



## PROFESSIONAL RESPONSIBILITY

### WHERE DO WE GO FROM HERE?

BY KENNETH L. JORGENSEN

*“Sound professional ethics standards and compliance with those standards can translate into better delivery of legal services.”*

Shortly after my appointment as Director<sup>1</sup> of the Office of Lawyers Professional Responsibility, I began receiving congratulatory calls and letters from lawyers throughout the state. Since I had worked my entire legal career in a system responsible for investigating and disciplining lawyers, this was undoubtedly ironic to others and yet heartwarming to me. Not all of my fellow bar members chose to let me off so easy. Their accolades were accompanied by the curious, if not skeptical, question, “Why, after all these years, did you want to be Director?” It is a question that could not be answered with a concise or clipped response.

When I started in lawyer discipline over 20 years ago, I was initially uncertain about the ability of lawyers to police themselves. As a law student and young adult I questioned whether self-regulation, be it of lawyers or any other profession, was a euphemism for self-protectionism.

Some of my early legal research buttressed this misconception. Much of my law school long paper on lawyer advertising focused upon the professional regulations found unconstitutional by the U.S. Supreme Court in the 1970s and also the antitrust implications of those regulations.<sup>2</sup> It was only when I began to have significant involvement with the people involved in the lawyer discipline system that I began to comprehend what self-regulation was really about.

My first contested hearing as a young lawyer involved a private admonition issued to an elderly lawyer from western Minnesota. The professional sin with which he was charged was that he had directly communicated with the opposing party who was represented by counsel.<sup>3</sup> Despite losing the hearing, I was struck by the personal investment of the participants. Presiding over the hearing was the senior partner of a successful Twin Cities plaintiff's firm. The other two Panel members were the senior partner of an insurance defense firm and a nonlawyer reporter from the local paper. Prior to the three-hour hearing, all had devoted substantial personal time to reading the various pleadings and other documents submitted by parties. The quality of their

questions during the hearing and the reasoning proffered for their decision demonstrated acute familiarity with both the facts and law.

My opponent, the *pro se* lawyer from western Minnesota, had traveled hundreds of miles to the hearing and brought along his secretary as a witness. In the weeks prior to the hearing, he had submitted voluminous documents to the Panel members and now was devoting an entire day to prove that the admonition was unjustified. My witness, a guardian *ad litem*, had likewise traveled hundreds of miles, with her only compensation being the nominal mileage and per diem fee. For all intents and purposes, other than the court reporter, I was the only person paid to participate in the hearing.

Few regulatory systems, if any, would devote this amount of resources to a relatively minor matter, especially where no one was prejudiced. Over the years I came to realize that this was standard fare in Minnesota's lawyer regulation system. I witnessed literally thousands of persons, lawyers and nonlawyers alike; devote countless hours to the often-thankless task of conducting district ethics committee investigations. Some who performed admirably were rewarded with six more years of volunteer service on the State Lawyers Board where they confronted more tragic cases of serious lawyer misconduct or disability. Seldom, if ever, did I have occasion to even speculate about whether an adverse decision was the product of lawyer nepotism or motivated by lawyers' desires to protect themselves.

SO, WHY BE DIRECTOR?

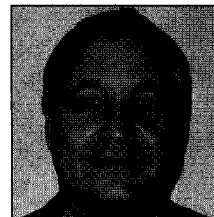
There are few opportunities to be a leader in a system populated with so many quality individuals dedicated to improving the profession. Simply rubbing elbows with people of this ilk might be enough by itself for some to seek the position. The added attraction for me was the opportunity to apply my wealth of experiences over the last 20 years to try to improve what is already regarded as a well-run system. The chance to build upon this foundation was made even more attractive by the existence of an experienced and dedicated staff within the Director's Office and a Court that has historically demonstrated its commitment to lawyer regulation, both in time and resources.

Another compelling factor was my perception of how the Minnesota bar views self-regulation. While some see it as a necessary evil, many others share my belief that self-regulation involves more than just weeding out the bad actors. Sound professional ethics standards and compliance with those standards can translate into better delivery of legal services. Better delivery of services can reduce client dissatisfaction and possibly even improve the profession's image.

Evidence of the bar's ongoing commitment to self-regulation surfaced only days after I was appointed. A federal indictment was returned against disbarred lawyer Steven Samborski for embezzling over \$225,000 from more than 20 clients. The local media contacted my office about the disbarment proceeding, which had served as the springboard for the indictment.

Samborski's preindictment disbarment qualified as a “newsworthy” event and appeared in the media reports. Deemed unworthy of mention in these same reports was that 21 of Samborski's victims

**KENNETH L. JORGENSEN is director of the Office of Lawyers Professional Responsibility. He has served the cause of lawyers' self-regulation in Minnesota for over 20 years.**



## PROFESSIONAL RESPONSIBILITY

had been reimbursed by the Client Security Fund for 100 percent of their losses before the indictment was even issued. While the media apparently had little appreciation for the commitment of Minnesota lawyers to maintain the profession's integrity, it was not lost on me.

