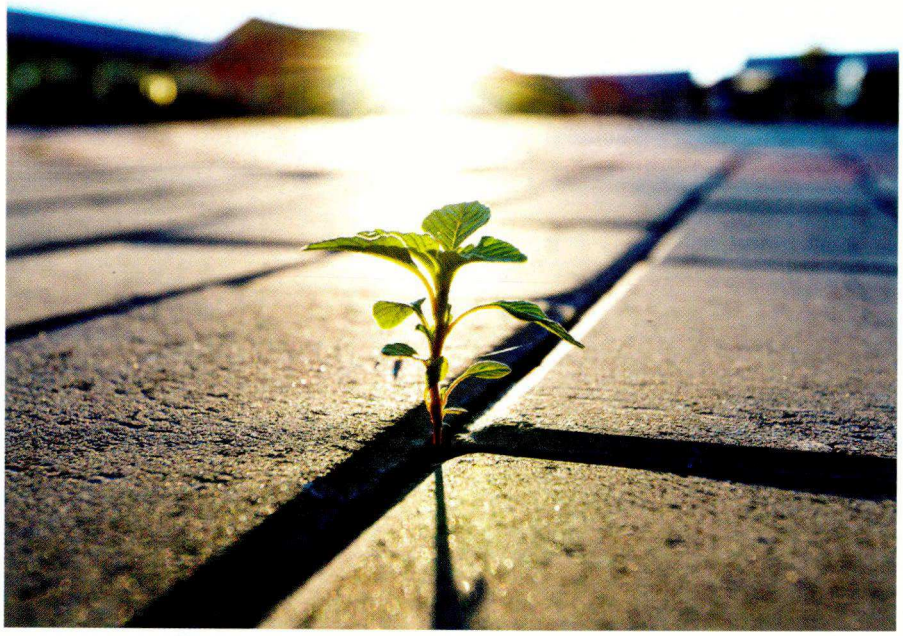


WHENCE LAWYER DISCIPLINE?

The origins and evolution of the Lawyers Professional Responsibility Board

Forty-eight years ago, the ABA Clark Report assayed lawyer discipline systems around the United States and proclaimed a crisis. This article traces the history of the Lawyers Professional Responsibility Board that Minnesota launched in response, and examines the changes it has undergone in the decades to follow.

BY WILLIAM J. WERNZ

The Lawyers Professional Responsibility Board was born amid a national scandal and crisis. In 1970, the ABA Clark Report sounded the alarm, calling for reform of attorney discipline programs in the United States.

> This Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

Former U.S. Supreme Court Justice Tom Clark chaired the committee that studied discipline systems for three years. The Clark Report identified 36 problems and recommended corresponding changes. The report laid the foundation for new attorney discipline systems in most states. Most importantly, the Clark Report sent a clear message that new discipline systems were urgently needed.

When the Clark Report was issued, the MSBA and the Minnesota Supreme Court took immediate and comprehensive action. In 1970, acting on MSBA petitions, the Court signed orders: (1) adopting the new ABA Model Code of Professional Responsibility (the ethics rules); (2) creating the Lawyers Professional Responsibility Board; (3) appointing board members and the board's administrative director; (4) raising the attorney registration fee from $7 to $25 to finance the discipline system; and (5) adopting rules for discipline procedures. On February 1, 1971, the new system was up and running.

The Lawyers Board's creation became an ongoing process. The Minnesota Supreme Court adapted the Clark Committee process to Minnesota. Every 10 to 15 years, the Court appointed a committee to review the Lawyers Board and director's office. The committees issued reports, recommending changes in rules and practices. Additional, more frequent review processes were built into the professional responsibility system. We will take a closer look at these committees and at the board's first iteration, but first a look back at lawyer discipline in Minnesota before 1970 will set the stage.

The old days

The Roman poet Juvenal posed a famous, pointed question: "Who will guard the guardians?" As to Minnesota lawyers, answers to this question evolved over many decades.

