

## FREE SPEECH, FALSE ALLEGATION

By  
William J. Wernz, Director  
Minnesota Office of Lawyers Professional Responsibility

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. . . when a citizen petitions the government for redress of grievances, in a peaceable manner, according to legal custom or a statutory procedure, using proper language, he enjoys, not a qualified freedom, but *an absolute privilege* for whatever he may say, and he enjoys *an absolute immunity* against any and all forms of criminal or civil prosecution against him.

So argued Minnesota attorney John Remington Graham, who was accused of unprofessional conduct for falsely alleging “of his own certain knowledge” that two judges, two attorneys, and unnamed “others” had conspired to fix a case he was trying.

The Minnesota Supreme Court rejected Graham’s argument and suspended him for 60 days. *In re Graham*, 453 N.W.2d 313 (Minn. 1990). On October 1, the U.S. Supreme Court denied Graham’s petition for writ of certiorari. That court had previously held that the Petition Clause of the First Amendment “does not grant absolute immunity from liability for libel.” *McDonald v. Smith*, 472 U.S. 479 (1985).

The legal principles in Graham’s case are both ancient and novel, and the Court’s balancing of them is important for Minnesota attorneys. Attorneys’ rights to free speech and to petition the government for redress of grievances were examined by the Minnesota Supreme Court under the light of its own duty to certify competent and trustworthy attorneys to the public.

The Court found an objective standard for interpreting Rule of Professional Conduct 8.2(a):

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of integrity of a judge, adjudicatory officer or public legal officer. . . .

The Court noted that, contrary to Graham’s assertions, “On its face, Rule 8.2(a) rejects an absolute privilege for false statements made by attorneys with reckless disregard for their falsity.” The Court concluded that the subjective standard used in certain defamation cases for applying a “reckless disregard” test was inappropriate in attorney discipline cases:

Because of the interest in protecting the public, the administration of justice and the profession, a purely subjective standard is inappropriate. The standard applied must reflect that level of confidence, of sense of responsibility to the legal system, of understanding of legal rights and of legal procedures to be used only for legitimate purposes and not to harass or intimidate others, that is essential to the character of an attorney practicing in Minnesota.

Just as a “pure heart, empty head” defense is no longer effective in Rule 11 civil proceedings, so also

is an objective standard appropriate in professional responsibility cases. Rule 3.1, Rules of Professional Conduct, which Graham's baseless allegations also violated, forbids taking litigation positions that have no basis or only a frivolous basis. If an attorney in litigation alleges a lack of integrity by a judge, without any objective basis for the allegation, Rules 3.1 and 8.2(a) are thereby violated.

Important principles were at stake in *Graham*. History, most recently the lamentable *Greyford* cases in Chicago, has shown that judges and other public legal officers have, from time to time, lacked integrity. An attorney who has evidence of corruption should not be afraid of discipline for speaking out. Even if the attorney is mistaken, or the allegations of corruption simply cannot be proven, discipline should not necessarily follow.

Why, then, was Graham disciplined? Because his very specific allegations, that he *knew* of a conspiracy, came from fevered speculations rather than evidence and reason.

Graham's main evidence of conspiracy was a snip of holiday bar association cocktail party talk about his adversary's case being "in the bag." The person who reported this conversation also told Graham that as far as he was concerned the judge Graham believed was involved in exerting influence, was not involved. Graham inferred the involvement of two purported conspirators (whose names no one had given him) because he "... was motivated by malice and a desire to retaliate against imagined wrongs." [Ftn 1](#) Moreover, the underlying case that Graham claimed was fixed, was so obviously lacking in merit that it needed no fixing.

Because Graham's allegations were so serious and so definite, an exhaustive investigation, including examination of voluminous travel and telephone records, was undertaken to determine whether a conspiracy did in fact occur. Because the alleged conspirators resided in different cities, and Graham alleged that they conspired within a definite period of time, it was possible to show beyond any reasonable doubt that no conspiracy occurred.

Reviewing the evidence and findings is important for assuring attorneys of sound judgment that making reasonable charges of corruption and the like will not result in discipline. On the other hand, the invented charge of a vast conspiracy, by an attorney with purported certain knowledge, will shake public confidence in the administration of justice. In a publicly filed affidavit, Graham swore that "others" besides the two judges and two attorneys were involved in the conspiracy. At trial, he admitted that he had no knowledge of any such "others." At trial, his "certain knowledge" became mere "belief" and purported "political" connections became "old boy" ties.

As the judge who tried the case noted, if Graham had merely reported to the proper authorities the information he actually had, as opposed to swearing that he *knew* of corruption, he could have exercised his rights of free speech and to petition without being disciplined.

"Whenever there is proper ground for serious complaint against a judge, it is the right and duty of a lawyer to submit his grievances to the proper authorities." *Owen v. Carr*, 497 N.E.2d 1145, 1149 (Ill. 1986). Whenever such allegations are made frivolously and without any rational basis, it is the duty of the court licensing the attorney to question whether the lawyer can remain certified to the public as a professional of sound judgment.

The history of attorney discipline proceedings unfortunately is not free of the taint of punishing those with unpopular, or sharply worded, things to say – for example, *see* Black, "Attorney Discipline for

'Offensive Personality' in California, " 31 *Hastings L.J.* 1097 (1980); *In re Snyder*, 105 S.Ct. 2874 (1985). The rights of attorneys to bear unwelcome news, to challenge public officials, and to be mistaken from time to time should not be pinched by a disciplinary system that identifies with those in power. On the other hand, the attorney who baselessly and publicly charges judicial corruption, and who then in discipline proceedings recklessly multiplies his extravagant allegations, cannot continue to be certified as a trustworthy professional. The courts carefully balanced these competing, great principles in the case of John Remington Graham.

#### NOTES

<sup>1</sup> *It was also found that Graham's "feelings were genuine." Whether this combination of malice and genuine feelings would have met a subjective test did not have to be decided, after the Court adopted an objective standard for reckless disregard.*