

By Martin Cole

## If It Ain't Broke . . .

In exactly equal numbers, the Minnesota Supreme Court has appointed directors of the Office of Lawyers Professional Responsibility and the Client Security Board<sup>1</sup> from within and from outside the Director's Office. In recent memory, the Court promoted Bill Wernz and Ken Jorgensen from within to be director, while it hired Marcia Johnson and Ed Cleary from outside practice. This varied approach has ensured that Minnesota's disciplinary system enjoys both the benefit of experience and occasional renewed vitality.

I have recently been appointed as director to replace Ken Jorgensen, following his appointment to the 10th District Court bench. I wish to thank the Supreme Court, the Lawyers Board, and the Client Security Board for their confidence in me and for the opportunity I have received. I become part of the internal promotion group, having most recently served as first assistant director. I hope that, after 21 years in the disciplinary and client protection systems, I will be able to maintain the position's high level of experience and ethics knowledge.

For biographical purposes, I was born and mostly raised right here in Minnesota, and am an alumnus of the University of Minnesota (undergraduate and law school). After briefly practicing with a Minneapolis law firm, I have been employed in the lawyer disciplinary system for over 21 years.

Many of you already are familiar with

me from having talked with me during one of the over 2,000 telephone advisory opinions I have given over the years, or from Continuing Legal Education presentations or talks at one of the area's law schools, or from bar association committee work. A few know me from having sat on the opposite side of the courtroom during a discipli-

nary prosecution. I've met several more of you at recent district bar association meetings. The upcoming state bar convention offers yet another opportunity for me to meet Minnesota lawyers and judges.

We have solid reasons to be proud of how well self-regulation continues to work in Minnesota in terms of lawyer discipline, client security, continuing legal education, and our expanding role of providing public information. Thus, my appointment is truly reflective of an "if it ain't broke, don't fix it" approach by the Court towards Minnesota's lawyer disciplinary system. An unbroken system isn't just an accident; it is the product of many years of effort by an interested and involved Supreme Court, state and local bar associations that are supportive of professional responsibility issues, and hundreds of volunteer lawyers and nonlawyers who have served on the Lawyers Board, the Client Security Board, district ethics committees and bar committees. It is also the result of the

hard-working attorneys, paralegals and support staff within the Director's Office. Finally, I am keenly aware that the disciplinary system owes a great debt to my most immediate predecessors, Ed Cleary and Ken Jorgensen, who have raised the visibility and credibility of the Director's Office to new heights.

### ... Don't Fix It?

So, can we smugly sit back and assume that our system will remain excellent? Are there no areas in which we cannot improve? The answers are obvious: no matter how good something is, there is always room for improvement.

The core function of a lawyer discipline office is, and must be, investigation of complaints and prosecution of those matters that warrant discipline. The attorneys in our office are, first and foremost, trial lawyers (prosecutors). We must give priority to the cases that may result in disbarment or suspension, and promptly bring these to conclusion, if protection of the public is truly our primary purpose. Many of these cases are complicated and time-consuming. Nevertheless, we can improve and better expedite some of these matters. We will also strive to achieve consistent results with the help of the Supreme Court.

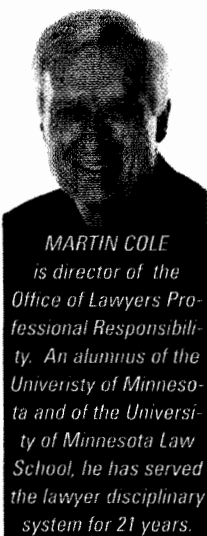
What might be called our "outreach" or "proactive" function has grown in the past few years into an almost equal core function. Teaching at CLEs, providing telephone advisory opinions, writing articles for *Bench & Bar* and other publications, speaking to civic organizations, and participating in bar association activities compete with prosecuting disciplinary cases for our staff's limited time. Our attorneys and support staff also handle several administrative duties, including providing staff services to the Client Security Board, regulating professional firms filings, monitoring attorneys who are on probation, and answering disclosure requests concerning lawyers' disciplinary history.

