

MYTHS CONCERNING THE BOARD

By

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This month's column will address some common misconceptions concerning the Board and the Director's office.

Myth: Advisory opinions are not available.

Since October, 1982, my office has provided written advisory ethics opinions to Minnesota lawyers and judges. During 1983, 107 original written opinions were issued. Through the first seven months of 1984, my office has issued 48 original opinions and 50 other miscellaneous responses providing lawyers with professional responsibility articles and ABA opinions. The Board has recently approved a telephone advisory opinion service for Minnesota lawyers. The addition of the telephone service was made possible by an increase in funding from attorney registration fees. The fee increase was endorsed by the MSBA at the June convention and approved by the court in August. The procedures for obtaining telephone advisory opinions have recently been outlined in this column.

Myth: The opening of Director-initiated files has created a significant growth in the disciplinary workload.

My office recently calculated the number of Director-initiated files (*i.e.*, files opened by the Director without a complaint pursuant to Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR). Director-initiated files account for approximately two percent of all files opened (20 of the 921 files opened in 1983). A review of Director-initiated files reveals that a high percentage of these files result in formal discipline. Most often, Director-initiated files involve an attorney who has been charged or convicted of a criminal offense where a complaint has not been received.

Myth: The Director's office does not screen complaints prior to forwarding them to the district ethics committees for investigation.

All complaints received by the Director's office are screened for possible summary dismissal prior to forwarding for investigation. It is our policy to dismiss those complaints stating allegations which, even if true, would not constitute a disciplinary rule violation. On the other hand, if the complaint states allegations which, if true, may involve disciplinary rule violations, an investigation is initiated. In 1983, 217 of the 921 files opened (23 percent) were summarily dismissed without investigation.

Myth: Referrals to the district ethics committees have declined.

It has been alleged that the Director's office has retained a higher percentage of matters for direct investigation rather than utilizing the district ethics committees. The reverse is actually true. In 1983, 515 of

the 921 files opened (55 percent) were referred to the district ethics committees for investigation. With another 23 percent summarily dismissed, only 22 percent were investigated directly without referral. For the first six months of this year, 371 of the 577 files opened (64 percent) were referred to the district committees for investigation. As a general rule, complaints are referred to the district committees for investigation. The majority of the complaints which are not referred to the district committees involve attorneys who are already the subject of pending disciplinary proceedings or investigations.

Myth: The dispositional recommendations of the district ethics committees are not followed.

In the vast majority of cases, the dispositional recommendations of the district committees are adopted by the Director. This is especially true where the district committee recommends that the matter be dismissed. Occasionally, however, it is necessary for the Director to depart from the committee's recommendation. For example, departure from a committee recommendation is sometimes necessary to insure that lawyer discipline standards are applied uniformly statewide. Similarly, the lawyer may have a prior record of disciplinary violations which is unknown to the district committee. Finally, in some cases, the Director conducts further investigation which discloses either additional violations or mitigating circumstances which may affect the committee's recommendation.

Myth: Disciplinary cases are never settled.

My office resolves disciplinary cases through the use of stipulations whenever possible. A comparison of the statistics for 1983 and the first eight months of 1984 shows that the use of stipulations in Minnesota disciplinary proceedings is becoming more common. In 1983, six files were closed through the use of private stipulated probation. Through the first eight months of 1984, however, 17 files have been closed through the use of private stipulated probation disposition. Similarly, in 1983, 8 of 17 public disciplinary matters were disposed of by stipulation. In comparison, 15 of 24 public matters decided in 1984 have been resolved through the use of stipulations.

Myth: Discipline is more severe now than ever.

A 1981 ABA survey of lawyer discipline agencies in the United States showed that serious discipline is less likely in Minnesota than other states. The survey showed that there were 929 lawyers per public disciplinary disposition in Minnesota, compared with 386 per public disposition nationally. Similarly, there were 1,444 lawyers per suspension or disbarment in Minnesota, compared to 1,165 per suspension or disbarment nationally.

The supreme court has also adopted a progressive approach in determining the severity of the disciplinary sanctions it imposes upon lawyers who suffer from alcoholism and mental illness. See, *In re Johnson*, 332 N.W.2d 616 (Minn. 1982) and *In re Weyhrich*, 339 N.W. 2d 274 (Minn. 1983). The new approach taken by the court recognizes alcoholism and mental illness as mitigating circumstances, provided the lawyer can establish the criteria set forth by the court. The *Johnson* and *Weyhrich* decisions have been cited repeatedly by other jurisdictions as they follow the trend set by Minnesota in recognizing alcoholism and mental illness as mitigating factors in imposing discipline. See also Rule 28, RLPR, providing for the transfer of lawyers suffering from alcoholism and mental illness to disability inactive status.

Myth: A complaint once filed is forever a black mark on an attorney's disciplinary record.

On April 26, 1983, the supreme court amended the confidentiality rule (Rule 20, RLPR) to provide for

the expunction of dismissed complaints. Pursuant to Rule 20(d), all records or other evidence of a dismissed complaint are destroyed five years after the date of the dismissal. After a file has been expunged, the Director responds to all inquiries concerning the dismissed complaint by stating that the matter was dismissed and that all records have been expunged. My office is sensitive to the effect that disciplinary records may have on the appointment of lawyers to public positions and admission to the bar in other states. Consequently, the following disclaimer is included in all disclosure letters involving dismissed complaints:

The Director believes no inference adverse to the applicant should be drawn from complaints determined to be without merit.