

In Pursuit of Ethical Lawyering

By Charles E. Lundberg

Note from the Director: This month brings a changing of the guard for the Lawyers Professional Responsibility Board. After an extended and dedicated term of service to the Lawyers Board spanning 12 years -- the last six years as chair -- Charles Lundberg is stepping down. The Minnesota Supreme Court recently appointed former State Bar President Kent Gernander to replace Chuck as Lawyers Board chair.

Over the past 20 years I have been fortunate to work with many excellent lawyers who spent countless hours of their valuable time on Board matters. Only a select few ever approached Chuck's level of commitment. Formulating and enforcing ethical standards is a difficult and sometimes unpopular endeavor. Not once has Chuck ever complained, despite devoting 200 to 300 hours per year as Board chair.

Chuck's commitment to Minnesota legal ethics goes beyond the time and energy he invested as a member and chair of the Lawyers Board. In the 1980s Chuck served eight years on the Hennepin County District Ethics Committee. During this time, he recommended an amendment to the Minnesota confidentiality rule (adopted by the Court in 1990) permitting lawyers to disclose confidential information where the client has perpetrated a fraud by using the lawyer's services. Only after the recent Enron and WorldCom scandals did the aba come to the realization that such a rule was necessary at the national level; they adopted a similar rule this last summer.

We will miss Chuck and are fortunate to have Kent Gernander fill Chuck's very large shoes as Board chair. Chuck has graciously agreed to share his thoughts and observations from his many years on the Board in this month's column.

-- *Ken Jorgensen*

It will certainly feel different, not being on the Lawyers Board any more. (For one thing, I don't know what I'll do with all the extra time.) But it is an

occasion for reflection, not just on all that has changed over these 12 years,¹ but on the work of the Board itself -- what the Lawyers Board does and will continue to do, and why the bar of Minnesota should be exceedingly grateful for it:

Rooting out the bad lawyers, clearing the good ones: Let's face it: There are a few very bad lawyers out there, lawyers who steal clients' money, perpetrate fraudulent schemes, or engage in similar serious misconduct for which disbarment is not even arguable. They come in all shapes and sizes, from judges and partners in large or well-known law firms (Roland Amundson, James O'Hagan, David Moskal) to the nearly unknown sole practitioner.

When a lawyer goes bad like that, the bar as a whole suffers tremendously. If we want to remain a self-regulated profession, we must be ever-vigilant about rooting out professional misconduct. There ought to be an outcry from the bar to deal severely with lawyers who so tarnish our profession.² A long time ago, I suggested that we should institute a public "tar and feathers" ceremony for such lawyers.³ The Court cannot do it, of course, nor can the Board. But the Bar could. Think about it: *A KARE 11 Exclusive: The Minnesota State Bar Association presents: "Lawyers Gone Bad."* If we ran it during sweeps week, it could get a 40 share, easy.

At a minimum, we should take every opportunity to remind the public that each lawyer in this state pays hundreds of dollars each year out of his or her own pocket to fund this system that uncovers and disciplines unethical lawyers. Shout it from the rooftops -- we can be justly proud of our profession's devotion to and insistence on ethical lawyering.

Then there are the lower level -- yet still serious -- rule violators: attorneys who are guilty of everything from lying to their clients or the court, to engaging in serious conflicts of interest, or even abandoning clients. Here, too, public discipline is critically important in order to protect the public, either by suspending the lawyer's license to practice or by putting the public on notice of the lawyer's ethical misconduct.

And then the lion's share of the Board's work: the many lawyers -- over a hundred every year -- who are the subject of private discipline, where a disciplinary rule has been violated but the violation is isolated and non-serious and therefore the lawyer is privately admonished.⁴ Here too, discipline is important not just for rehabilitation purposes but also because of what it says about the significance of ethical practice: *that the rules really do matter*. Otherwise, we are no better than the pirate captain Barbossa in "Pirates of the Caribbean," who famously explained that the vaunted Pirate's Code "is more what you'd call 'guidelines' than actual rules."⁵

Finally, don't forget the Board's essential role in defending the good name of

all the lawyers who are subject to non-meritorious ethics complaints every year. It is very important, when a lawyer has been wrongly accused of misconduct, that the Board and the Office of Lawyers Professional Responsibility ("OLPR") say so, and say so clearly (as well as explaining to the complainant why discipline is not warranted).

