

LOOK & LEARN

By

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Reprinted from *Bench & Bar of Minnesota* (January 2012)

As we are deep into the holiday season as I write this column, it's not too soon to look back at the disciplinary results of 2011 and forward to any changes expected in 2012. The Lawyers Professional Responsibility Board and the Office of the Director of Lawyers Professional Responsibility submit an annual report to the Minnesota Supreme Court each year in July, corresponding more to the judicial branch's fiscal year. For most followers, however, calendar year-end reviews are more usual and meaningful.

Complaints & Decisions

Overall our system continues to work and to work well. Sure, there will always be people who interact with the lawyer-discipline system and come away unhappy (the complainant who cannot understand why his "say so" is not sufficient evidence to support his complaint; or on the other hand, the attorney who feels aggrieved having even to respond to an allegation since we should have known intuitively that the complaint could not be true). Far more common this past year were heartfelt statements of gratitude, especially from aggrieved individuals in several cases that involved multiple complaints and particularly difficult respondent attorneys who had made life miserable for clients, opposing counsel, and courts alike.

In 2010, our office received 1,365 complaints, an increase of 13 percent over the previous year. In 2011 (with a few days remaining), the number will be down slightly, around 1,320, which remains generally up from previous years. The total number of open files in the system has been whittled down this year, but will nevertheless remain slightly above 600 at year's end. We will continue to work diligently to reduce that number even further this coming year.

There will again be fewer than 30 decisions recommending public discipline this year, with 25 having been issued through mid-December. This is about the same as last year, but fewer than the historical average. There are, however, 34 cases pending at

various stages of the public disciplinary process; several already are under advisement by the supreme court, either following oral argument or submitted upon proposed stipulation. It appears that 2012 could see an increase in public disciplinary decisions. Only two attorneys have been disbarred thus far in 2011, a number obviously below the historical average.

It would be nice to report that fewer public discipline decisions and fewer disbarments indicate that fewer acts of serious misconduct are occurring. Unfortunately, that may not be true. The two disbarments^{Ftn 1} involved serious dishonesty, including misappropriation of client funds; one resulted in a federal criminal conviction. Seventeen lawyers also were suspended in 2011, for conduct ranging from misappropriation (where substantial mitigating factors were found) to criminal convictions for possession of cocaine or tax evasion to multiple instances of neglect or noncooperation with the disciplinary investigation. Pending public cases exhibit most of the same types of serious misconduct. In addition, approximately 110 private admonitions for less serious misconduct have been issued this year. Despite all the educational activities undertaken by our office's staff and by Lawyers Board members, including presentations at many Continuing Legal Education seminars, a small percentage of "bad apples" will remain among us, some of whom take up a disproportionate amount of the system's resources before ultimately being disciplined.

Rule Changes

This past year, amendments to two of Minnesota's Rules of Professional Conduct (MRPC) took effect on July 1. Rules 1.5 and 1.15 were changed to eliminate the inaccurate terminology "nonrefundable" fee or retainer from Minnesota lawyers' lexicon. This change was debated and written about extensively before being promulgated, and attorneys were given a long time to adjust their practices between the issuance of the court's order and its effective date. A few complaints continue to trickle in against lawyers who have been slow to alter their own fee practices, but overall compliance seems strong. The Lawyers Professional Responsibility Board did not issue any formal opinions this past year, the most recent still being Opinion No. 22 dealing with metadata.

Crystal Ball

Are there any major issues or anticipated changes planned for 2012? On the local scene, not necessarily. The Lawyers Board is a participant^{Ftn 2} in a case, long under advisement before the 8th Circuit Court of Appeals, that challenges portions of the Code of Judicial Conduct concerning endorsements and solicitation.^{Ftn 3} The matter was argued to an *en banc* court in early January 2011, and ought to be decided sometime

soon. Whether a remand or another layer of appeal will follow cannot yet be determined. No new Board opinions are under consideration currently, and although a few minor clarifications to the MRPC have been referred to the MSBA Rules of Professional Conduct Committee for discussion, an actual petition for rule change seems unlikely this coming year, if at all.

On the national front, The American Bar Association's Ethics 20/20 Commission is nearing completion of its preliminary work. Established in 2009,^{Ftn 4} the Commission identifies its mission as to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. After two years of study, the Commission issued a series of proposals for comment (some revised from earlier releases) and discussion drafts in November-December 2011. Public hearings will be held in conjunction with the ABA's midwinter meetings in February 2012 in New Orleans, with formal presentation of selected reports expected in August or into 2013. Topics include alternative law firm structures (*e.g.*, nonlawyer investment or ownership of law firms), outsourcing of legal work, and issues related to unauthorized practice of law and multijurisdictional practice. Most of these issues will wend their way through the ABA process and, even if adopted into the Model Rules, will require renewed study here before being adopted in Minnesota.

One aspect of the ABA review of multijurisdictional practice that may be more immediately worthwhile to Minnesota law practice is the attempt to clarify the concept of "systematic and continuous presence" as it is used in Rule 5.5(b) of the Model Rules and the MRPC. The rule provides that an attorney not licensed in Minnesota but licensed in a different jurisdiction (and in good standing) may perform limited legal services in Minnesota under certain circumstances, but may not establish an office or maintain a "systematic and continuous presence" in the state. The ABA's new proposal would more clearly enable lawyers qualified to practice in one jurisdiction to practice in a new jurisdiction, even continuously, if they are diligently pursuing admission. Such clarification may be worth exploring in Minnesota independent of the ABA Commission's ultimate activities.

Conclusion

A look back over the year just completed helps us to recognize those things we did well and, we hope, also those things that can still bear improvement. If we learn from those areas and apply their lessons in future, the lawyer discipline system will continue to evolve and improve.

As we start 2012, our system remains financially healthy, thanks to the support of the courts and the bar in Minnesota, and responsive to the needs of the bar and the public.

Notes

1 *In re Jonas*, 794 N.W.2d 370 (Minn. 2011); *In re Swokowski*, 796 N.W.2d 317 (Minn. 2011).

2 Actually, individual Board members were named as defendants, but solely in their official capacity.

3 *Wersal v. Sexton, et al.*, No. 09-1578, 8th Circuit Court of Appeals.

4 See Gernander, "20/20 Vision," 67 *Bench & Bar of Minnesota* 1 (January 2010), p. 22.