

By MARTIN COLE

## Changing for the Better

The Minneapolis *Star Tribune* recently ran a front-page story about lawyer discipline,<sup>1</sup> which accurately reported that the number of lawyers publicly disciplined had risen from 26 in 2010 and 2011 to 38 in 2012. The article further reported that the number was on pace to exceed that total in 2013, and possibly match the record total of 55 public decisions for any calendar year.<sup>2</sup> The article was intelligently written and researched, and noted that no one simple explanation accounts for the apparent spike in serious misconduct.

One explanation of legitimate concern to the profession that was noted in the article is that more attorneys—perhaps more than ever before—are practicing solo, and with less experience, preparation, or mentoring. In an era of economic instability, this development can lead to lawyers taking too many cases, especially too many cases in areas in which they are not fully qualified. Problems can and do ensue. On the other end of the spectrum, lawyers are continuing to practice longer as they age; some continue beyond when they should retire. Again, problems can occur. We will continue to need to address these issues in the future.

I believe the *Star Tribune* authors intended to report, but not necessarily draw conclusions. Nevertheless, what

many people simplistically took away from this article was that more lawyers are committing more misconduct, maybe more than ever before. But is that an accurate assumption, especially the last part? I would suggest it is not accurate. While there certainly have been many changes in the legal profession in the past 25-30 years, that collectively lawyers are

inherently less ethical or more dishonest is not one of them. Indeed, there is evidence that Minnesota lawyers as a group in fact may be changing for the better.

### Statistics

First, it is worth noting that the 26 public disciplinary actions by the Minnesota Supreme Court in 2010 and again in 2011 were actually below the average for the past 30 years of 34 per year (if there is ever a truly “average” year for lawyer misconduct). Annual totals have varied from the record high of 55 to a low of 19. Telling is that the high water mark occurred back in 1990, while the low occurred in 2004. That hardly indicates that lawyers are worse now than before. Further, in those same two years, 150 complaints were resolved with private discipline in 1990, while private discipline was issued in only 114 instances in 2004. The point is that peaks and valleys have regularly occurred over the years, and that with a full historical perspective in mind, the number of cases meriting public and private discipline actually has remained remarkably constant for the past 30 years. Had it been written two years earlier, the *Star Tribune* article might have been analyzing why cases of attorney discipline had decreased, rather than why they have increased in the latest two years. Also of note is that the number of complaints filed has not increased over that same time period, although here too there have been periodic increases followed by decreases. On net, however, the number has remained in a reasonably narrow range.

There are of course many more lawyers today than in 1990 (approximately 10,000 more), and based upon that statistic, one would expect that the number of complaints also would have increased significantly, if only to maintain a similar complaint:lawyer ratio. But that has not happened, despite the ever-increasing lawyer population. Maybe that is the real story. Despite the increased lawyer population, and despite not having provable reasons for temporary increases or decreases in serious misconduct, are there reasons why over the long haul, neither complaints nor discipline has increased dramati-

cally? Perhaps ... or at least we would like to think so.

### Reasons?

Focusing our inquiry at the beginning of a new lawyer's career, we note that it may be that professional responsibility is emphasized in the law schools, and integrated into the entire law school curriculum, to a far greater degree than a generation ago. Law schools certainly claim that this is true and I believe there is a more fundamental awareness of ethics and a discouraging of student competition now than when I attended law school. The multistate professional responsibility exam has been part of the bar exam for many years now, and requires at least one focused review of the Rules of Professional Conduct as part of the preparation for becoming a lawyer. Mandatory Continuing Legal Education requirements in ethics and elimination of bias also cause lawyers to continually be aware of and exposed to professional responsibility issues, at least periodically.

Is it possible that the extra emphasis on professional responsibility education has helped to lower the ratio of complaints to lawyers? Evidence is at best anecdotal, but we need not be above claiming some credit. After all, the attorneys in the Office of Lawyers Professional Responsibility (OLPR) speak at upwards of 50 CLE seminars every year; we certainly hope someone is listening and taking heed. Writing these columns and the monthly pieces our staff prepares for *Minnesota Lawyer* is another educational function our office provides; it too may be in some small way responsible for preventing increases in complaints and discipline. A substantial number of other sources on professional responsibility issues also exist today (treatises, articles, list serves), far more than when I started practicing law.