In 1891, the Minnesota Legislature created the Board of Law Examiners (BLE). From the early 20th century until 1971, BLE was the petitioner in public lawyer discipline cases. There were not many. By mid-century, public discipline was imposed on attorneys about twice a year.[1]

Although the Minnesota Supreme Court always played the primary role in regulating the legal profession, the Legislature played a much greater role until the 1930s than it does today. A 1921 statute provided that complaints against lawyers were to be filed with the Supreme Court, and the Court was directed to appoint some person to investigate such complaints. In compliance with this statute, the Court adopted a rule providing that such complaints were to be investigated by BLE.[2]

The Legislature also enacted statutes of limitations for discipline cases. Initially, the Court regarded them as binding. In one discipline case the Court held, "This proceeding not having been instituted within one year of such discovery [or two years of occurrence], the charge is barred [by statute] and for that reason must be dismissed."[3]

Gradually, the Court came to assert that its inherent power includes regulation of the legal profession. Three cases—from 1908, 1936, and 1973—show the evolution of the Court's position. In the first case, the Court stated, in suspending a lawyer's license, "The courts are not agreed as to whether an attorney can be removed from office on other than statutory grounds." In the second case, the Court asserted regulation of attorneys as an inherent judicial power. In the third case, the Court held that legislative attempts to intrude on the court's authority to regulate lawyers were unconstitutional.[4] The legislative incursions in the third case involved both the financing of the lawyer discipline system and the setting of standards for professional conduct.

Beginning in the early 20th century, the MSBA played an important role in lawyer discipline. Although in many states lawyer membership in bar associations is compulsory, MSBA membership has always been voluntary and less than universal. By the 1920s, at least some MSBA District Ethics Committees (DECs) were formed and played important roles. The DECs undertook initial reviews and could dismiss complaints or issue private disciplines. The DECs referred serious matters to a statewide MSBA committee, which in turned referred some matters to BLE for prosecution.

Standards for attorney conduct evolved slowly. The earliest Minnesota discipline cases either did not cite authorities, or cited the common law and the attorney oath of admission.[5] As discipline cases slowly accumulated, precedents could be cited. In 1908, the ABA adopted the Canons of Professional Ethics. The canons were the first nationwide attempt at setting professional standards. Some canons were drafted as statements of principle, or even exhortation, rather than as specific rules whose violation would lead to discipline. Although the Minnesota Supreme Court gave the canons great weight, the Court did not adopt them until 1955. By 1961, the Court had also adopted rules for discipline procedures.

Setting the stage

How did the discipline process work in Minnesota in the 1960s? What problems existed? Answers to these questions will explain why the Lawyers Board was created.

On April 17, 1969, Kenneth M. Anderson wrote a letter to Chief Justice Oscar Knutson, sharing observations about the Minnesota system. Anderson was a Gray Plant lawyer who served as BLE chair, then as the first Lawyers Board chair. Anderson was "alarmed at what seems to me to be a failure of the self-policing system in Minnesota." The failure came from the inadequacy of volunteer efforts, the insufficiency of funding, the paucity of precedent for guidance, and a general unwillingness among lawyers to police themselves or to be critical of fellow lawyers. Anderson recommended increased financing, professional staff, provisions for probations, and review of district committee dismissals.

District committees had authority to investigate, dismiss, issue private disciplines, issue public reprimands, or refer matters to the MSBA statewide committee. There was wide variety in the procedures and effectiveness of these local committees.

