved to the point where the Discipline Committee strongly recommends that, as a complement to Recommendation 3 above and consistent with national practice, the Court amend the Rules for Lawyer Discipline to provide that Disciplinary Counsel is charged with screening and investigation of all complaints.¹²⁹ Disciplinary Counsel should also be able to initiate an investigation when circumstances necessitate.¹³⁰

The consultation team explored with relevant interviewees the pros and cons of moving these responsibilities to Disciplinary Counsel; the response was overwhelmingly positive.

¹²⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(6).

¹²⁷ N.D.R. Lawyer Discpl. R. 2.1(E).

¹²⁸ The 1983 Consultation Report noted similar problems associated with the use of volunteers to conduct the investigation of complaints and the limited role of Disciplinary Counsel. That Report also recognized the financial limitations that existed and other considerations that resulted in the 1983 Discipline Committee recommending only that Disciplinary Counsel should attempt to conduct all investigations, and when necessary, the Inquiry Committees should assist or conduct investigations.

¹²⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(1) and (2).

¹³⁰ *Id.*

Disciplinary Counsel and the Assistant Disciplinary Counsel have excellent reputations in the legal community and among complainants. The Discipline Committee is not aware of any reason to believe that Disciplinary Counsel's office is not up to the task and cannot be trusted to discharge these responsibilities fairly and competently. In fact, Disciplinary Counsel is already entrusted with conducting the screening and investigation of complaints against North Dakota judges.¹³¹ There will be checks and balances remaining in the system as described below. If Disciplinary Counsel's office is unfamiliar with an area of law related to a complaint, it is important that they consult with an expert in that practice area and make other efforts to adequately educate themselves so that the matter can be appropriately handled.

In addition, the consultation team heard of security concerns that have arisen with regard to the volunteers when working to fulfill their investigative responsibilities. Inquiry Committee members have been required to contact witnesses, including prisoners, from their offices, mobile devices or home telephone numbers. They have been required to meet with witnesses to interview them. The team heard of concerns about security at Inquiry Committee meeting locations. The transfer of investigative responsibilities to Disciplinary Counsel's office (an office with proper security measures), will eliminate unnecessary risks to the volunteer Inquiry Committee members. These individuals will no longer have to be concerned with strangers having access to their offices, mobile device or home telephone numbers. Instead, contacts will be centralized via Disciplinary Counsel's office and telephone number.

1. Screening and Investigation of Complaints

With regard to the screening of complaints, the Discipline Committee recommends that Disciplinary Counsel be granted the authority to summarily dismiss complaints if they do not fall under the jurisdiction of the disciplinary system or when the facts alleged, if true, would not be grounds for discipline.¹³² Upon summary dismissal Disciplinary Counsel should advise the complainant and lawyer of the disposition and the reasons for it. Disciplinary Counsel should also forward the matter to the appropriate agency when necessary and so advise the complainant. Currently, there is no appeal from a summary dismissal. The Discipline Committee recommends that this remain the case.

If, after the investigation of a complaint, Disciplinary Counsel determines that there is an insufficient basis to proceed with diversion, a petition for discipline, admonition or consensual probation, then Disciplinary Counsel should have the authority to dismiss the complaint.¹³³ The Discipline Committee recommends that the Court amend the relevant Rules for Lawyer Discipline accordingly. In addition, Disciplinary Counsel's notice of dismissal to the complainant should include a concise statement of the facts resulting from the investigation, the

¹³¹ N.D. SUP. CT. R. JUD. CONDUCT COMM. R. 4(B) & 10.

¹³² The Discipline Committee is aware that in the North Dakota judicial disciplinary system, at least every thirty days, Disciplinary Counsel sends a list of potential summary dismissals and the reasons for that disposition to the Judicial Conduct Commission. If, within 10 days after receipt of this list, a Commission member does not request further consideration of the matter it is considered to be summarily dismissed and Disciplinary Counsel issues a letter to that effect. The Discipline Committee does not believe this extra step to be necessary for the lawyer discipline system, but it does offer an alternative for the Court to consider.

¹³³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(3) and 11((B)(1)(a).

reasons the matter has been dismissed, and that the complainant may appeal the dismissal to the Disciplinary Board. That Disciplinary Counsel has conducted the investigation will allow the office to effectively communicate this information to complainants, which in the Discipline Committee's experience results in fewer appeals of such dismissals.

The Discipline Committee also does not believe that it is a good use of resources to require the entire Disciplinary Board to consider and vote whether to uphold Disciplinary Counsel's (currently the Inquiry Committee's) dismissal of a complaint. Rather, the Committee recommends that (even if the Court determines that dismissals must still occur via Inquiry Committee), the Court should amend Rule for Lawyer Discipline 2.1(H)(1) to provide that upon receiving a complainant's appeal of a dismissal after investigation, the Chair of the Disciplinary Board shall review the matter and may approve the dismissal or remand it for further investigation.¹³⁴ Amending the Rule in this manner will also reduce the duplication of paper files that currently takes place. Ultimately, with appropriate technology and the implementation of secure and password protected web access, this information should be made available electronically.

Finally, the consultation team was advised that admonitions are private discipline, although Rule 1.3 of the Rules for Lawyer Discipline does not specify that fact. Currently, the Inquiry Committees are empowered to issue admonitions. Given the recommendation below with regard to revising the duties of the Inquiry Committee, the Discipline Committee recommends that the Court amend Rule 1.3 of the Rules for Lawyer Discipline first to clarify that admonitions constitute private discipline. Next, the Committee recommends that the Court amend Rules 2.1, 2.4 and 2.5 to eliminate the power of the Inquiry Committees to admonish a lawyer and to provide that authority to Disciplinary Counsel.¹³⁵ Admonitions by Disciplinary Counsel should be imposed only with the consent of the respondent and the approval of the Chair of the Disciplinary Board. Admonitions should be conveyed in writing and served on the respondent. A summary of the conduct for which an admonition is given should be published in the bar journal, absent the lawyer's name or identifying information, as a means of educating the bar. Admonitions should be able to be used in subsequent formal disciplinary proceedings where a respondent has been found guilty of misconduct as relevant to determining the appropriate sanction to be imposed in the subsequent formal proceeding.¹³⁶

2. Increased Administrative Oversight of Disciplinary Counsel

Along with these increased responsibilities for Disciplinary Counsel should come enhanced administrative oversight. Based on the current system it appears that the Operations Committee is in the best position to accomplish this task. Unlike the Disciplinary Board, the Operations Committee has no adjudicative role in the system and is already charged with oversight of finances for the system, including personnel management, which the team was advised relates

¹³⁴ See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 3(E) (recommending that the Chair of a Hearing Panel consider appeals from Disciplinary Counsel's dismissals.) As a Hearing Panel is not appointed by the Chair of the North Dakota Disciplinary Board until after the filing of a petition for discipline, the Discipline Committee believes it makes sense for the Board Chair to handle these few matters.

¹³⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(5).

¹³⁶ *Id.*

mostly to hiring decisions. Additionally, adoption by the Court of Recommendation 2(B) regarding the technology driven caseload management system as well as the development and publication of an annual report will enhance the ability of the Operations Committee to perform this function.

In terms of enhancing its oversight, the Discipline Committee first recommends that the Court amend Rule 2.2(A) to clarify the composition of the Operations Committee. It is not clear from the language of the Rule whether appointees can only be lawyers and judges. If Operations Committee membership is currently intended to be limited to lawyers and judges, the Discipline Committee recommends expanding the Operations Committee membership to four individuals so that one member can be a public member who has not previously served on the Board or Judicial Conduct Commission.

