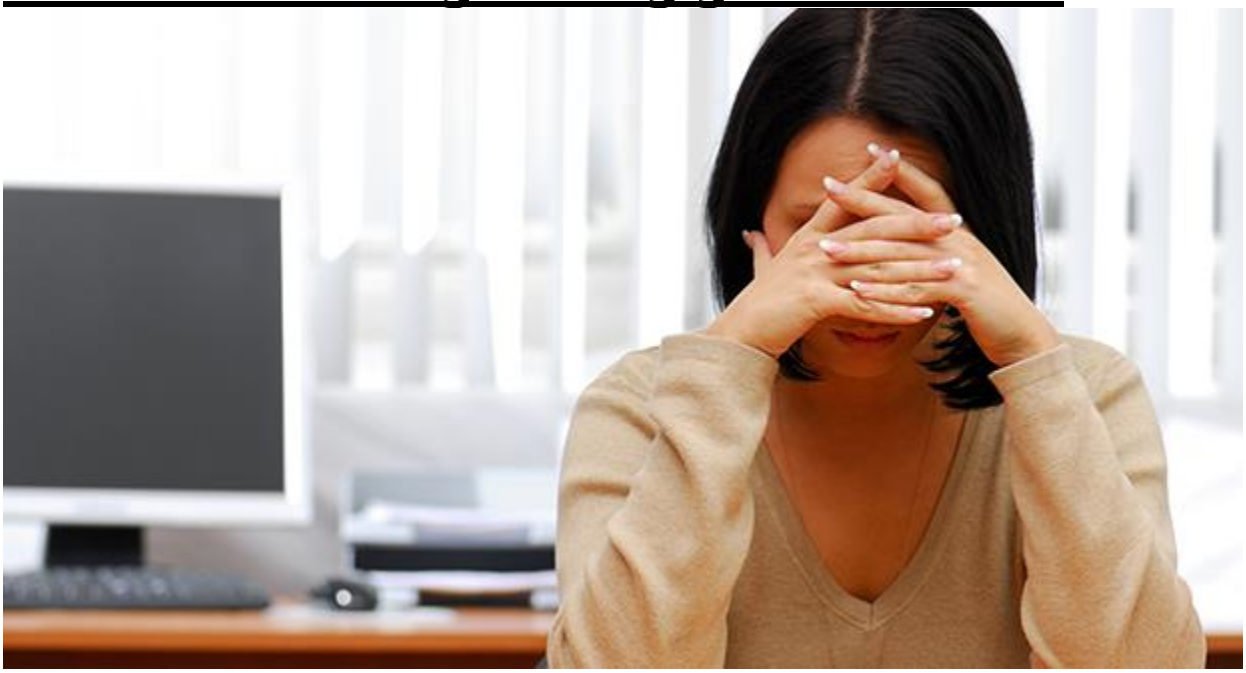
Charles Lundberg: Giving good remorse



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Remorse in attorney disciplinary proceedings has been much in the news

By: Charles Lundberg December 29, 2015

Remorse in attorney disciplinary proceedings has been much in the news in the Minnesota legal community in 2015 — five major Supreme Court decisions, and additional commentary (see below). In chronological order, *In Re Severson* (discussing at length the significance of remorse/the lack thereof); *In re Selmer* (lack of remorse and refusal to acknowledge wrongdoing an aggravating factor); *In re Kennedy* (believed to be the first 4-3 MN discipline decision ever, court splits on whether the attorney's conduct [characterized by the dissent as "assisting his client, the alleged victim of a crime by a public employee, to negotiate a civil settlement during the pendency of a criminal case"] violates the rules at all; the majority finds lack of remorse an aggravating factor, raising a troubling issue about why remorse would be counted *at all* when there is a substantial legal question about the existence of a rule violation in the first instance); *In re Tayari-Garrett* (lack of remorse, suspension for blowing off court date, feigning illness, and instead taking non-refundable trip to Paris); *In Re*

Butler ("absolutely no remorse" for continuing to assert "show me the note" legal theory after repeated sanctions orders holding that theory to be legally frivolous).

Responding to *Severson*, one local legal commentator effectively asked the musical question, "What's remorse got to do with it?" — why should remorse matter at all, in light of the court's repeated statement that discipline is not intended to punish? (Leventhal, Minnesota Litigator, Minnesota Disciplines Its Lawyers But Does Not Punish Them*?*), suggesting that "if discipline is specifically untied to punishment why wouldn't the two wrongdoers, the penitent and the defiant, suffer the same penalty?"

There is also a troubling empirical issue of whether any judge can properly appraise remorse. Just last month *Slate* ran a very provocative article, "Sorry, Not Sorry," reporting on a new scholarly study pointedly questioning whether judges or juries *can even tell* when remorse is sincere.

But remorse is foundational in attorney discipline law. The remarkable online treatise, Wernz, *Minnesota Legal Ethics* (5th ed. 2015) focuses on remorse at the very outset of some 1,400 pages on legal ethics in Minnesota, in an introduction explaining *"What Minnesota Legal Ethics Is All About."* He writes, "Minnesota legal ethics is about morals – – about redemption, remorse, roles and relationships". Wernz notes that the Minnesota court has repeatedly stressed the importance of remorse and similar religious-based concepts in its cases involving attorneys. "In … reinstatement, bar admission, and discipline cases, the court has used a resonant, even religious vocabulary: "contrition," "atonement," "remorse," and "repentance*" are not just the words used, they are decisive criteria*". Id. at 8 (emphasis added).