### WHERE FROM HERE?

There will always be a small minority of lawyers who choose to lie, steal, cheat, or engage in other serious misconduct. If the public is to be adequately protected, these individuals must be dealt with swiftly and severely.

Even within the lawyer discipline system, however, miscreants such as these are rare. A far greater number of discipline cases involve lawyers who innocently run afoul of the professional standards, or simply don't comprehend the ethics rule or its application to the situation. From my many years of experience, most lawyers when given the choice will comply with an ethics standard provided they recognize the issue and understand the professional standard. In short, they represent a very remediable or correctable problem that is often a cause of client dissatisfaction.

During the last 20 years, the Director's Office has gradually increased the resources it allocates to ethics education and other proactive measures designed to assist or promote ethical compliance. I believe that more can be done and that the time is right to continue the shift from reactive lawyer regulation (*i.e.*, prosecution) to proactive regulation (*i.e.*, education).

Over the last several years complaints against lawyers have remained flat despite the increasing number of lawyers admitted each year.<sup>4</sup> At the same time, requests from lawyers for telephone advisory opinions have skyrocketed. We are now at the point where calls from lawyers for ethical guidance substantially exceed the number of complaints

***“There will always be a small minority of lawyers who choose to lie, steal, cheat, or engage in other serious misconduct.”***

filed each year against lawyers. Although it is impossible to measure a cause and effect relationship between these trends, a heightened awareness of ethical issues, as evidenced by the continuing climb in advisory opinion calls can only bode well for the profession and the protection of the public.

Ideally, sufficient resources would be allocated to handle an unlimited number of ethics advisory calls from lawyers. In reality, budget limitations foreclose this option. After fielding over 1,800 telephone requests last year, our capacity to handle additional calls is limited. Hence we need to look for alternative ways to assist lawyers with ethical compliance.

One option is to make additional ethical resources available to lawyers. To that end, our website [www.courts.state.mn.us/lprb](http://www.courts.state.mn.us/lprb) will be reorganized to provide additional resources. We are looking at expanding the content and enhancing the structure of the site to create easily navigable “self-help” solutions for lawyers calling. We will continue to publish pamphlets and brochures assisting lawyers with the operation of client trust accounts. Although our formal Lawyers Board Opinions are currently in a state of flux,<sup>5</sup> we are working on incorporat-

ing the critical opinion regulations into the Rules of Professional Conduct. Others will likely be retained solely for lawyer guidance.

New substantive ethics rules are also on the horizon. The MSBA currently has a task force evaluating the Ethics 2000 amendments to the Model Rules of Professional Conduct. Much of the focus of these amendments is to further clarify not only the ethical standards themselves, but also their application to specific practice settings. Improvements include the addition of a specific rule establishing the ethical obligations owed to prospective clients and greatly expanded comments that apply the standards to recurring factual scenarios.

Effective self-regulation requires far more than just disbarring dishonest lawyers. All of these improvements are intended to enhance the ability of lawyers to comply with and adhere to the professional standards. □

### NOTES

1. I was appointed Director on December 2, 2002, by the Minnesota Supreme Court to succeed Ed Cleary who was appointed by Governor Ventura to the Ramsey County District Court bench in July 2002.
2. See *e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *In re RMJ*, 455 U.S. 191 (1982).
3. Rule 4.2 prohibits direct contact by a lawyer with a represented party unless the party's counsel has consented to the direct communication.
4. The number of complaints received against lawyers in 2002 was 1,165. This compares with 1,246 in 2001, 1,362 in 2000, 1,278 in 1999 and 1,275 in 1998.
5. See *e.g.*, *In re Panel File 99-42*, 621 N.W.2d 240 (Minn. 2001) where the Supreme Court held that an attorney could not be professionally disciplined solely for violating an opinion of the Lawyers Professional Responsibility Board.

## PROVEN SUCCESS

In Major Litigation

### 6 \$ INJURY AND WRONGFUL DEATH JURY VERDICTS FOR CLIENTS OVER \$1,000,000

If you need help in maximizing your client's recoveries in complex litigation, Mark N. Stageberg can help with consultations, second opinions, associations, or direct referrals. Now representing only injury and wrongful death clients in the areas of Product Liability, Motor Vehicle Accidents, Malpractice, Dram Shop, Aviation, and Farm Accidents.



- Recognized in Best Lawyers in America
- Certified Civil Trial Specialist
- 32 years experience
- Many insurance company contacts
- Metro and outstate practice
- Referral fees paid

**MARK N STAGEBERG**

5101 Thimsen Avenue, Minnetonka, MN 55345 • (952)470-5242 • (800)340-5242 • Email: STAGEBERGLAW@cs.com