Next, the Discipline Committee suggests that the Court consider amending Rule 2.2(E) to provide the Operations Committee with additional administrative oversight responsibility for Disciplinary Counsel's office. In terms of oversight of the investigative and prosecutorial functions, Disciplinary Counsel should remain responsible for the day-to-day operations of the office, including managing lawyers and staff and the setting of investigative and prosecutorial priorities. However, the Operations Committee can oversee general caseload management to ensure the system is operating efficiently. For example, if the Operations Committee recommends that Disciplinary Counsel achieve a decrease in a certain percentage of pending aged files within the system, Disciplinary Counsel should be free to determine how his or her staff will do so. The Operations Committee's general administrative duties relating to efficient caseload management should not allow inquiry into the investigation or prosecution of any specific matters. The Operations Committee should receive caseload management reports from Disciplinary Counsel and review them together regularly. The caseload reports should indicate the type of misconduct alleged, whether the facts and evidence are complex in nature, 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. Similar reports should be prepared for cases pending before the Inquiry Committee and Disciplinary Board.

The Operations Committee should conduct Disciplinary Counsel's annual performance evaluation. Disciplinary Counsel should conduct the performance evaluations of all of his or her staff, including the lawyers.

This Report does not recommend increasing the amount of money that North Dakota lawyers pay that is allotted to fund the disciplinary system (of which, as noted above, the State Bar Association currently retains \$20,000 per year for the Lawyer Assistance Program). The Court will need to study funding issues in the context of whether and how to implement any changes recommended in this Report. The Operations Committee and Disciplinary Counsel should work together to present to the Court a comprehensive budget for the system that includes a true-needs assessment setting forth a proposed three-to-five-year funding plan for the system. This includes ensuring that salaries for the legal and professional staff are competitive enough to attract and retain experienced individuals and that adequate technology and other resources are made available. If necessary, a financial planner or budget analyst should assist in assessing the current and future needs of the system. Once provided with a long-range financial plan for the

future financial, technology, and staffing needs of the system, the Court can work with individuals and entities to address any necessary increases to the regulatory fee.

B. The District Inquiry Committees Should Continue to Be Responsible for Making Probable Cause Determinations

The dedicated volunteers comprising the Inquiry Committees do and should continue to serve a crucial function in the system. The Discipline Committee believes that the optimal use of their expertise and experience is for them to determine whether to uphold Disciplinary Counsel's recommendation that petitions for discipline be filed or disability proceedings initiated. As a result, in order to further streamline the disciplinary process, reduce delay and foster consistency, the Discipline Committee recommends that the Court amend the Rules for Lawyer Discipline to limit the Inquiry Committees' role to that of probable cause determinations.¹³⁷ This also means that the ability of an Inquiry Committee to impose consent probation should be eliminated.¹³⁸ The probable cause determination should be based upon a review of the full and complete investigation conducted by Disciplinary Counsel. Disciplinary Counsel should provide a complete investigative report and copies of all relevant documents and information, including exculpatory evidence for consideration.

With regard to the structure of the Inquiry Committees, the Discipline Committee recommends that the Court amend Rule 2.4 of the Rules for Lawyer Discipline to eliminate the three separate Inquiry Committees and create one statewide Inquiry Committee of 15 to 18 members that would act in three-member panels, akin to the Hearing Panels. The Discipline Committee recommends that two-thirds of this statewide Inquiry Committee be lawyers and one-third nonlawyers, as is currently the case for each individual Inquiry Committee. The statewide Inquiry Committee would elect its Chair and Vice-Chair, who would be responsible for appointing the three-member panels to consider matters. The three member panels should not be comprised of individuals all from the same disciplinary district. Each panel should have one nonlawyer member.

Creation of a statewide Inquiry Committee with adequately trained members sitting in panels comprised of individuals from multiple locations in the state will help alleviate concerns and perceptions of geographic inconsistencies with regard to the handling of cases. Currently, complaints against lawyers are considered by the Inquiry Committee in the disciplinary district where the respondent lawyer resides or has his or her office. This also creates perceptions of bias given the small community of North Dakota lawyers. Use of a statewide Committee consisting of panels comprised of individuals from different locations in the State will temper any such concerns.

The Discipline Committee also believes that the time has come for the Court to explore amending the Rules to eliminate the appointment of Inquiry Committee members by the

¹³⁷ In many states the probable cause determination is made by one individual, and such is ABA policy as set forth in the *Model Rules for Lawyer Disciplinary Enforcement*.

¹³⁸ See Recommendation 8.

President of the State Bar Association.¹³⁹ The Discipline Committee appreciates the sensitivity surrounding this issue and the consultation team was advised of the history involved in reposing that authority with the State Bar President. However, the Discipline Committee believes that it is in the best interest of the public and the bar for Inquiry Committee members to be appointed by the Court, or by the Court-appointed Disciplinary Board, with the opportunity for input from the State Bar Association President. The Court could utilize the recommended open and transparent appointment process to advertise for Inquiry Committee vacancies and screen candidates. If the Court determines that the Board should make the Inquiry Committee appointments, a similar process should be used to advertise vacancies and solicit applicants.

To ensure public trust and confidence in the lawyer disciplinary system, it should be controlled by the Court and not by elected state bar association officials.¹⁴⁰ Appointees should not be influenced or appear to be influenced by internal bar association politics and should be free of all appearance of conflict of interest. When elected bar officials control even parts of the disciplinary system such appearance of conflict of interest or unfairness is created, regardless of whether the system is indeed fair and unbiased. As noted earlier in this Recommendation, the team heard from several sources that some in the public domain consider the system to be “pro lawyer.” That perception exists regardless of the fact that the consultation team found evidence lacking to support that proposition.

The Discipline Committee also recommends that the Court amend Rule 3.1(D)(6) and (7) to eliminate the mandatory notice of opportunity for the complainant and respondent lawyer to appear before an Inquiry Committee.¹⁴¹ The completion of a full and complete investigation by Disciplinary Counsel will have afforded both the complainant and respondent lawyer sufficient opportunity to provide information. Respondents should have an additional opportunity to submit a written explanation of why formal charges are not warranted within a short period of time after receiving notice from Disciplinary Counsel that a matter has been sent to the Inquiry Committee. The only instance where a case may warrant an appearance by the complainant or respondent is one in which a probable cause determination cannot be made without an in-person assessment of their credibility.

The Committees should continue to meet regularly, and by telephone or electronically to efficiently and expeditiously perform their duties. The Inquiry Committees should not prepare reports; they should simply convey decisions to Disciplinary Counsel for the preparation of petitions for discipline or initiation of disability proceedings.

¹³⁹ In its 1983 Report the Discipline Committee recommended that the Court periodically review whether the appointment power for Inquiry Committees should continue to reside with the State Bar President.

¹⁴⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & Commentary.

¹⁴¹ Recommendations 8 and 9 below suggested revised procedures for probation and diversion.

Recommendation 4: All Professional Staff and Volunteers in the Disciplinary System Should Receive Formal Training on a Regular Basis

Commentary

The consultation team's review of the discipline system and discussion with interviewees revealed a troubling lack of training for the system's volunteers. Many interviewees reported to the team that they were given little to no information about the disciplinary process and were required to seek advice from their more experienced predecessors. The team concluded that volunteers learn primarily "on-the-job."

This approach to educating those who are entrusted with operating the lawyer disciplinary system is far from optimal. Although relying on institutional memory offers some training benefits, it is insufficient to achieve the objective to provide a fair, consistent and efficient disciplinary system. The Discipline Committee recommends that the Court direct the institution of a formal training program to guide current and future volunteers and professional staff. The Discipline Committee was pleased to learn that an effort by the Board to enhance the training of the disciplinary system's volunteers has begun and that the assistance of a University of North Dakota law professor with disciplinary experience from another jurisdiction has been useful. The consultation team was informed that these recent efforts have been well received and proved to be very instructive for all the attendees.

