

## **Making Private Discipline a Public Matter**

*By Charles E. Lundberg*

A recent decision of the Minnesota Supreme Court illustrates some important distinctions between public and private discipline of attorney misconduct. In response to an extraordinary petition -- filed by the complainant, a district court judge -- requesting that the Supreme Court review and reverse a Lawyers Board determination to impose private discipline, and instead order public ethics charges, the Court affirmed that a private admonition was the appropriate discipline for an attorney who had brought a motion to exclude the judge's clerk from participating in a personal injury trial based on the law clerk's disability. *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*, 653 N.W.2d 452 (Minn. 2002)

Notwithstanding the Court's holding that the discipline should remain private, it was certainly not treated as a private matter. Two days before the Court's opinion came down, the disciplinary proceedings were the subject of a front-page, above-the-fold story in the November 25, 2002 Minnesota Lawyer, identifying the privately disciplined attorney by name and disclosing details that should never have become public. The large color photograph accompanying the article showed the complainant judge in his chambers over the caption, "Pursued ethics charges against an attorney who sought to remove his clerk from the courtroom over a disability." Apparently believing that the matter should be widely publicized regardless of what the Supreme Court ultimately decided, the complainant judge took steps to ensure a very public airing of the case.

### **Public vs. Private Discipline**

The distinction between public and private discipline is absolutely fundamental to the work of the Lawyers Board. Under Rule 8(d)(2), private discipline -- more specifically, a private admonition -- is appropriate where an attorney has committed professional misconduct that is "isolated and non-serious." Board members spend much of their time in this important volunteer role in panel hearings to determine whether there is probable

cause to believe that public discipline is warranted or whether a private admonition is appropriate. The decision whether to "go public" is one of the most serious and important issues that Board members are called upon to determine.

Every year over 100 Minnesota lawyers receive Rule 8(d)(2) private admonitions -- written findings that a disciplinary rule has been violated but that the violation is isolated and non-serious and therefore the lawyer is privately admonished. An admonition goes on the lawyer's permanent record, but normally remains strictly confidential under Rule 20. The lawyer may sometimes have to disclose the admonition "voluntarily," in the context of a legal malpractice insurance renewal application, an application for a judgeship or other public office, etc. But it will normally never become public in the sense of being in the newspaper. Why, then, did the private discipline in Panel File No. 15976 become such a public matter?

### **The Facts of Panel File No. 15976**

The attorney represented a severely injured plaintiff in a personal injury suit. At trial, one of the issues was compensation for future wage loss due to those injuries. On the first day of trial the attorney discovered that the judge's law clerk was himself profoundly disabled; the clerk was confined to a wheelchair and required a respirator and the assistance of a personal care attendant. Notwithstanding these severe disabilities, the clerk performed his functions admirably. So admirably, in fact, that the attorney's client expressed concern that the jury, in considering the claim for future wage loss, would compare his disability unfavorably to the clerk's and award little or no future wage loss. The attorney moved the court for a mistrial, asking that the case either be assigned to a different jury panel and heard without the disabled clerk being present or be assigned to a different judge. The judge denied the motion with extreme prejudice, calling it "outrageous" and "unAmerican."

The jury found no liability and thus never reached the issue of damages. The attorney moved for a new trial, arguing it was error to allow the clerk to be present during the trial. That motion was also denied.

### **Disciplinary Proceedings**

The trial judge filed an ethics complaint with the Office of Lawyers Professional Responsibility [olpr], alleging that the attorney's motions to have the clerk excluded from the courtroom violated the ethics rules. After investigation, the OLPR issued a private admonition, based primarily on the recent case of *In re Panel File No. 98-26*, 597 N.W.2d 563 (Minn. 1999), where the Court held that it was serious misconduct for an assistant county attorney to have brought a motion to prohibit a criminal defendant from retaining "a person of color as co-counsel for the sole purpose of playing on

the emotions of the jury," commented that race-based misconduct is always serious, but found sufficient mitigating factors to support the issuance of a private admonition.

The attorney in No. 15796 appealed the admonition to a Lawyers Board panel, which affirmed. The attorney appealed that determination to the Supreme Court; the complainant judge also sought Court review, arguing that private discipline was inadequate and that the attorney should be publicly disciplined.

The Court ultimately held that while neither race nor disability should be used as a means of limiting participation in the courts, under the unique circumstances presented (and the demanding "arbitrary or capricious" standard of review that applied), a private admonition was the appropriate disposition.

Some experienced trial lawyers have argued that the conduct in question should never have been a disciplinary matter in the first place, citing the lawyer's critical role as an advocate for his client's interests. There is certainly a strong intuitive sense, especially among trial lawyers, that a lawyer should never be subject to discipline for making an argument that he or she reasonably believes to be in the client's interests. (The Court acknowledged these concerns in declining to hold that the respondent had violated Rule 3.1, which prohibits asserting frivolous claims: "We are concerned that overzealous application of Rule 3.1 may hinder the development of law by discouraging attorneys from bringing issues of first impression or good faith arguments for the extension, modification or reversal of existing law"). But the fact remains that a controlling Supreme Court decision, Panel File No. 98-26, squarely holds that similar courtroom conduct is not only sanctionable but inherently serious misconduct. That is the law of Minnesota on this issue. The OLPR therefore had no choice but to find discipline warranted here, and the Board had no option but to affirm that finding.

The fact that the judge filed the ethics complaint is admirable and in no way subject to question. The Lawyers Board places an exceedingly high value on a judge's important role in reporting possible ethics violations that occur in or out of the courtroom. To be sure, in most cases a judge simply reports the matter for investigation by the Lawyers Board, and then allows the disciplinary process to take its course. Rarely does a judge do what was done here -- personally assuming the role of an ethics prosecutor, seeking extraordinary appellate review and reversal of a discretionary Board determination. Still, the rules do specifically contemplate that a complainant in ethics proceedings may seek review in these circumstances, so the judge probably should not be criticized for taking that step. (Ironically, the complainant judge had a right to seek Court review only because the attorney had appealed the original OLPR admonition; without that appeal to a Board panel, the judge would not have had standing to appeal at all. See

Rule 9(1).)

The judge's decision affirmatively to pursue publicity, however -- giving an interview to a newspaper distributed to attorneys throughout Minnesota and publicly identifying the privately disciplined attorney -- was way beyond the pale.

The lawyer is not being named here. He has suffered enough. That may have been ameliorated in some small part by a letter published in the December 9th Minnesota Lawyer by Minneapolis trial lawyer Terry Wade strongly supporting the attorney and in the process raising some difficult questions about why the matter had become public and why all lawyers might well be concerned:

When a judge actively pursues ethics charges against a lawyer for conduct in the courtroom, it is a matter to which attorneys pay particular attention. No practicing lawyer wants to find himself or herself in that circumstance. Any lawyer so "pursued" by a judge before whom he has appeared would be mortified.

Before going public with the story, the complainant judge confirmed with the OLPR that the rules did not legally prohibit him from seeking publicity. It is true that the ethical rules do not prevent a complainant from publicly disclosing private discipline -- nor could they, consistent with the First Amendment. Ultimately, however, the individual who publicizes that which the Board or the Court has determined should remain private calls into question the legitimacy of the process by which that decision was reached. Where that person is a judge, he implicitly challenges the legitimacy of the very institution that gives stature to his complaint.

Both our courts and our professional responsibility system are grounded on fealty to the rule of law. The vast majority of complainants honor the confidentiality of the disciplinary system. At the very least, one would hope that lawyers and judges would respect that principle.

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