

A LOOK BACK, A LOOK AHEAD

By
Edward J. Cleary, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (October 1997)

In the eight years immediately following the creation of a full-time position for a director of lawyers' professional responsibility (1971-1979), four men held the position for periods ranging from three months (Harry McCarr) to three years (Walt Bachman). In the past 18 years, there have been only three directors for periods ranging from four and one-half years (Marcia Johnson, the most recent director, who is now a member of the Attorney General's Office) to seven years (William Wernz).^{Ftn 1}

On July 28, 1997, as I began serving as the current director of the Office of Lawyers Professional Responsibility, I was struck by the apparent consensus that this position is subject to what might be called "natural" term limits. Whether by accident or design, each director appears to be given approximately five to seven years to make his or her imprint on this office. This may be due to personal reasons or professional advancement; or the limited time period may result from the stress inherent in the position, that is, the almost impossible task of consistently pleasing both the members of the profession and the aggrieved members of the public. While practicing as a criminal defense attorney, I felt that the public often saw my role as an evil necessity; as director, I now perceive that it is the members of our profession who occasionally see this position as a necessary evil.

If in fact there is an unwritten "term limit" for this position, it could well be argued that turnover in positions of public trust, particularly positions involving the volatile area of professional discipline, is not only appropriate but is in the best interests of all concerned, including the director who is thus allowed to proceed as he or she deems proper, without becoming too wedded to the job.

The downside to all of this is that the position has not historically attracted candidates who "have been there," that is, lawyers who have practiced law extensively in public or private practice, who have met a payroll, handled trust accounts, tried cases, written appeals, and built a practice. Many of you fit that description and know how hard it is to leave for vacation, much less for a public position of indeterminate length. Yet you also know that the interests of the public and the profession are best served by the willingness of candidates who fit that description to serve in this office, at least periodically, perhaps in rotation with those candidates whose background is primarily in the field of professional discipline, as mine is not.

OBSERVATIONS

A St. Paul native, I received my education, both undergraduate and law school, at the University of Minnesota. In the 20 years since, I have practiced law both privately and publicly. Although my experience

is primarily in the area of criminal defense, I have tried cases ranging from homicides to dram shop litigation to securities arbitration and have written and argued both civil and criminal appeals, both locally and nationally. I have also tried my hand at writing and teaching, particularly on the First Amendment. In short, I have followed a nontraditional legal career path and it appears I am continuing to do so.

Like many of you, I have been active in the Bar and served a term on a district ethics committee. I felt then, as I feel now, that every attorney should try to serve a term on their local district ethics committee, if not out of altruism, then out of self-interest. Ask any lawyer who has served on a district ethics committee about the experience and chances are he or she will tell you it is sometimes difficult and time-consuming but often rewarding work. In addition, they are likely to tell you that they are better lawyers for the experience. Investigating and hearing the results of other investigations shows all of us the pitfalls of the practice, sometimes obvious, often insidious. While a small percentage of the cases result in disbarment, many others result in no discipline. Even those complaints offer a lesson about the vagaries of our profession . . . and how to avoid them.

A LOOK AHEAD

Of course, there will always be those lawyers who are driven by darker forces. While I knew we were fortunate in Minnesota in having such an extensive network of volunteer professionals to monitor our members, my first few weeks as director has taught me a great deal more. To begin with, I have inherited a very talented and experienced group of nine attorneys and 15 support personnel. Most of these attorneys have had some experience in private practice and all have high academic qualifications. They are dedicated and very professional and perhaps have not received the recognition due them for their ability to do their job well in the face of hostility and criticism.

The members of the Lawyers Board,^{Ftn 2} as well as all of the dedicated volunteer members of the individual district ethics committees around the state, form the solid foundation on which our professional responsibility system rests. They are generous with their time and their expertise and are largely unheralded for what they accomplish. Without them, we would be unable to function. Finally, the members of our Supreme Court have demonstrated a commitment to this office that often goes unnoticed. Their mandate is perhaps the hardest of all: to decide the proper form of discipline for certain members of our profession. There may be no other area of law quite as dynamic and fluid in the sense that the decisions are often unique to the circumstances before the Court, resulting in precedents of somewhat limited value, as some decisions enlighten and others obscure.^{Ftn 3} While all of us can agree as to certain forms of unacceptable professional conduct and the appropriate sanctions, past a certain point consensus is more difficult, both for lawyers and justices. Life experience, both personal and professional, shapes one's judgment in deciding where resources should be allocated and where discipline should be emphasized. This observation may also apply to members of the Court, who bring their own unique pasts to bear on issues of professional discipline. It is often distasteful to decide these issues and the Court's willingness to do what must be done while educating the legal community on the bounds of acceptable professional conduct is essential to the viability of the Code and of this office.

Of course, problems of professional discipline were with us long before 1971. Earlier, the Practice of Law Committee of the Minnesota State Bar Association was changed to the Committee on Professional Responsibility and Discipline. Later, the Supreme Court issued a Rule on Professional Responsibility and Discipline in response to the promulgation of the Code of Professional Responsibility by the House of Delegates of the American Bar Association in 1969, and that led to the creation of this office in 1971. Since

then, the number of licensed attorneys in the nation has almost tripled.

So is the need for disciplinary enforcement due to the number of lawyers and the desperate measures some take in defiance of the Code, often out of greed and other indefensible motives? More to the point, why do we as a profession go to so much trouble to enforce the accepted standard of ethical practice among lawyers? For the "favorable press"? Hardly. Every time the media report another disbarment and the conduct that led to it, our public standing is shaken, as we continue to be grouped by the public with politicians and used car salesmen for trustworthiness, even as we demonstrate our ability to self-regulate.

No, we accept the need for this type of oversight for other reasons. Think back to when you first considered a legal career. It may have been a member of your family or someone you read about that inspired you . . . or it may have been a Porsche-driving attorney on television. Where we received our inspiration to become a member of this profession often is reflected later in the choices we make in our career. Some view the law as a license to steal or at least to scam but the vast majority of us feel otherwise: that despite the hardships in the day-to-day practice of law we are very fortunate to be allowed to make our living in this manner and to be a member of a profession with such an honorable tradition. So the procedures and rules of the disciplinary system may change, the names of the volunteers making up the committees and boards may also change, as well as the occupants of the Director's Office. The one constant has been and will be the dedication of the legal community throughout our state to policing our own . . . not just to appease the public but because we are a proud profession and we know it is the right thing to do.

NOTES

¹ *The directors and terms they served: R. B. Reavill (1971-1974); R. Paul Sharood (1974-1975); Henry W. McCarr (1975); R. Walter Bachman, Jr. (1976-1979); Michael J. Hoover (1979-1985); William J. Wernz (1985-1992); and Marcia A. Johnson (1992- 1997).*

² *There are currently 23 members making up the Lawyers Professional Responsibility Board, led by Chairman Gregory M. Bistram, whose term expires on January 31, 1998. The chairman presides over 9 public members and 13 lawyers.*

³ See Charles E. Lundberg, "Recalibrating Attorney Discipline," *Bench & Bar* 53:4 (April 1996), pp. 20-22.