Training is vital to complete and timely resolution of complaints and formal proceedings. The prompt resolution of disciplinary complaints enhances the public's perception that the system is operating efficiently. The Court should require attendance at training sessions at least once per year. A separate orientation session should be mandatory for all new appointees, especially if they are required to execute their duties before the date of the annual training. All continuing volunteer members should receive annual training. Annual training provides an opportunity for the disciplinary office and the system's volunteers to address a variety of relevant and new issues often encountered by disciplinary agencies. For example, relevant topics can include keeping up with increasing caseloads; how to recognize trends in lawyer misconduct; or how to deal with an impaired lawyer. Training conferences also provide a forum for volunteers and staff to discuss problems and operations of the system as well as exchange information about their experiences.

The Discipline Committee suggests that the Disciplinary Board Chair collaborate with Disciplinary Counsel to develop a comprehensive training program and accompanying training manuals for all system's volunteers. Disciplinary Counsel can be a valuable resource for system adjudicators in the training process that should not be overlooked. Additionally, respondents' counsel can provide valuable insights to system adjudicators and should be invited to provide input and attend the training sessions.

The training sessions should include guest speakers. For example, the Clerk of the Supreme Court or the Court's law clerks could be asked to discuss administrative responsibilities. Representatives of relevant law enforcement agencies can discuss new investigative tools and techniques, and medical experts can address substance abuse, gambling, mental health and issues

relating to aging lawyers. All of these issues are being raised with increasing frequency in lawyer disciplinary cases.

A training manual should contain all rules, policies and procedures of the disciplinary system, an organizational chart clearly identifying the volunteer members' roles within the system, samples of exemplary Hearing Panel reports, sample scheduling and prehearing conference orders, applicable time guidelines for processing cases, relevant North Dakota federal and U.S. Supreme Court cases, and the North Dakota Standards for Imposing Lawyer Sanctions. All training materials should be made available to the Board, Hearing Panel, and Inquiry Committee members electronically, and updated as needed. As noted above, an electronic and searchable library of all of the Court's disciplinary opinions and Hearing Panel reports and recommendations should be created and Hearing Panel members should review this library to reinforce their training in addition to helping the draft reports and recommendations. The Discipline Committee's Guide to Training Lawyer Discipline System Volunteers is being sent to the Court under separate cover. The Committee is available to the Court to provide any requested follow-up assistance with regard to the development and presentation of training sessions.

The consultation team was pleased to hear that the Chair of the Disciplinary Board has attended meetings of the National Council of Lawyer Disciplinary Boards, Inc. (NCLDB). The NCLDB is comprised of individuals representing disciplinary boards throughout the United States. It provides a national forum for the exchange of information and ideas to assist volunteers and staff in improving the processes and address responsibilities, procedures, problems, and administration relating to formal proceedings before disciplinary boards. Their website can be accessed at www.ncldb.org.

The Committee also recommends that the Court officially recognize the volunteer efforts of the Inquiry Committee, Hearing Panel, Disciplinary Board, and Operations Committee members. They devote significant time and efforts to the system. Courts in other jurisdictions do so by providing certificates or holding luncheons.

In addition to the system's volunteers, Disciplinary Counsel should receive training on a regular basis. The consultation team learned that the types of cases being investigated are becoming increasingly complex and sophisticated. This is consistent with what is happening nationally. Disciplinary Counsel's office should be prepared and well equipped to address these types of cases and the increasing technological advances impacting the practice of law.

The Discipline Committee recommends that Disciplinary Counsel attend the ABA National Conference on Professional Responsibility. The ABA National Conference on Professional Responsibility is the preeminent educational and networking opportunity in the field of ethics and professional responsibility. Attendees have the opportunity to 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 country. Conference programs address recent trends and developments in legal ethics, professional discipline for lawyers and judges, professionalism and practice issues and are intended to be informative and educational on a level appropriate to a group with considerable

knowledge of and familiarity with the area. The National Conference on Professional Responsibility 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. Also, Disciplinary Counsel should continue membership with the National Organization of Bar Counsel (NOBC) and be encouraged to attend the group's meetings. The NOBC is an affiliated organization of the ABA. NOBC meetings are held in conjunction with the ABA Midyear and Annual Meetings. Resources provided by the NOBC include online educational programming tailored for disciplinary counsel, briefs, pleadings and educational presentations at the meetings to help jurisdictions with the implementation of more efficient and effective regulatory enforcement mechanisms.

To help ensure uniformity and consistency in the handling of disciplinary matters and facilitate transition upon the hiring of new personnel, a procedures manual and caseload processing guidelines should be created for the investigation and prosecution of matters by Disciplinary Counsel's office. Templates for letters, pleadings and other relevant documents can be developed and incorporated into the manual to allow the office to manage the caseload more effectively and efficiently.

V. PROCEDURES

Recommendation 5: There Should Be Increased Separation Between Investigative/Prosecutorial and Adjudicative Functions

Commentary

The consultation team heard from a number of sources that there is a lack of sufficient separation between those exercising investigative/prosecutorial and adjudicative roles in the system. The Discipline Committee suggests that the Court can address this in several ways. First, the Committee recommends that the Court amend Rule 2.5 of the Rules for Lawyer Discipline to eliminate paragraph (B)(2), which provides that Disciplinary Counsel is responsible for advising the Board, Hearing Panels and Inquiry Committees on legal issues relating to lawyer discipline and disability matters. Disciplinary Counsel and the volunteers who perform the probable cause and adjudicative functions for the system must maintain necessary independence. Maintaining appropriate separation between the system's adjudicators and the parties is vital to maintaining the fairness of the disciplinary process and to instilling confidence in the public. For this reason, Disciplinary Counsel cannot also serve the dual role of prosecutor and counsel to the adjudicators.

The consultation team understands that the Board Chair recently retained the services of counsel to assist in conducting legal research and in the development of training materials. This is a good step toward increasing requisite separation. The Discipline Committee suggests that the Inquiry Committee also seek ways in which to reduce reliance on Disciplinary Counsel's office for administrative matters including the setting of agendas and scheduling of meetings.

The Discipline Committee also recommends that the Court consider adding to the Rules for Lawyer Discipline a provision specifically addressing *ex parte* communications. The consultation team was advised that the manner in which the Board and Inquiry Committees have relied upon Disciplinary Counsel to answer questions about matters increases the risk that improper *ex parte* communications between participants at all levels of the discipline process may occur and fosters the perception that they do. It also places Disciplinary Counsel's office in the awkward position of having to navigate between its role as prosecutor and its current administrative duties to the Board and Inquiry Committees. The Discipline Committee's recommendations regarding the restructuring of the duties of Disciplinary Counsel and the Inquiry Committees address some of these risks. However, the Discipline Committee believes that adding specific language to the Rules for Lawyer Discipline regarding avoidance of *ex parte* communications will be beneficial.

Neither Disciplinary Counsel nor respondents should communicate *ex parte* with Board, Hearing Panels or Inquiry Committee members about a pending disciplinary matter except as specifically provided for by the Rules, no matter how well intentioned those communications may be.¹⁴² With regard to administrative matters, such as scheduling or emergencies, *ex parte* communication should not occur unless it is reasonable to believe that no party will gain a

¹⁴² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(D).

procedural or tactical advantage as a result of the communication. If necessary to communicate about such matters, all of the other parties should be promptly notified of the substance of such a communication and given an opportunity to respond. Disciplinary Counsel should not be present during deliberations concerning any matter presented to the Board, Hearing Panels or Inquiry Committee, although Disciplinary Counsel should be available to the Inquiry Committee to answer questions prior to its deliberations. A violation of this rule should also be grounds for discipline and cause for removal.¹⁴³ The Discipline Committee's recommendation does not restrict communications to the Court about the operations or general administrative matters concerning the discipline system.¹⁴⁴

¹⁴³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(D)(2).

