MYTHBUSTERS

By
Martin A. Cole, Director
Minnesota Office of Lawyers Professional Responsibility

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As incredible as it sometimes seems to me, I joined the Office of Lawyers Professional Responsibility as a staff attorney (then, as now, entitled an assistant director) in September 1984, after a short time in private practice. It is now September 2013 as I write this. How time flies! Also then as now, the director wrote a monthly column for *Bench & Bar of Minnesota* magazine.Ftn 1

The first such column written by the director after I joined the office (OLPR) was entitled, "Myths Concerning the Board,"Ftn 2 and obviously addressed what were listed as misconceptions about the Lawyers Board and the Director's Office. As the "new guy" on the staff, I read it carefully if only in order better to learn just what I'd gotten myself into. The myths identified were all, for the most part, shown to be inaccurate. Yet, perhaps amazingly, some or all of the misconceptions identified still exist today to some extent in the minds of some people. A quick refresher may be in order and the answers updated if necessary—only now, we can pretend we're watching the popular Discovery Channel TV show, Mythbusters.

Hit or Myth?

The first myth identified concerned the perceived unavailability of advisory opinions, which was a relatively new service for the OLPR at the time, and which had just been expanded from being offered only in writing to include a telephone "hotline" as well. That service has only grown and grown since then and also now includes the ability to submit advisory opinion requests through the LPRB/OLPR website,Ftn 3 something that obviously didn't exist in 1984. In calendar year 2012, for example, 2,249 advisory opinion requests were handled by the attorneys at the OLPR. Advisory opinions definitely are not a myth!

The second myth dealt with the perception that the Director's Office initiated too many complaints on its own without a complaint having been received. As was in fact true then, the number of such file openings each year is miniscule (always fewer than ten per year, more often only one or two). Since 1985, a change to the Rules on Lawyers Professional Responsibility (RLPR) further has required that investigations to be commenced on the sole initiative of the director first be approved by the Lawyers Board Executive Committee.Ftn 4 This occurs most often based upon a newspaper account of an attorney's criminal conviction, or from a Minnesota Supreme Court or court of appeals opinion.

The next identified myth was that the OLPR did not screen complaints before determining whether to investigate, and especially before sending a complaint to the local District Ethics Committee (DEC) for preliminary investigation. Now, as then, all complaints are carefully reviewed by an attorney in the Director's Office to determine whether it can be summarily dismissed (*i.e.*, without investigation determined not to warrant discipline). For 1983, the article stated that the percentage of files so dismissed was 23 percent—by 2012 the percentage of files dismissed without investigation doubled to almost 47 percent (which may have been a particularly high percentage year, but the point is the same).

Somewhat connected to the "screening myth" was another myth that fewer files were being referred to the DECs for investigation. I tend to doubt that any DEC was complaining that it was receiving too few total complaints to investigate; rather, the gist of this myth seems to have been that the Director's Office was retaining a higher percentage of files to investigate "in-house" than previously. I'm not completely sure why this was perceived as bad unless some lawyers perceived that the OLPR was less in tune with local practice. In any event, the 1984 report indicated 55 percent of all complaints were sent to DECs, 22 percent were investigated in-house, and 23 percent were summarily dismissed. The corresponding 2012 numbers would be: 31 percent to DECs, 22 percent kept in-house, and 47 percent summarily dismissed. Thus, roughly the same overall percentage of complaints are being investigated directly by OLPR staff attorneys; what has changed, as noted just above, is that more files are being dismissed without opening files that otherwise the DEC volunteers would be asked to investigate. Files kept in-house tend to be personally sensitive matters (that if ultimately proven not true unfairly might damage an attorney's reputation in their local community), criminal conduct, trust account issues (that may require record gathering and auditing beyond what is fair to ask of a DEC volunteer), and complaints against an attorney already under investigation for other matters.

Four More Myths

The remaining myths dealt with various aspects of final dispositions of complaints. The first myth was that the OLPR does not follow the dispositional recommendations of the DECs. I know personally that this myth still existed as of 2008, when a committee of the supreme court reviewed the disciplinary system, even though the percentage of recommendations followed was 91 percent. It was 87 percent for 2012. Those figures do not even account for the fact that some disciplinary recommendations are augmented based upon information about prior discipline that the DEC does not consider. (Such an increase in the discipline imposed nevertheless is counted as a recommendation not followed). This statistic is regularly reported in the LPRB/OLPR Annual Report.Ftn 5

Next up was a myth that disciplinary cases are never settled. Stipulated disposition of matters for private probation or for any level of public discipline was not uncommon in 1984, but now is done with considerable greater frequency—it has to be for the office to keep up with its workload. For example, so far in 2013 (as of September 10), 39 public discipline decisions have been issued by the supreme court. Twenty-eight of the cases were submitted to the court on stipulation—and of the 11 others, four were default matters in which the attorney did not participate. Today, it is the relatively rare case that proceeds all the way through contested referee trial, supreme court briefing, and oral argument. Another myth that is so busted!

The next reported myth from 1984 was that discipline was more severe than before. That was a hard concept to quantify then and remains so. More severe compared to what? To discipline imposed in other states? To discipline imposed for similar misconduct in prior cases or years? To the wishes of some unhappy complainants? It all depends. As was noted in 1984, Minnesota remains a leader in dealing with attorneys with chemical dependency and psychological mitigation claims, often fashioning appropriate probation terms to allow such attorneys to successfully continue or return to practice if they are getting help. Perhaps the issue is really more one of consistency in discipline. Because of such uniquely individualized mitigating factors, including depression or extreme personal stress, one disposition may appear more, or less, severe than the discipline imposed in some matter in which the misconduct seems similar. Such perceived inconsistency has always been the norm in lawyer discipline and may always remain so, despite our office's constant attempts to apply disciplinary standards evenly. By the way, if you desire tougher application of discipline, I can name several states in which you'd be wise not to commit serious misconduct!

Finally, the "myths" article cited the perception that any complaint remained a "black mark" on a lawyer's record forever. To the extent that was once true, the article noted that the supreme court had amended the RLPR in 1983 to provide for expunction of dismissed complaints after five years. The period before expunction was reduced to three years in 1986. No record whatsoever of expunged files is retained. Even during that three-year holding period, authorized disclosure of dismissed complaints is limited and clearly delineated.Ftn 6 That remains the rule to this day.

Conclusion

As the above information suggests, many of the myths of 1984 seemed focused upon the Director's Office as being overly prosecutorial. These myths generally were busted as being exaggerated or untrue then; they should have little, if any, life left in them now.

Notes

1 All *Bench & Bar of Minnesota* professional responsibility columns since 1971 are available at *http://lprb.mncourts.gov/articles/Pages/default.aspx*.
2 Michael Hoover, "Myths Concerning the Board," *Bench & Bar of Minnesota*, November 1984.
3 *http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx*.
4 Rule 8(a), RLPR.
5 Available at *http://lprb.mncourts.gov/AboutUs/Pages/AnnualReports.aspx*.
6 Rule 20(e), RLPR.