Since remorse can be such an important factor in discipline cases, a respondent lawyer would want to take pains to get it right, especially since getting it wrong not only risks losing an important *mitigating* factor, but also a finding that the lack of proper remorse itself is an *aggravating* factor. *Severson* expressly so holds. (Query whether this isn't "double-counting". *Cf. Tayari-Garrett* at n. 4 (("[W]e have also cautioned the Director not to 'double count' the same acts of noncooperation as both additional misconduct and an aggravating factor")).

Any respondent lawyer facing disciplinary proceedings would be well-advised to retain counsel for advice regarding remorse (among a number of other issues, of

course). I addressed this point 24 years ago in an article arguing that lawyers should almost never represent themselves in disciplinary proceedings:

"[A] respondent attorney who appears without counsel and self-righteously attempts to defend against an ethical complaint can often end up with self-inflicted wounds."

. . . The Minnesota Supreme Court has recently come down very hard on attorneys who have not demonstrated proper "remorse" or "contrition" for their actions; sometimes a heartfelt and sincere approach to admitted wrongdoing can result in relatively mild discipline. Often the best thing that respondent's counsel can do for the attorney client is the "visit to the woodshed" for a heart to heart talk, where the client is advised, in no uncertain terms, that an ethical line has in fact been crossed and that the lawyer needs to acknowledge that fact and accept the consequences.

Recognizing and owning up to professional misconduct can often allow an attorney to avoid much more serious consequences. It is sometimes possible to forego public discipline altogether by accepting a private admonition or by entering into a stipulation for probation or other private discipline if but only if the lawyer is prepared to forthrightly acknowledge the misconduct.

"A Fool for a Client," Minnesota Bench & Bar (Dec. 1991).

And remorse is even more critical in serious cases involving suspension. As Bill Wernz recently noted, respondent lawyers who fight every charge to the death often wind up serving more than their minimum suspension. Even worse, in the eventual petition for reinstatement, they still have to demonstrate remorse to a lawyer board panel — a high hurdle when there has been no prior expression of contrition. As *Severson* notes, "To express remorse, an attorney must express genuine regret and moral anguish for his or her conduct and the effect it had on others."

One key inquiry for respondent's counsel is whether and to what extent proof of remorse is required in a particular case. Not every disciplinary matter calls for moral anguish, and certainly not if the respondent has not violated any rule or standard of practice. But even where the conduct has fallen short in some way, full-throated moral anguish may not be appropriate. For example, if the

respondent's conduct (1) does not meet best practices, but does not violate a rule; (2) violates a rule, but in an isolated and non-serious way; or (3) violates a rule in a serious way, but the rule is merely regulatory (e.g., a trust account books and records problem), simply acknowledging the mistake with genuine regret, maybe with something that sounds like, "I get it, and it won't happen again," would be more apt than expressions of deep moral anguish.

In more serious matters, where remorse truly is called for, respondent's counsel should carefully consider *how* and *when* to be remorseful. In any public discipline matter, the issue of remorse will ultimately be tried to a referee (normally a retired district court judge) as a factfinder, unless a stipulation can be reached with the OLPR. And counsel will likely want to address remorse with the OLPR early on in any event. The best possible outcome may be a stipulation that acknowledges remorse as part of a reasonable resolution jointly recommended to the court. The worst would be if OLPR were to contest the genuineness or sincerity of proffered remorse.

Doing remorse correctly — making a show of remorse, doing an act of contrition – can be critical, and must be handled with great care, because courts do not hesitate to point out when remorse seems to be less than completely genuine or sincere: See *In re Glass* (failed bar admissions bid of the notorious reporter Stephen Glass; California Supreme Court finds showing of remorse and restitution to be *"*oddly belated and, we believe, disingenuous*"*). A recent Michigan disciplinary case picks up the theme: "Having heard and observed (respondent's) hearing testimony, we conclude that (he) does not fully appreciate the nature of his misconduct and is instead saying what he thinks he should say in the disciplinary process,"

Doing it right – giving good remorse – is a skill that can be learned. One online PowerPoint gives step-by-step instructions in how to do it: *Sorry Seems to be the Hardest Word: Mitigating Risk Through Effective Contrition.* As one might expect, it's all about humility, sincerity and expressing contrition for misconduct, something that shows genuine regret and appropriate moral anguish for one's misconduct and the effect it had on others, instead of non-apology apologies and other telltale signs that "the attorney just doesn't get it." Where remorse is

appropriate, independent counsel about how most effectively to approach this often delicate issue can be essential.

More apologies

Interestingly, 2015 was a very fertile year for "remorse" in the popular press as well. Just in the last few months, remorse has been headline news in connection with the hack of the Ashley Madison site, which bills itself as enabling extramarital affairs, Adrian Peterson's abuse of his son, any number of corporate scandals and repeated extraordinary — almost heroic — examples of utter lack of remorse by Donald Trump, a leading contender in the 2016 Republican presidential primary race.

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. He served for twelve years on the Minnesota Lawyers Board, including six years as Board Chair. He recently retired from Bassford Remele after 35 years of practice, and now advises attorneys and law firms through Lundberg Legal Ethics.