¹⁴⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2.

Recommendation 6: Prehearing Conferences Should Be Mandatory and a Hearing Panel Chair Appointed to Conduct Them

Commentary

Rule 3.5(E) of the Rules for Lawyer Discipline provide that in matters where petitions for discipline have been filed, the Hearing Panel may, in its discretion, order a prehearing conference. Additionally, either party to the proceedings may request one. Interviewees confirmed to the team that the prehearing process differs from case-to-case, and from Hearing Panel to Hearing Panel, and that in the opinion of interviewees, they are underutilized. Interviewees also expressed an interest in having the Rules provide additional guidance with regard to the form and substance of prehearing conferences. The Discipline Committee agrees that this is a good idea.

Rule 2.3 of the Rules for Lawyer Discipline provide for the appointment of a Hearing Panel, but does not provide that one member of that Panel should serve as the Chair. The Committee first recommends that the Court amend Rule 2.3 to provide that, in addition to appointing the Hearing Panel for a matter, the Board shall appoint one lawyer member of that Panel to serve as the Chair. The Chair of the Hearing Panel should be charged with conducting prehearing conferences and considering and deciding any prehearing motions.¹⁴⁵

Next, the Discipline Committee recommends that the Court amend Rule 3.5(E) to provide that at least one prehearing conference is mandatory for matters in which petitions for discipline, disability/incapacity or reinstatement have been filed, and setting forth additional guidelines for the substance and conduct of such proceedings. Amending the Rule in this manner will result in greater uniformity and consistency in the disciplinary process. Further, there is no question that disciplinary cases are becoming increasingly complex and document intensive. Regularly scheduled prehearing conferences will reduce delay by allowing the parties and the Hearing Panels to create a case management plan early in the process that is tailored to the unique nature and complexity of each case.

The Discipline Committee's collective experience and that of discipline systems nationwide indicate that regular prehearing conferences are an important caseload management tool. The Committee recommends that the chair of the Hearing Panel be required to schedule a prehearing conference to occur as soon as practicable. Soon after the filing of the respondent's answer to the formal charges makes sense because then the contested issues will be framed. To ensure optimal use of resources, the Committee recommends that prehearing conferences be held by teleconference or video conference. If necessary, or if all parties and Hearing Panel Chair are located in the same city, they can be held in person. Prehearing conferences should be recorded by some means. Additional prehearing conferences should be scheduled as necessary to bring the case to a timely and efficient conclusion.

¹⁴⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 3(E)(2) and (3).

The routine use of prehearing conferences also creates opportunities for the Hearing Panel Chair to obtain copies of undisputed documentary evidence in advance of trial to distribute so that the full Panel can familiarize itself with that evidence before the commencement of the hearing. This too saves time and allows for a well-prepared adjudicator.

In order for a prehearing conference to have maximum effectiveness, issues that the parties and Hearing Panel Chair should consider include:

- (1) deadlines for the filing of respondent's answer or extension of time if not yet filed;
- (2) the formulation and simplification of issues;
- (3) the elimination of charges and defenses;
- (4) amendments to pleadings;
- (5) obtaining stipulations relating to facts and the admissibility of documents to eliminate unnecessary proof;
- (6) obtaining pre-trial rulings on the admissibility of evidence;
- (7) the identification and limitation of occurrence, character and expert witnesses, including explanations of the subject matter of their proposed testimony;
- (8) limitations on discovery including the setting of deadlines and limitations on the number and length of depositions;
- (9) the possibility of proceeding as a stipulated matter;
- (10) the consideration of hearing dates and its estimated length;
- (11) deadlines for the exchange of exhibits between the parties and submission of exhibits to the hearing panel;
- (12) anticipated evidentiary and legal issues to be raised at trial; and
- (13) any other matters that will aid in the prompt disposition of a case.

Subsequent to each prehearing conference, the Chair should enter an order setting forth all action taken and reciting any agreements between the parties. These pre-trial orders should be enforceable. The Discipline Committee recommends that a template be created for a comprehensive pre-trial order that can be utilized and made a part of training materials.

The Discipline Committee suggests that the amended Rule 3.5 governing prehearing conferences provide that where the issues under consideration relate to the establishment of deadlines, strict time limits be set and continuances permitted only for good cause shown.

Recommendation 7: The Board Should Develop a Policy About Whether Disciplinary Counsel Can Use Previously Undisclosed Investigative Reports to Attempt Impeach Respondents With Prior Inconsistent Statements

Commentary

Under the current Rules for Lawyer Discipline, the parties are to engage in reciprocal discovery of all non-privileged matters. The North Dakota Rules of Evidence also apply to disciplinary proceedings, as appropriate and unless otherwise provided for in the Rules for Lawyer Discipline. The consultation team was advised from several sources that during hearings on petitions for discipline, Disciplinary Counsel has, on occasion, attempted to use an investigative report not previously tendered to the respondent or her lawyer during discovery as a prior inconsistent statement for impeachment purposes. It was related that the Hearing Panels permitted such impeachment to take place. If true, this practice raises a number of concerns that the Discipline Committee believes warrant clarification.

First, it was not clear whether the investigative reports at issue are not provided to respondents and their counsel because they are considered to be Disciplinary Counsel's or the Inquiry Committee's work product. Second, it was unclear whether the statements of the respondents in the investigative reports that are being used for impeachment purposes are verbatim recitations of oral statements by the respondent to the assigned investigator (currently either Disciplinary Counsel or an Inquiry Committee member), non-verbatim summaries of such statements, quotes from written materials submitted by the respondent, or any combination thereof. In the Discipline Committee's experience, statements in the investigative report that are verbatim quotes of the respondent or verbatim quotes from written materials submitted by the respondent during the investigation would not be privileged. As a result, the Committee suggests that the Disciplinary Board study this issue, seek input from Disciplinary Counsel and respondents' counsel, review the current relevant rules and precedent, and determine whether to propose clarifying amendments to the Rules for Lawyer Discipline for adoption by the Court.¹⁴⁶ In determining whether to recommend changes to the applicable Rules, the Board should ensure that issues of fairness regarding the use of investigative reports for impeachment purposes are given necessary attention.

The Discipline Committee recommends that, in its study of this issue, the Board consider that allowing the use of investigative reports to serve as prior inconsistent statements for impeachment purposes also would necessitate having the investigating Inquiry Committee or Disciplinary Counsel (when he or she served as the investigator who wrote the report) called as a witness to prove up the prior inconsistent statement if it is challenged. The notes of the statement in the report are not what are impeaching; it is the statement itself. Absent the use of a certified transcript of a sworn statement of the respondent, the impeaching statement must be proved up by the individual to whom the statement was made. This is yet another reason why the Discipline Committee recommends that the Court consider finding the resources to allow Disciplinary Counsel the ability to use the services of an investigator.

¹⁴⁶ Rule 2.1(H)(6) of the Rules for Lawyer Discipline specifies that among the Board's powers and duties is proposing amendments to the Rules for adoption by the Court.

VI. SANCTIONS

Recommendation 8: The Court Should More Clearly Distinguish Between Probation and Diversion, and Enhance Its Probation Rule to Include Provisions Specifying Terms for Monitoring and Revocation of Probation

Commentary

Rules 1.3 and 4.3 of the North Dakota Rules for Lawyer Discipline, as well as the North Dakota Standards for Imposing Lawyer Sanctions,¹⁴⁷ address the disciplinary sanction of probation. Rule 1.3 provides that probation may be imposed not only by the Court, but also by a Hearing Panel or by a District Inquiry Committee. If imposed by the Hearing Panel or District Inquiry Committee, the respondent must consent to the imposition of probation. Generally, probation may not exceed two years. However, it may be extended for another two years if the respondent agrees to such renewal or if after a hearing there is a determination that probation should be continued.