The availability of competent professional advice may be a factor as well in why complaints and discipline have not increased dramatically. There are now several experienced private lawyers who not only represent attorneys in lawyer discipline matters, but are available to advise and assist other lawyers establish and maintain an ethical practice,



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## Professional Responsibility

or answer specific questions. At one time, attorneys who could provide such legal services were far rarer. Many malpractice insurers now have riders available specifically for ethics issues; of course insurers have always been able to provide advice to lawyers on avoiding malpractice claims, which often overlap areas of ethics concerns.

The Director's Office's advisory opinion service also plays a role in keeping the percentage of complaints down. In the past year, over 2,200 telephone and electronic advisory opinion requests were handled by the director's staff attorneys. A direct correlation of course is difficult to establish (how do you prove how many violations of the ethics rules did not occur?), but at least intuitively we believe that immediately helping lawyers who have ethical issues enables some of them to avoid having a complaint filed against them.

Another aspect of the profession that may be preventing complaints is the greater availability of help for lawyers with chemical dependency issues or mental health issues. Lawyers Concerned for Lawyers (LCL)<sup>3</sup> and similar services provided through private health insurers are now more widely known and used by lawyers, even if only during times of particular stress. The early involvement (or intervention if needed) of professional counseling may save a life; it also may prevent further misconduct and so, at a minimum, help some practitioners avoid receiving multiple complaints.

### Conclusion

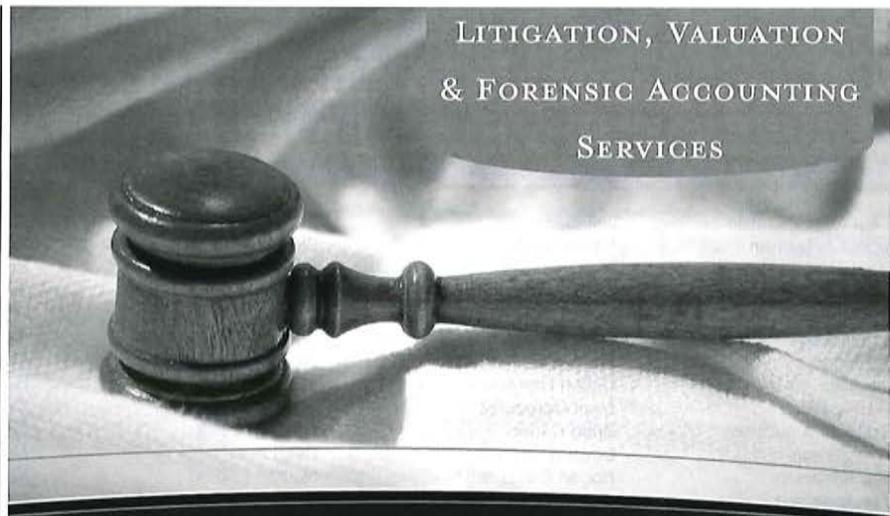
It likely goes too far to postulate that lawyers are more ethical than they were 25 years ago. But it seems equally true that assuming the contrary—that lawyers are in any way less ethical than before—also is a fallacy. While numbers can lie, in this instance they do not. With the increased emphasis on education and awareness of ethical issues, and with greater resources available to assist lawyers, percentage-wise there are fewer complaints per lawyer today than there were 25 years ago and fewer serious complaints per lawyer as well. All in all, maybe we are changing for the better! ▲

### Notes

<sup>1</sup> "Rising number of Minnesota lawyers punished for misconduct," *Star Tribune*, May 12, 2013.

<sup>2</sup> This statistical trend also was noted in "Summary of Public Disciplines," in the March 2013 issue of this magazine.

<sup>3</sup> LCL's website address is <http://www.mncl.org/>.



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