

MINNESOTA LAWYER

Quandaries and Quagmires: New MLM policy for judicial disciplinary expense

By: Minnesota Lawyer, Special to Minnesota Lawyer, Chuck Lundberg November 13, 2019

Something entirely unprecedented happened here recently: Minnesota Lawyers Mutual Insurance Company (“MLM”) announced a new [insurance policy for judges](#), covering attorney fees and expenses resulting from disciplinary investigations and proceedings.

While disciplinary expense coverage has been offered in other states for some time, this is a first in Minnesota, and it raises several issues:

What’s covered, and how much does it cost?

Here are the details of the MLM policy:

Annual aggregate limit: **\$50,000** in attorney fees and expenses resulting from a disciplinary investigation of which timely notice has been given under the policy.¹

Annual premium: **\$500**.

Deductible: **\$ 0**

Why would a judge need to buy insurance?

The ultimate issue for a judge considering this new coverage is this: Do you want to insure against the risk of substantial attorney fees and expenses you may incur as a result of a disciplinary investigation by the Board on Judicial Standards (BJS) into your conduct as a judge? That expense is on your own dime. Sometime in their judicial career, any judge may have to spend money to retain counsel to respond to a BJS investigation — or worse, to defend actual discipline proceedings.

And it can get expensive – sometimes very expensive. More on that later.

As a threshold matter, however, before we get into the expense vs. insurance/ risk-cost-benefit analysis, the real question to focus follows.

Does a judge need legal counsel for an ethics investigation?

That's an easier question. Yes, a judge confronting a BJS investigation unquestionably needs some legal counsel — if not full-blown representation, then at the very least another set of eyes to review the matter and advise you.

Why? First and foremost, because of *Fool for a Client* issues. When you represent yourself, it's almost impossible to maintain the objectivity required to correctly analyze the issues raised by serious allegations against you. And just like a lawyer representing himself before the Lawyers Board, a judge who appears before BJS without counsel and self-righteously attempts to defend against charges of ethical misconduct can often end up with self-inflicted wounds.

Counsel can also be essential in deciding how to handle two critically important issues: acknowledging mistakes and showing sincere remorse when necessary. I wrote at length about the role of remorse in lawyer discipline in this column four years ago;² if anything, these principles are even more critical to judges than they are to lawyers.

In addition, according to people who know, there are several other compelling reasons for a judge to retain counsel in dealing with BJS complaints:

In researching this article, I spoke with several “people who know” — judges who have been through BJS investigations, BJS members, and several of the most experienced lawyers in town who represent judges in disciplinary matters — all on deep background. Here is what they said:

Reputation is the only thing we have as a judge. An ethics complaint could destroy your reputation. (Imagine the horror of having potentially public discipline come to light in the year you are up for re-election.³)

Judges should know this — This is a very tricky business. The BJS rules and procedures are sometimes arcane and unlike any other legal proceeding you've ever seen before.

There's a serious risk in appearing before BJS pro se, a potential to make unforced errors. Judges are uniquely incapable of objectively looking at allegations against themselves.

It is a very stressful process; you really need support.

Your judicial colleagues will think, “I'd never make that mistake”. *Nobody thinks it's going to happen to them.*

One judge who has been through the process and lived to tell the tale said this: “Initially when I got the complaint, I wanted an attorney immediately. I wondered if I could afford it. No one has any idea how much it will cost. You simply can’t prepare for this.”

Significantly, none of the judges I’ve represented were aware that they had arguably crossed a line at the time of the act giving rise to the complaint.

By the numbers

Back to the expense vs. insurance issue: It can get expensive. Here’s some data from experienced defense counsel to illustrate the point:

In the four BJS matters I have handled, the total fees ranged from \$7,000 to \$34,000. Those were all private matters. Other experienced lawyers report similar ranges. At a minimum, the assistance of counsel required just to prepare a comprehensive response to an investigation and attend to follow up requests from BJS could range from \$3,000 to \$10,000.

If, as sometimes happens, a live appearance before the board is required (or recommended by counsel), one can expect the range to increase accordingly, perhaps \$15,000 to \$20,000.

If full blown litigation is required (say, an appeal from a private admonition), you’re likely into the \$25,000 – \$40,000 range.

Public discipline proceedings are naturally more expensive – figure \$50,000 plus. And going all the way through a Supreme Court proceeding may well exceed \$100,000.

Generally speaking, judges are not wealthy; the annual salary for a Minnesota District Court judge is about \$153,000 (or roughly what second- or third-year associates earn at the larger firms in town). Having to pay thousands of dollars in attorney fees for representation in a BJS investigation can be a serious financial burden to some judges, potentially requiring tapping into retirement resources (or children’s college funds) or taking out a loan.

On the other hand, you must analyze the risk. That’s what insurance is about. Do I need flood insurance? It depends. What are the chances that this risk will materialize?

According to the 2018 BJS Annual Report, the overwhelming majority of complaints against judges in 2018 were summarily dismissed without investigation. In such cases, the judge never even hears about the matter.

The odds of being the subject of a complaint that is actually investigated are relatively small. In 2018, there were 23 investigations (some involved more than one complaint against the same judge, some related to child support magistrates, ALJs, retired judges, referees, etc.) If you are one of the 294 District Court judges in Minnesota, the odds of being the subject of an investigation in any one year are roughly between 1 in 15 and 1 in 18 or so.

A related question is, “How serious is the risk?” Over the past several years, the average number of disciplines annually was four, and the average number of public disciplines was one. Some are very easy, e.g. the complainant relies on memory to allege that at a hearing a judge said X. Saying X would violate the code. The judge is asked whether he or she said X. The judge gets a transcript, showing X was never said.

So, whether the \$500 annual premium is worth it depends on how risk averse you are, and whether you’d be able to cover up to \$50,000 out of your own pocket. Still, the investigations that would require much consideration and counsel seem relatively rare, maybe ten or so, among all the full time Minnesota District Court judges in a given year; the number for which legal fees would exceed \$10,000, maybe half that.

And it is possible to do this *pro se*; certainly, it is somewhat easier now than it once was. In the last several years things have improved dramatically at the BJS. To cite just one example, the board’s website — <http://www.bjs.state.mn.us/> — now contains a treasure trove of resources, including all the applicable rules, Formal Opinions, a summary of Advisory Opinions, judicial discipline cases and significant Minnesota Supreme Court cases involving judicial ethics, a tremendously helpful 150-page judicial ethics outline, and BJS annual reports from the past several years describing in great detail recent investigations and disciplines. If you want to represent yourself and are willing to devote the time, the resources are there.

Ultimately, each judge will have to make a personal decision whether to insure against the potential expense of discipline proceedings, or to self-insure against that risk. In the end, the immortal words of Dirty Harry Callahan come to mind: “You’ve gotta ask yourself one question—’do I feel lucky?’”

The good news is that the new MLM policy now gives Minnesota judges an option that they never had before.

Endnotes

1. Like legal malpractice insurance, this policy is written on a “claims made and reported” form: if you don’t give the insurer notice of the commencement of the BJS investigation promptly, you jeopardize and could well forfeit any coverage. Trust me on this: Never, ever mess around with reporting requirements in a claims-made policy.
2. “Giving good remorse,” Minn. Lawyer, December 29, 2015, linked here: <http://lundberglegalethics.com/wp-content/uploads/2017/11/giving-good-remorse.pdf>
3. For a very recent example see “In rare defeat for sitting judge, Atwal ousted,” Minn. Lawyer, November 8, 2018, <https://minnlawyer.com/2018/11/08/in-rare-defeat-for-sitting-judge-atwal-ousted/>

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).