Probation may be imposed where there is little likelihood of public harm during the period of rehabilitation and if the conditions can be adequately supervised.¹⁴⁸ The terms of probation must be reduced to writing. If there is to be any limitation on the lawyer's right to practice only the Court may impose such limitations.¹⁴⁹

A lawyer may also be placed on diversion at any time during the pendency of disciplinary proceedings. Diversion may be imposed at the District Inquiry Committee level, by the Disciplinary Board or by the Court.¹⁵⁰ As discussed below, a lawyer placed on diversion must participate in the Lawyer Assistance Program.

Probation is a disciplinary sanction, while diversion is not. That is because there are cases involving minor misconduct where the imposition of a public sanction and rehabilitative conditions is appropriate. Probation allows for a respondent to engage in necessary rehabilitation while also being subject to the appropriate and necessary public discipline for his or her misconduct.

The Discipline Committee first recommends that, the Court amend Rules 1.3(A)(4) and Rules 2.4 and 2.5 to provide that in addition to consent probation by Hearing Panels, Disciplinary Counsel (instead of the Inquiry Committee), may impose probation with the respondent lawyer's consent.¹⁵¹ If the respondent objects, Disciplinary Counsel should recommend that the Inquiry Committee find probable cause for the filing of a petition for discipline. This is consistent with Recommendation 3(B) above.

¹⁴⁷ Standard 2.6 of the North Dakota Standards for Imposing Lawyer Sanctions specifies that: "Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand or an admonition; probation can also be imposed as a condition of readmission or reinstatement."

¹⁴⁸ N.D.R. Lawyer Discipl. R. 4.3(A)

¹⁴⁹ N.D.R. Lawyer Discipl. R. 4.3(B)

¹⁵⁰ N.D.R. Lawyer Discipl. R. 1.0 and 6.6

¹⁵¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(3).

Rule 4.3 does not set forth provisions relating to the monitoring of probation or procedures for revocation of probation when appropriate. The Discipline Committee recommends that the Court amend Rule 4.3 to include provisions regarding the monitoring and revocation of probation, as well as enhancing the Rule to provide more guidance as to the types of cases where probation, as opposed to diversion, is appropriate.¹⁵²

For example, the Court might consider a lengthier general statement of conditions that would justify the imposition of probation, such as:

- (1) the lawyer can perform legal services without causing the courts or legal profession to fall into disrepute;
- (2) the lawyer is unlikely to harm the public during the period of rehabilitation;
- (3) the conditions of probation can be clearly 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.

The Committee recommends that the Rule specify that the order placing a respondent on probation shall state unambiguously each specific condition of probation. Currently, Rule 4.3 provides that the terms must be stipulated in writing. Placing the precise conditions of probation in the probation 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 further discipline. The conditions should take into consideration 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;
- (2) limitations on practice;
- (3) psychological counseling and treatment;
- (4) abstinence from drugs or alcohol;
- (5) random substance testing;
- (6) restitution;
- (7) successful completion of the Multi-State Professional Responsibility Examination;
- (8) successful completion of a course of study; and
- (9) regular, periodic reports to Disciplinary Counsel.

The terms of probation should establish a schedule for periodic review of the order of probation, and provide a means to supervise the probationer's progress.

The Discipline Committee also suggests that Rule 4.3 be amended to include a provision stating that, prior to the termination of a period of probation, probationers and probation monitors must file an affidavit with the Court stating that the lawyer has complied with the terms of probation.¹⁵³ Probationers should be required to bear the costs and expenses associated with imposition of the terms and conditions of the probation.

¹⁵² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(3).

¹⁵³ *Id.*

An effective means of monitoring probationers is essential to the successful use of this disciplinary sanction. Therefore, the Rule should provide for the administration of probation under the control of Disciplinary Counsel. In order for the probation process to be successful, a probation monitor must report to Disciplinary Counsel regarding the probationer's progress. The monitor's role is to supervise the monitored lawyer in accordance with the terms of the probation and to report compliance or noncompliance to Disciplinary Counsel. The monitor is not to be a twelve-step or recovery program sponsor for the probationer. The Rule should provide that the probationer is required to sign a release authorizing the monitor to provide information to Disciplinary Counsel. Additionally, the Court should provide immunity for probation monitors.¹⁵⁴ Disciplinary Counsel can work with the Lawyer Assistance Program Coordinator to locate an appropriate monitor. That monitor may, but need not be associated with the Lawyer Assistance Program. The goal is to find the monitor most appropriate for the lawyer and his or her problem.

Currently, Rule 1.3(B) of the North Dakota Rules for Lawyer Discipline provides that failure to comply with a condition of probation (or reprimand and admonition) constitutes grounds for reconsideration of the matter and the imposition of either stated or additional discipline. The Discipline Committee is concerned that this provision, absent further specifics in Rule 4.3, does not provide optimal guidance to lawyers or Disciplinary Counsel with regard to revocation of probation.

Probation monitors should be required to immediately report to Disciplinary Counsel any instances of noncompliance. Upon receipt of such a report, Disciplinary Counsel may, if appropriate¹⁵⁵, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation, and request an order to show cause why probation should not be revoked and further discipline imposed. The Court should provide the probationer with a short time period, fourteen to twenty-one days, in which to respond to the order to show cause. After consideration of the probationer's 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 a heightened sanction, modification of the terms of probation or continuance of the terms of probation as originally imposed. This summary proceeding will save time and resources and promptly remove the risk to the public and the profession that a lawyer who is not complying with the terms of probation poses. The Committee believes that the Court is the appropriate entity to handle revocation proceedings, and that having the Court's imprimatur on a revocation and order for additional discipline highlights the seriousness of these issues and the Court's commitment to public protection.

Adequate and regular training of probation monitors is vital to the successful use of probation. Disciplinary Counsel should work with the State Bar Association and Lawyer Assistance Program to develop training materials and curricula for probation monitors. Other jurisdictions

¹⁵⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 12(A).

¹⁵⁵ Not all instances of noncompliance warrant Disciplinary Counsel seeking revocation of probation. It should be left to Disciplinary Counsel's discretion to determine when it is appropriate to seek revocation based on noncompliance. It is not uncommon for lawyers with substance abuse problems, for example, to relapse in some manner. Disciplinary Counsel should consult with the probation monitor and conduct any additional necessary investigation to determine whether the noncompliance warrants seeking revocation of probation.

that have training programs for probation monitors in place should be consulted. All probation monitors should be required to attend training at least bi-annually.

Recommendation 9: Rule 6.6 of the North Dakota Rules for Lawyer Discipline Should be Further Tailored to Clarify the Scope of Diversion, and Programmatic Opportunities for Diversion Should Be Enhanced

Commentary

The Discipline Committee commends the Court for including in the Rules for Lawyer Discipline a procedure for diversion from discipline.¹⁵⁶ In North Dakota, diversion may be imposed by the District Inquiry Committees, the Disciplinary Board or the Court. If a lawyer is placed on diversion the proceedings before the Inquiry Committee, Board or Court are stayed, conditioned on the lawyer's participation in the Lawyer Assistance Program.¹⁵⁷ Participation in the diversion program is limited to lawyers who, while violating the North Dakota Rules of Professional Conduct, have not done so in a manner that raises questions about their "moral fitness or integrity, but about the lawyer's practice administration or organization, health or competence."¹⁵⁸ The goal is to address the circumstances that led to the violation of the Rules of Professional Conduct in a remedial manner so as to avoid repetition of the misconduct.