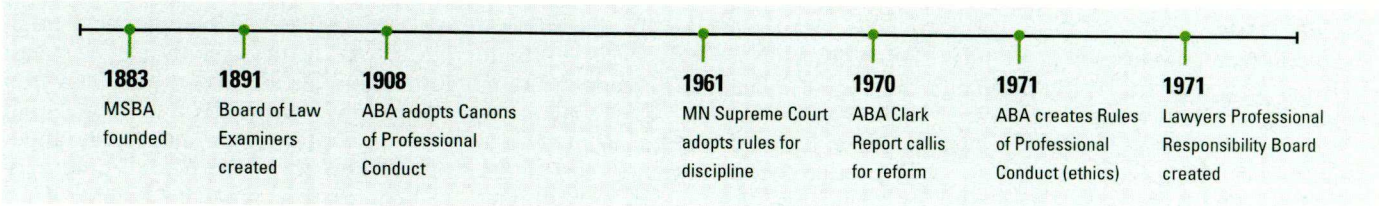
On October 23, 1969, the Court extensively amended the Rules for Discipline and Reinstatement of Attorneys. The amendments gave the MSBA statewide committee and the BLE more review authority.

In 1971, the first administrative director reported, "[W]e found that a number of the district committees were not functioning at all, and others were not functioning efficiently. We found that the committees were uncertain about procedures; they had no full-time central source to contact for advice or assistance. Too frequently, because of the awkward and underfinanced procedures, complaints did not receive the attention they should have received." The director also reported, "there were four district ethics committees which were not functioning at all" and "a great many of the committees were both confused and discouraged."[6] The primarily local character of attorney discipline procedures was reflected in what appears to be absence of a comprehensive, authoritative statewide list of licensed Minnesota attorneys until 1961.

In the early 1980s, as an assistant director at the Office of Lawyers Professional Responsibility (OLPR), I observed most district committees doing an excellent job. However, two cases showed me the inadequacy of primarily local systems. The first file was closed in the 1960s. A metro-area district committee had dismissed a complaint. The committee reasoned that because the lawyer had restored the client funds he had misappropriated, the problem had been resolved. By the 1980s, and today, there would be an audit of the entire trust account. There would be an investigation into whether the restitution followed or preceded detection of the shortage. Disbarment or suspension, rather than dismissal, would be the likely disposition.

The other case was charged in 1982, but the respondent's misappropriation of client funds stretched back years, even decades. The respondent practiced in a rural area. When I went there to investigate, I learned that everyone, including other lawyers, was afraid of the respondent. In the local probate court, lawyers had an honors system for checking out court files and the local probate judge for many years had been a farmer, not a lawyer. Court files relating to alleged misappropriations were missing. Respondent had apparently been stealing client money for decades, with impunity until the discipline proceeding. Everyone knew and no one did anything. A discipline trial resulted in findings of extensive misappropriation.

The Clark Committee recommended replacing local volunteer committees with a single, statewide committee that employed professional staff. Minnesota adopted a hybrid system.



The Minnesota discipline system prior to 1971 had structural and operational problems. Financing was an example of both types of problems. Before 1971, the system was financed by tax revenues, attorney registration fees, and contributions from the MSBA. The Court found this system "improper" for several reasons. The system covered all lawyers, but the MSBA contribution came solely from MSBA members. If the Court's claim to exclusive inherent authority was to be well-anchored, lawyers should provide financing, rather than the public. And the sum of financial support from lawyers was insufficient to support a central system and professional staff.

Delay was a perennial and most serious problem. Delay was built into a system that required transfers of cases from a local committee, to a state committee, to a state board, to a Supreme Court referee, to the Court itself. Delay was also built into a system that depended primarily upon voluntary lawyers, with busy schedules and little statewide oversight. The discipline procedure rules emphasized, then as now, "It is of primary importance to the members of the Bar and to the public that complaints involving alleged unprofessional conduct of attorneys be *promptly* investigated and disposed of..." (emphasis added).[7]

Development of uniform and appropriate standards was another challenge. Local volunteers sometimes showed favoritism toward misbehaving colleagues. Different districts treated the same misconduct differently. Even at the Supreme Court level, there were so few cases that, in Kenneth Anderson's words, "there is really no adequate body of common law to guide either the practicing lawyer or the various discipline agencies." For example, Anderson advocated for something we might assume always existed: "a rule adopted by the court stating that commingling of client funds with an attorney's own funds is improper..."