Minnesota's telephone advisory opinion service truly is special. To be able to call the Director's Office when facing an ethical dilemma, talk with one of the staff attorneys — almost always that same day — and to receive real advice on how to proceed is indeed remarkable, so remarkable that we may be in danger

## Directors of Lawyers Professional Responsibility

1971 - Date

Richey Reavill	1971-74
Paul Sharood	1974-75
Henry McCaer	1975
Walter Bachman	1976-78
Michael Hoover	1979-85
William Wernz	1985-92
Marcia Johnson	1992-97
Edward Cleary	1997-2002
Kenneth Jorgensen	2002-05
Martin Cole	2006-Date



**MARTIN COLE**  
is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 21 years.

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of becoming victims of our own success. The number of advisory opinion calls has continued to increase in recent years to over 2,000 each year.

This is a good thing, we believe, since we perceive a correlation between the number of advisory opinions issued and the fact that complaints have not increased in recent years.<sup>2</sup>

Only attorneys experienced in the Director's Office provide advisory opinions; a thorough familiarity with the Rules of Professional Conduct is required to handle such calls promptly. These are, of course, the same senior attorneys who handle many of the most complex litigation matters. If the trend of more advisory opinion calls continues, one or the other of our core functions could suffer. That cannot be allowed to occur.

The Director's Office and the Lawyers Board therefore will be exploring ways to increase our ability to handle advisory opinion requests without expending considerably more resources to do so. Some of the callers now receiving a face-to-face response seek only basic information about a particular rule, which does not require an in-depth discussion. Perhaps a larger amount of such basic information can be made available on the Office's website, [www.courts.state.mn.us/lprb](http://www.courts.state.mn.us/lprb), so that lawyers (and the public) will be able to "build their own advisory opinion" without the need of a return call. A sampling of frequently asked questions could be included. Other possibilities will be explored, so we can continue to fulfill the increased expectations of the bar in this area, without sacrificing our disciplinary core function.

### More Discipline?

In April, Minnesota Public Radio reported that this year there has been an increase in the number of lawyers publicly disciplined by the Supreme Court.<sup>3</sup> Since the overall number of complaints has remained comparatively constant in recent years, perhaps this is just a statistical oddity. It could reflect that the percentage of complaints involving serious misconduct has increased, however. If that is so, it is troubling.

Certain types of misconduct will always exist: the "hardy perennials" of our trade. Lack of diligence, failure to communicate with a client, or failure to

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return client files upon termination of representation all remain legitimate sources of client discontent. These failures rarely result in public discipline, how-

ever, absent other misconduct or a history of such misconduct.

There will also always be those who commit more serious misconduct. Dishonesty, for example, is more serious, and at least anecdotally is growing. For too many attorneys, truth and ethics remain relative.<sup>4</sup> Of course this is true in many aspects of society, and while zealous advocacy allows putting facts in a light most favorable to your client's position, the facts must have some connection to the truth. Attorneys should remain vigilant against crossing the line. We should not accept attorneys' routinely misleading courts, opposing parties, or clients simply because the whole truth is inconvenient. This is an area in which attorneys should expect tough enforcement policies from the Director's Office.

Finally, as reported by Board Chair Kent Gernander in the February 2006 *Bench & Bar*, there may in the next year or so be a new review committee created to examine the workings of the lawyer discipline system as a whole. Such periodic review should be welcomed. If there are areas in which we can improve, we need to be instructed. I believe that such a committee more likely will determine that our system "ain't broke," and does not require significant reform. ▲

### Notes

<sup>1</sup> Since 1987, the Office of Lawyers Professional Responsibility has provided staff services to the Minnesota Client Security Board. Thus, since that time, the director of the Office has also been the director for the Client Security Board.

<sup>2</sup> See Gernander and Lundberg, "What Works Well and Why," *Bench & Bar of Minnesota*, February 2006.

<sup>3</sup> Minnesota Public Radio aired such a story on April 21, 2006, which should be archived at their website [www.minnesota.publicradio.org](http://www.minnesota.publicradio.org).

<sup>4</sup> See Cole, "Truth or Consequences," *Bench & Bar of Minnesota*, December 2003.