Referral to the Lawyer Assistance Program can be initiated by anyone involved in the disciplinary process, including the respondent lawyer, and by others.¹⁵⁹ In the disciplinary process, the Lawyer Assistance Program screens the lawyer to determine whether he or she would benefit from participation in the program.¹⁶⁰ If the lawyer would benefit from participation in the program, the Lawyer Assistance Program identifies an appropriate individual to work with the lawyer and to develop an individual assistance plan.¹⁶¹ The Lawyer Assistance Committee must approve the plan, and if execution of the plan is to be part of the disciplinary diversion, the disciplinary entity before which the complaint against the lawyer is pending must also approve the plan (e.g., the Inquiry Committee or Board).¹⁶² The Lawyer Assistance Program monitors the lawyer and must report noncompliance to the entity that approved the plan.¹⁶³ Upon successful completion of the plan, the complaint against the lawyer is dismissed.

The Lawyer Assistance Program is staffed wholly by volunteers. That includes the Lawyer Assistance Program Coordinator. As noted above, the Lawyer Assistance Program is funded by the State Bar Association in the amount of \$20,000 per year. The \$20,000 is derived from a portion of each lawyer's \$75 annual payment that is allocated to fund the lawyer disciplinary system. The Lawyer Assistance Program's role in the disciplinary system appears to be limited to the diversion cases referred to it or to probation cases. Much of its work appears not to relate

¹⁵⁶ As a companion to Rule 6.6 of the North Dakota Rules for Lawyer Discipline, the Court established a Lawyer Assistance Program Committee via the adoption of Administrative Rule 49.

¹⁵⁷ N.D.R. Lawyer Discipl. R. 1.0(E).

¹⁵⁸ N.D.R. Lawyer Discipl. R. 6.6(B)(1)

¹⁵⁹ N.D.R. Lawyer Discipl. R. 6.6(C); *see also*

<https://www.sband.org/Resources%20for%20Lawyers/Lawyer%20Assistance%20Program/lapWorks.aspx>

¹⁶⁰ *Id.*

¹⁶¹ N.D.R. Lawyer Discipl. R. 6.6(D)

¹⁶² N.D.R. Lawyer Discipl. R. 6.6(E)

¹⁶³ *Id.*

to the disciplinary system. Information provided to the consultation team indicates that in 2012 there were 2 cases referred to the Lawyer Assistance Program and only 1 matter was referred in 2013.

The Lawyer Assistance Program provides assistance to lawyers and judges who suffer from impairment or mental health issues. In addition, the Program can provide assistance to lawyers who have practice management performance issues. The Program collaborates with the State Bar Association and St. Alexius Medical Center to provide services to lawyers and their families through the Member Assistance Program. That the Court and the State Bar Association have recognized the importance of providing this type of assistance to lawyers and judges is laudable.

The Discipline Committee believes that changes to Rule 6.6 and enhancements to the availability of programming within the State Bar Association and connected to the diversion program will benefit North Dakota Lawyers and judges. It will enhance the ability of the State Bar Association to serve its members, in particular younger lawyers who the team was advised are now remaining in the State because of the increase in available work due to the oil and gas industry.

Consistent with Recommendation 8 above, the Discipline Committee recommends that the Court make changes to Rule 6.6 to better distinguish diversion from probation. Currently, both probation and diversion are available at any stage in the disciplinary process. As noted above, probation is a form of discipline while diversion is not.

Nationwide, the majority of complaints made against lawyers allege instances of lesser misconduct. Single or a few instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction that cases resulting in probation do. These complaints are almost always dismissed by the disciplinary agency. However, dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems and the bar. Although these matters should be removed from the disciplinary system, they should not be simply dismissed. The diversion process is a useful tool to address them.

Because these cases do not rise to the level where formal charges or the imposition of a sanction is appropriate, the Discipline Committee recommends that the Court amend Rule 6.6 to provide that diversion is available only prior to the filing of a petition for discipline.¹⁶⁴ Diversion should be available to lawyers whose misconduct does not require further involvement in the discipline system (e.g., the District Inquiry Committees, Board or the Court). That is not the case in matters where the filing of a petition for discipline is appropriate. Matters subject to diversion are handled more administratively. Should the Court agree to make such change to Rule 6.6, it will also be necessary to amend related rules addressing the period of time during which a matter may be diverted.

¹⁶⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(2).

In addition to limiting the time in the disciplinary process during which a lawyer may be referred to diversion, the Discipline Committee recommends that, consistent with Recommendation 3 regarding proposed new duties and responsibilities for Disciplinary Counsel, the Court amend Rule 6.6 and related Rules to provide that referral to the diversion program should be made only by Disciplinary Counsel.¹⁶⁵ Professional Disciplinary Counsel, such as North Dakota's, is in the best position to recognize when a respondent is in need of the type of intervention that an alternatives to discipline program provides. In determining whether to refer a lawyer to the diversion program, Disciplinary Counsel should consider how many instances of misconduct are at issue, whether the presumptive sanction for the misconduct would be no more severe than reprimand or admonition, whether the participation in the program will likely benefit the lawyer, aggravating and mitigating factors present, and whether diversion has already been tried.¹⁶⁶

The respondent lawyer should be afforded the opportunity to decline to participate in diversion, the result of which is that the matter proceeds as if no referral occurred.¹⁶⁷ In this regard, the lawyer risks that it will be determined that a petition for discipline is appropriate, or it may be that the complaint is dismissed.

The Discipline Committee believes that lawyers and the public will benefit from further explication in Rule 6.6 regarding what is referred to as the Individualized Assistance Plan. The Committee suggests that this Plan should take the form of a contract negotiated between Disciplinary Counsel and the respondent.¹⁶⁸ The contract should be tailored to the unique circumstances of each case, should set forth with specificity the terms and conditions of the plan (e.g., testing for controlled substances or mental health counseling), and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to Disciplinary Counsel.¹⁶⁹ A practice and/or recovery monitor should be identified and his/her duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures can be made to Disciplinary Counsel. The agreement should include a specific acknowledgment that a material violation of a term of the contract renders voidable the respondent lawyer's participation in the program for the original minor misconduct at issue.¹⁷⁰ The contract should be amendable upon agreement of the respondent lawyer and Disciplinary Counsel. Rule 6.6 already provides that the respondent is responsible for payment of all costs incurred in connection with the diversion.

The Discipline Committee also recommends that the Court amend Rule 6.6 to require that Disciplinary Counsel notify the complainant of the proposed decision to refer a respondent to the diversion program and offer the complainant the opportunity to provide additional information about the respondent lawyer.¹⁷¹ The complainant's statement should be made a part of the record.

¹⁶⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(1).

¹⁶⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(3).

¹⁶⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(5).

¹⁶⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(4).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(2).

It appears that referrals to the diversion program are not made as frequently as they could or should be made. The Committee believes that North Dakota lawyers would greatly benefit from expansion of the types of programs available by the State Bar Association of North Dakota for purposes of facilitating diversion or simply for the benefit of North Dakota lawyers and the public they serve. Currently, the only alternative to discipline is participation in the Lawyer Assistance Program. Typically, alternatives to discipline programs include fee arbitration, mediation, ethics school, trust accounting school and any other authorized program.

The team observed that the State Bar Association does not appear to have a law practice management committee or advisor.¹⁷² Expanding member benefits to encompass law office practice management through an entity or individual with focus and expertise in this area would be an excellent step to assist lawyers and ultimately the public. Nor does the State Bar Association appear to operate a mediation program, ethics or trust accounting school.