In Minnesota, the work of the Clark Committee was closely monitored. One Minnesota lawyer (John McNulty) was a committee member, and other Minnesota lawyers (especially Kenneth Anderson) closely watched the committee's work. In April 1969, 10 leaders of the Minnesota discipline system, including Justice Donald Peterson, attended an ABA conference in Chicago. They brought back to Minnesota an expectation, even prior to the report's release, that major changes were needed.

The system established in 1971 is in many ways structured like today's system, but there are important differences. The most important difference is that the 1971 system followed the model of state agencies, in which the board had primacy over both policy and cases. As the numbers of lawyers and cases greatly increased in the 1970s and 1980s, the involvement of the board in cases became unwieldy. In 1983, rules amendments shifted some responsibilities for cases from the board to the office now called "director" rather than "administrative director."

1971–1984

Minnesota's new system addressed many of the problems found by the Clark Report, but other problems required more time to address. In the board's early years, the procedural rules were frequently and extensively amended. Soon after adoption, for example, the rules were amended to provide for probation as a discipline disposition, to require district committees to notify the administrative director of the receipt of a complaint, and to add three public members to the board.[8] Minnesota became a leader by including public members on the Lawyers Board, District Ethics Committees, the Board on Judicial Standards, and the Client Security Board.

In 1977, amendments changed the district committees in several ways: (1) They no longer could dismiss complaints or issue private disciplines; (2) committee chairs would be appointed by the Court; (3) committees should have 20 percent non-lawyer members; and (4) committee reports were due 45 days after a complaint, rather than 90 days.[9]

1984–1986: Challenges and rebirth

In the mid-1980s, two developments created a turbulent chapter in the board's history.

The first development was rapid growth in the discipline system. In 1971, there were 400 complaints against lawyers and about a dozen public disciplines. In 1985, there were 1,244 complaints and 46 public discipline decisions. The system did not keep pace. The director's office became understaffed. Complaints were not handled promptly.

When I joined the office in 1981, there was a "file bank"—a large group of complaint files that were not assigned and were inactive. The problem was grave. "Prompt" disposition of complaints was, by rule, "of primary importance." The office was violating its own basic rule.

The explosive increase in complaints made some procedures and structures outmoded. Among these was the involvement of Lawyers Board hearing panels in numerous cases. For example, I presented a case in the early 1980s in which the director and a respondent attorney, represented by counsel, signed a stipulation in which misconduct was admitted and a specified discipline was recommended to the Court. Instead of filing the stipulation and disciplinary petition with the Court, however, by rule the director first had to present the matter to a board panel for approval. The panel conducted an evidentiary hearing before approving the stipulation. Rules to streamline procedures were badly needed.

The second development was that the director's office lost the confidence of many Minnesota lawyers. In 1984, an agenda item at the MSBA convention concerned whether to support the Lawyers Board's request that the Court increase the attorney registration fee to fund staff additions in the director's office. Staff was badly needed and the request should not have been controversial. However, scores of lawyers spoke against the proposal. The most common complaint was that the director's office did not proceed fairly in discipline cases.

A compromise was brokered. The fee increase would be approved. And the Court would appoint a committee to review the director's office and Lawyers Board, and to recommend changes. What began as an ad hoc solution to a serious but transitory problem became in-

Delay has been the most persistent problem. Since the 1980s, the Lawyers Professional Responsibility Board has had a policy that there should be no more than 100 files that are at least a year old. The most recently reported number of year-old files is 139.

stitutionalized. The Court has appointed review committees every 10-15 years, not just to deal with a crisis, but to regularize the process of review and change.

The 1980s committee was, by far, the most important of the review committees. That committee worked long and hard with the Lawyers Board and the director to identify problems and recommend solutions. The work product, involving extensive amendments to the procedural rules, resulted in the essentials of a system that remains in effect today.