Tending the legal ethics system, making it better. Much of the Board's work takes place behind the scenes: considering and taking policy positions through rule amendments and Board opinions, defending 1st Amendment litigation up to the U. S. Supreme Court, and overseeing the OLPR generally -- including pushing where needed to correct some problem in the system, whether it be an underpaid professional staff or an error in the law of attorney disqualification.

Thanks to the many people and groups I have worked with in this role. Thanks first and foremost to the Minnesota Supreme Court -- not just to the seven esteemed justices who presently sit on that bench, but to the institution itself. It is the Court which is ultimately responsible for all lawyer discipline. The Board simply serves as an arm of the Court. The Court takes attorney discipline issues very seriously, as it of course must do. And the Court has always listened carefully to concerns about how lawyer discipline must take into account the real life practice of law. It has been both an honor and a pleasure to serve the Court in this way.

Thanks, too, to the OLPR directors with whom I served: To Ed Cleary (now a Ramsey County District Court judge), whose extraordinary professional judgment, trial experience, and devotion to constitutional law were just what were needed for such a time as this, when we faced serious challenges at the Board and were codefendants in constitutional litigation that went all the way to the United States Supreme Court. I had the privilege to work closely with Ed on virtually a daily basis for almost five years. The bar of this state was very fortunate indeed to have him in that position.

And to present Director Ken Jorgensen, who has devoted his entire 20-year professional career to the Minnesota attorney discipline system. Ken not only knows more about legal ethics than anyone else in the state, but also cares very deeply about how the disciplinary system should work, to the point of recently making an impassioned plea to the Court not to make a change in policy that might have had the unintended result of giving his own position too much power vis-a-vis the Board.

Thanks as well to all the lawyers and staff of the OLPR, one of the finest and most experienced legal teams I have ever seen in practice.

Finally, thanks to the many other Board members with whom I've had the honor to serve. I have very much enjoyed working with this amazingly talented, insightful, and hardworking group of lawyers and lay members,

and I will sorely miss them.

NOTES

1. See Lundberg, "Retrospective of the Minnesota Professional Responsibility System," in Annual Report of the Lawyers Professional Responsibility Board (June 2003), available at <http://www.courts.state.mn.us/lprb/olpr03ar.htm>).

2. Once their vile acts come to light, these miscreants usually are allowed to stipulate to disbarment, and then sometimes are forced to deal with the criminal authorities. Most frequently lately this has been the U.S. Attorney's Office, which takes a very dim view of lawyers who commit financial fraud. They call it a "zero tolerance" policy: If you so abuse your license to practice law, you are going away to prison for a very long time.

3. See Lundberg, "Flanagan, Sampson and Batdorf: Is Legal Ethics an Oxymoron?" *Hennepin Lawyer* (July-Aug. 1987) ("I think of the 1960s television series "Branded," which began each week with Chuck Connors having his cavalry stripes ripped off and sword broken while being drummed out of the service in disgrace.").

4. See Lundberg, "Making Private Discipline a Public Matter," *Bench & Bar* (Feb. 2003).

5. Of course, this rules vs. guidelines quip is either a direct steal from, or an homage to, the classic scene in "Ghostbusters" (1984), where a very seductive Sigourney Weaver (Dana Barrett) -- whose body has just been possessed by the god Zuul (the Gatekeeper)-- has designs on Bill Murray (Peter Venkman):

DANA: *Do you want this body?*

PETER: *Is this a trick question?*

* * *

DANA: *Take me now, sub-creature.*

* * *

PETER: *I make it a rule never to get involved with possessed people.*

[She grabs him and pulls him onto the bed.]

PETER: *Actually, it's more of a guideline than a rule.*

CHARLES E. LUNDBERG is a partner in the Minneapolis trial law firm of Bassford Remele, A Professional Association, where his practice focuses on the law of lawyering (legal malpractice defense, legal ethics, and related fields) and appellate advocacy.