The State Bar Association does operate the Mentorship Program in which all newly admitted North Dakota Lawyers must participate. There exists a Model Mentoring Plan to help the mentor and mentee structure their relationship.¹⁷³ The first five sections of the Model Mentoring Plan must be completed by all new lawyers. Participating lawyers can earn up to a 15 CLE credits per reporting period.¹⁷⁴ The State Bar Association also makes available to its members a “Protect Your Practice Toolkit” to help lawyers secure their online information from danger.¹⁷⁵

Enhancing the availability of programs to be a part of the diversion program or generally available to members of the State Bar Association will require cooperation between the State Bar Association and Disciplinary Counsel’s office in order to be successful. Disciplinary Counsel, the State Bar Association, and the Lawyer Assistance Program each have distinct and important roles to play in successfully implementing this initiative. The State Bar Association will also have to ensure that these member programs are adequately resourced separate and apart from funds allocated for the disciplinary system.

¹⁷² The Discipline Committee is available to provide additional resources to the State Bar Association regarding law practice management programs at other state bars in addition to contacts with law practice management advisors who may be able to assist in the development and implementation of such programs.

¹⁷³ See, <https://www.sband.org/Resources%20for%20Lawyers/mentorship-program.aspx>

¹⁷⁴ *Id.*

¹⁷⁵ <https://sband.org/UserFiles/files/misc/SBANDProtectYourPRACTICEToolKit.pdf>

Recommendation 10: The Court Should Amend Rule 4.1 to Provide for Interim Suspension Upon a Finding of Guilt

Commentary

Rule 4.1 of the North Dakota Rules for Lawyer Discipline currently provides that a lawyer convicted of a serious crime is to be suspended pending the conclusion of formal disciplinary proceedings that are commenced based upon that conviction. Rule 4.1 is substantially similar to an earlier version of Rule 19 of the ABA Model Rules for Lawyer Disciplinary Enforcement.

In criminal proceedings, there often is significant delay between a determination of guilt and the entry of a judgment of conviction. Such delays may be attributable to several factors, including time spent on completing presentence investigations or the postponement of sentencing pending a defendant's cooperation with the government pursuant to a plea agreement. Continued practice of law during such an interim period by a lawyer found guilty of a serious crime undermines public confidence in the profession. In 1999, the Discipline Committee proposed amendments to the ABA Model Rules for Lawyer Disciplinary Enforcement to enable the disciplinary agency to seek summary suspension upon the finding of guilt. The ABA House of Delegates approved this amendment.

The Discipline Committee recommends that the Court amend Rule 4.1 to provide that any lawyer found guilty of a serious crime is subject to immediate summary suspension. Permitting the imposition of an immediate interim suspension prior to the entry of a judgment of conviction does not deprive a lawyer found guilty of committing a serious crime of due process. The lawyer may still challenge the temporary suspension or may ask the Court to vacate or modify it.

Recommendation 11: Discipline on Consent Should Be Encouraged

Commentary

Discipline on consent, implemented in appropriate cases, benefits the public and the parties. It should be encouraged. In addition to saving time and resources for the system and the respondent lawyer, an advantage of discipline on consent, when properly used, is that it provides some certainty in exchange for a lawyer's admission to misconduct.

The North Dakota Rules for Lawyer Discipline allow for discipline on consent.¹⁷⁶ According to the Rules, a lawyer may offer a conditional admission to misconduct in exchange for a stated form of discipline. A copy of the request for discipline on consent must be served on Disciplinary Counsel. Disciplinary Counsel's approval is not required in order for the conditional admission to be accepted. However, the consultation team was advised that, in practice, it is uncommon for a lawyer to submit a conditional admission without first having negotiated an agreed disposition with Disciplinary Counsel. Information provided to the team indicates that Disciplinary Counsel typically prepares the first draft of these stipulated dispositions.

The conditional admission is initially subject to review by a Hearing Panel, and depending on the extent of the discipline sought, ultimately by the Court.¹⁷⁷ Accompanying the conditional admission must be a stipulation signed by the lawyer and Disciplinary Counsel acknowledging that the lawyer is freely and voluntarily submitting the conditional admission and understands the consequences, that the lawyer admits that the material facts in the case are true and knows that the charges against him cannot be successfully defended, and that there is presently pending against him a disciplinary proceeding.¹⁷⁸ The Hearing Panel may reject or accept the request for discipline on consent. If the Hearing Panel rejects it, the stipulation is withdrawn and cannot be used against the lawyer in any subsequent disciplinary proceedings.

If the Hearing Panel accepts the request for consensual discipline and the sanction is a reprimand or consent probation, the Hearing Panel enters the order. If the requested form of stipulated discipline is disbarment or suspension, the Court must approve or reject the conditional admission and enter any order.¹⁷⁹ While stipulations are used in all kinds of cases, it appears that in North Dakota, reprimands are the most common form of consensual discipline, in addition to probation (which may also be in coupled with another sanction).

The effectiveness of consensual discipline depends upon the manner in which it is used, and whether the Court and Hearing Panels receive the necessary information to allow them to approve such requests. A number of interviewees expressed concern that discipline on consent is not being optimally utilized. As noted above, discipline based upon admitted misconduct should be encouraged. The Discipline Committee recommends that Disciplinary Counsel study the

¹⁷⁶ N.D.R. Lawyer Discipl. R. 4.2

¹⁷⁷ N.D.R. Lawyer Discipl. R. 4.2(A)

¹⁷⁸ N.D.R. Lawyer Discipl. R. 4.2(B).

¹⁷⁹ N.D.R. Lawyer Discipl. R. 4.2 (C).

manner and frequency with which conditional admissions are being utilized to determine whether there are ways in which to optimize its use in appropriate cases. Discipline Counsel may wish to seek input from the respondents' bar regarding this issue.

In the Discipline Committee's experience, the reason that most requests for discipline on consent are rejected is because the adjudicator has not received sufficient information. Stipulations should be as complete as possible.¹⁸⁰ The document setting forth the agreement for discipline on consent should not only set forth the specific factual basis for the admitted misconduct, but also should indicate the connection between those facts and the specific rule violations at issue. Factors in mitigation and aggravation should be included. A request for discipline on consent should always provide citations to applicable precedent supporting the recommended sanction. In North Dakota, this includes not only case law, but also the North Dakota Standards for Imposing Lawyer Sanctions. In addition, the pleadings submitted should distinguish any precedent that may conflict with the recommendation. Relevant documents should be appended.

In order to ensure consistency and completeness, and because this appears to be the practice the majority of the time, the Court may want to consider adding a provision to Rule 4.2 providing that Disciplinary Counsel should prepare the conditional admission pleadings for joint submission with the respondent. The respondent should still be required to submit a document stating that he or she consents to the suggested discipline freely and voluntarily, that he or she is aware of the ramifications of submitting the conditional admission, that the material facts alleged therein are true and that, if the matter proceeded to trial, he/she could not successfully defend against the allegations. Rule 4.2 refers to this document as a stipulation signed by the respondent and Disciplinary Counsel. The Discipline Committee recommends that the Court amend Rule 4.2(B) to provide that the only the respondent must execute such document under penalty of perjury.¹⁸¹

When an adjudicative entity rejects a proposed stipulated disposition, it should convey to the parties some explanation of the rejection. In the Discipline Committee's experience most such rejections are not accompanied by any explanation, leaving the parties in a difficult position in terms of understanding where there may be a paucity of evidence or whether the issue relates to the severity of the proposed sanction.

¹⁸⁰ Completeness of the stipulation is also important to preserve evidence of guilt if the respondent later claims that he or she did not commit the misconduct. Petitions for reinstatement or readmission are often filed many years after the imposition of discipline.