An important example of the streamlining of procedures in the 1980s involved rule amendments to reduce the number of hearings in certain cases. Going forward, petitions for discipline could be filed in the Court without board panel involvement where there were reasonable guarantees that a public accusation of serious wrongdoing had a substantial basis, such as criminal convictions, civil findings of fraud, admission of serious misconduct, or respondents' own waivers. The most serious cases received expedited treatment.

Then and now

By the mid-1980s, the essentials of the Minnesota lawyer professional responsibility system were in place. Perhaps surprisingly, the annual number of complaints has remained fairly stable. In 1985-87, the average was 1,189, while in 2014-6, the average was 1,239.

In recent decades, there have been many changes in the professional responsibility world. Technology has fostered great improvements, such as the board website. The law of lawyering has matured, with a wealth of research resources and case law precedents. Ethics expertise has become widespread in law schools, law firms, and among malpractice insurers. But the essentials of the system born nearly 50 years ago remain in place.

One of the essentials is review. The board's Executive Committee closely monitors the director's performance. From a greater distance, the Court's liaison justice monitors the system's performance. The board reviews the director's performance every two years and makes a recommendation to the Court regarding re-appointment. The director and board file annual reports. The board and the director have recently embarked on a five-year strategic planning process.

Delay has been the most persistent problem. Since the 1980s, the board has had a policy that there should be no more than 100 files that are at least a year old. In the early 1980s, there were regularly more than 200 such files, and many were consigned to the file bank. A staffing increase, streamlined rules, and other changes resulted in a long-term resolution of the problem. In 2008, however, a Supreme Court committee reported that there were about 150 year-old files and delay was the only serious problem in an otherwise well-functioning system. The report should have engendered reform, but instead the problem became much worse. By 2014 there were 231 year-old files. The alarm belatedly sounded and the Court, through its liaison justice, emphatically directed improvements. The most recently reported number of year-old files is 139.

The legal profession has come to occupy a very large place in American society. Effective professional regulation is a necessity. Nearly 50 years ago, bar and court leaders recognized the need and responded strongly and swiftly. And for over 30 years, review and improvement have been institutionalized, through periodic review committees and other procedures. With only a few exceptions, the review committees and processes have helped prevent repetition of the problems reported by the Clark Committee. ▲

Notes

[1] 3/15/1952 letter of Minnesota Supreme Court Clerk to U.S. Treasury Department.

[2] Section 5697 G. S. Minnesota (1921); Supreme Court Rule, adopted 5/20/1921.

[3] *In re Buck*, 214 N.W. 662, 662-3 (1927). The Court ceased recognizing the statute of limitations in discipline cases many years ago. *In re Heinze*, 233 Minn. 391, 395, 47 N.W.2d 123, 125 (1951).

[4] *State Bd. Of Law Exam'rs v. Hart*, 104 Minn. 88, 112, 116 N.W. 212, 214 (1908). *In re Tracy*, 197 Minn. 35, 266 N.W. 88 (1936). *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

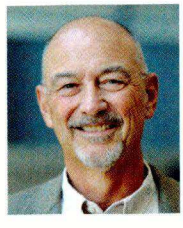
[5] *State Bd. of Examiners v. Dodge*, 93 Minn. 160, 100 N.W. 684, 689 (1904); *In re Lane*, 93 Minn. 425, 101 N.W. 613 (1904).

[6] R. B. Reavill, *District Ethics Committees*, Bench & Bar of Minn., Jan. 1972; R. B. Reavill, *Progress Report*, Bench & Bar of Minn., Feb. 1972.

[7] Rule 1, Rules of the Supreme Court for Discipline and Reinstatement of Attorneys, as amended 10/23/1969. The essence of this rule remains in effect today, but "fairness and justice" were added as primary values in or about 1987. Rule 2, Minn. R. on Lawyers Prof. Resp.

[8] R. B. Reavill, *Progress Report*, Bench & Bar of Minn., Feb. 1972.

[9] R. W. Bachman, Jr., *Report*, Bench & Bar of Minn., Jan. 1977.



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