¹⁸¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 21(D).

Recommendation 12: The Court Should Adopt Procedures for Addressing Continued Misconduct by Disbarred Lawyers

Commentary

The Discipline Committee was asked to recommend a process for addressing continued misconduct by disbarred lawyers. In the Committee's experience the most prevalent reason for complaints of misconduct by disbarred lawyers relates to their continued practice of law in violation of the court's disbarment order or their employment in an office where the practice of law is conducted, leading to perception that they are licensed to practice. For example, in some jurisdictions disbarred or suspended lawyers may work as paralegals. The Discipline Committee has been advised in other jurisdictions that permit such a practice of instances where the disbarred or suspended lawyer committed additional serious misconduct, thereby causing harm to clients and to the lawyer/law firm that hired that individual.

Rule 1.1(C) of the North Dakota Rules for Lawyer Discipline provides that the Court has jurisdiction over any formerly admitted lawyers with regard to acts committed prior to suspension or disbarment or with regard to acts subsequent thereto that amount to the unauthorized practice of law or misconduct worthy of discipline. Under Rule 1.2(A)(8) a ground for discipline includes willful violation of an order of the Court imposing discipline.

Pursuant to Rule 6.3 of the North Dakota Rules for Lawyer Discipline, within 10 days of the entry of the disbarment order, the disbarred lawyer must notify clients, co-counsel, opposing parties or their counsel if they are represented, of the disbarment and the lawyer's inability to practice law after the order's effective date. The disbarred lawyer must also return to clients all papers and property to which they are entitled and to seek withdrawal before any courts or agencies. The disbarred lawyer must file with the Court proof of compliance with Rule 6.3. The Rules do not specifically prohibit a disbarred (or a lawyer who is suspended or on disability inactive status) from maintaining a presence in or occupying an office where the practice of law is conducted.

The Discipline Committee first recommends that the Court amend Rule 6.3 to prohibit disbarred lawyers, suspended lawyers and lawyers placed on disability inactive or incapacitated status from maintaining a presence in or occupying an office where the practice of law is conducted.¹⁸² These individuals should also be required to remove any indicia of their association with the title lawyer, attorney at law, counselor, legal assistant, law clerk, paralegal or other similar title.¹⁸³ This change to Rule 6.3 will make clear to disbarred lawyers, as well as to lawyers suspended and placed on disability or incapacitated status, the specific type of prohibited behavior that can lead them to violate the Court's disbarment order and become subject to complaint and, as discussed below, contempt proceedings.

Allowing a disbarred or suspended lawyer to be employed in a law office in any capacity is not protective of existing clients and the public and defeats the purpose of discipline. The risks

¹⁸² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 27(G).

¹⁸³ *Id.*

posed by permitting a disbarred or suspended lawyer to be employed in a place where the practice of law is conducted far outweigh any benefit of permitting this practice. It also increases the risk that other lawyers or the entity that employs the unlicensed individual may aid in the unauthorized practice of law. The Court may also wish to make clear in this amendment that there is no exception to allow a disbarred lawyer or a lawyer who has been suspended or placed on disability or incapacitated status to represent a family member, corporation controlled by that individual or provide pro bono legal services.

The Discipline Committee next recommends that the Court adopt a Rule providing that a disbarred lawyer's engaging in conduct in violation of the Court's disbarment order will result in the institution of contempt proceedings against that individual. Disciplinary Counsel's office should be the entity to initiate such proceedings before the Court or before a district court judge should the Court determine that is the more appropriate venue. The Court or district court judge may order the disbarred lawyer to appear and show cause why he or she should not be held in contempt. While there is no ABA policy directly on point, a number of jurisdictions do handle complaints that disbarred or suspended lawyers are continuing to practice law or otherwise violating the Court's disciplinary order.¹⁸⁴ In addition, the evidence of misconduct should be retained by Disciplinary Counsel in the event the individual petitions for readmission or reinstatement.

¹⁸⁴ See, e.g., AZ. REV. STAT. ANN., SUP. CT. RULES, R. 60(c); ILL. SUP. CT. R. 779; S.D. CODIFIED LAWS 16-19-82; OR. STATE BAR RULES OF PROCEDURE, R. 6.3; CO. SUP. CT., NOTICE OF FINDING OF CONTEMPT & ORDER RE: SCHEDULING OF STATEMENT IN MITIGATION, CASE NO. 13SA120 (2014), available at <http://bit.ly/11692Xq>.

VII. CONCLUSION

As noted throughout this Report, the consultation team was impressed by the dedication of the Court, the volunteers and the professional staff of the disciplinary agency. The determination of all those involved to make the North Dakota lawyer disciplinary system more effective and efficient is notable.

The Standing Committee on Professional Discipline hopes that the recommendations contained in this Report will assist the Court in its study of the system and will expedite its implementation of desired changes. As part of the discipline system consultation program, the ABA Standing Committee on Professional Discipline is available to provide further assistance to the Court if so requested.

Disciplinary System Questionnaire

Your completion of this questionnaire is purely voluntary. Any responses you provide will be used to improve the attorney disciplinary system in Texas. Thank you for your participation.

1. Are you a former client of the respondent lawyer? YES NO
2. Was your grievance dismissed? YES NO
 - a. If your grievance was dismissed, did you appeal? YES NO
 - b. Did BODA reverse the dismissal? YES NO
3. Did your grievance result in a sanction against the respondent lawyer? YES NO
4. Was your grievance heard by: AN EVIDENTIARY PANEL A DISTRICT COURT
5. If your complaint was heard by an evidentiary panel, how would you describe your treatment by the evidentiary panel?

6. How long did it take to reach a conclusion about your grievance? less than 90 days 90-179 days 180-260 days more than 360 days
7. Did your grievance involve a: CRIMINAL MATTER CIVIL MATTER
8. If your matter was criminal in nature, was your attorney: APPOINTED HIRED
9. If your matter was criminal in nature, did you receive a sentence that included jail or penitentiary time?
 YES NO
10. Which regional office of the chief disciplinary counsel's office processed your grievance? Austin Dallas Houston San Antonio
11. Did you ever talk with an employee of that regional office? YES NO
 - a. If so, did you talk with: staff an attorney both
 - b. What were the names of the employees that you spoke with?

12. How would you describe your treatment by whomever you talked with?

13. Do you believe the grievance system is fair? YES NO
 - a. If you answered no, why do you think the system is unfair?

14. Do you have any suggestions for improving the grievance system?

Return to: Office of the Chief Disciplinary Counsel
State Bar of Texas
Post Office Box 12487
Austin, Texas 78711

QUESTIONNAIRE

SUPREME COURT OF WISCONSIN BOARD OF ADMINISTRATIVE OVERSIGHT

FAIRNESS AND EFFICIENCY EVALUATION

(PLEASE WRITE OR PRINT NEATLY. FEEL FREE TO USE THE REVERSE OR ADDITIONAL PAPER, IF NECESSARY.)

In your case, were you:

- 1) The grievant (the person filing the complaint)
or
2) The respondent attorney

In your case, was the grievance dismissed? Yes No

Were you given the opportunity to present whatever information you felt was necessary to clearly state your position?

Yes No

Comments: _____

Were you treated courteously and professionally by staff members of the Office of Lawyer Regulation?

Yes No

Comments: _____

Was the matter resolved in a timely fashion?

Yes No

Please explain how long it took and how long you think it should have taken: _____

Did the Office of Lawyer Regulation staff evaluate the grievance fairly?

Yes No

Comments: _____

Is there anything else you believe should be done to improve the grievance process?

THANK YOU FOR YOUR INPUT.

SUPREME COURT OF WISCONSIN
BOARD OF ADMINISTRATIVE OVERSIGHT