

THE CONFIDENTIALITY OF LAWYER ETHICS INVESTIGATIONS

by
Charles E. Lundberg
Chair, Minnesota Lawyers Professional Responsibility Board

Reprinted from *Minnesota Lawyer* (January 22, 2001)

With very few exceptions, whenever the Lawyers Board, the Office of Lawyers Professional Responsibility or one of the District Ethics Committees conducts an ethics investigation of a Minnesota lawyer, all of the information concerning the investigation is absolutely confidential by Supreme Court rule. Anyone who has ever been involved in the Minnesota legal ethics system learns this from the very beginning: The confidentiality of ethics proceedings under Rule 20 is one of the pre-eminent values of the entire attorney discipline system in Minnesota. (For the full text of Rule 20, see accompanying side bar.)

Having served for almost 18 years in various capacities in the legal ethics arena, I am well aware of this emphasis on confidentiality. I was therefore startled when I saw the banner headline and the first few sentences of the following article in the Dec. 22, 2000, issue of the *Star Tribune*:

EX-COURT CANDIDATE WERSAL FACES LAWYERS OFFICE PROBE

Former Minnesota Supreme Court candidate Greg Wersal is being investigated by the state Office of Lawyers Professional Responsibility for allegedly making misleading statements about justices on the high court.

The probe could result in sanctions as severe as the loss of his license.

I was stunned. How in the world did this confidential information about a pending ethics investigation get to the *Star Tribune*? Could there have been a leak from within the Lawyers Board office? It hardly seemed possible. Few things are considered more sacred at the Lawyers Board than confidentiality.

I then remembered that the attorney in question was himself no stranger to the tactical use of headlines and press releases. (Indeed, Mr. Wersal had generated a tremendous amount of publicity during the campaign when he filed for office using a new middle name of Scandinavian heritage.) It occurred to me that perhaps he had orchestrated the press coverage of the ethics investigation himself.

After checking with the *Star Tribune* reporter, I learned that Mr. Wersal had in fact been the source of the information - a critical fact that regrettably was not made clear in the article. (I have heard from several people who assumed that the information may have been leaked to the press by someone inside the system, an assumption that might have seemed plausible to some, in light of Mr. Wersal's recent spate of well-publicized federal lawsuits against the Board as part of his campaign strategy.)

A Look at Rule 20

The principle behind Rule 20 is fairly straightforward: Since publicity about an ethics complaint could ruin an attorney's reputation, information about an investigation should not be made public unless and until certain due process hurdles are met, including independent review to confirm the ethics charges are well-grounded. As a result, until about seven years ago, the Board was not allowed to comment at all about non-public matters.

In the mid-1990s, the rules were amended to allow certain very limited disclosures, but the general rule remains the same - proceedings relating to an ethics investigation of a lawyer are confidential and shall not be disclosed.

There are a couple of obvious exceptions. First and foremost, once the investigation is completed and a determination is made that public discipline should be sought, the veil of confidentiality is lifted. Rule 20(a)(2) expressly allows disclosure of information after a probable cause determination has been made.

Of course, a lawyer who is the subject of an ethics investigation can always choose to make the information public. (It could hardly be otherwise, in light of First Amendment constraints.) Where the complainant is or was the attorney's client, information about the attorney's response to the complaint is shared with the complainant. Finally, the rule also allows the Director to confirm certain very limited "special matters," including the fact that a matter is under investigation.

Confidentiality is the Rule

It might surprise some to learn that not all states require such strict confidentiality in ethics investigations. In Oregon, for example, confidentiality doesn't exist - all disciplinary records and proceedings are open and available for public inspection from the very moment a complaint is filed.

In Minnesota, however, confidentiality is the rule. The reason for this is simple: The mere fact that an ethics complaint has been filed against a lawyer, or that a lawyer is being investigated for any reason, could have severe adverse effects on the lawyer's reputation if it became publicly known. In fact, the disclosure of an ethics investigation could irreparably damage the attorney's reputation for integrity, especially if the complaint is ultimately determined not to be meritorious (as most ethics complaints are).

Thus, unless and until an independent review of the charges has been conducted by a Lawyers Board panel and a determination made that there is probable cause to believe that public discipline is merited, all information concerning ethics proceedings is kept confidential.

This policy can sometimes create problems for the Director's Office, which occasionally gets calls from clients or potential clients asking whether a particular attorney is reliable and ethical. For example, imagine a situation in which a potential client who is about to entrust a lawyer with substantial financial assets wants to be sure the attorney is trustworthy. What if that attorney was presently under investigation for misappropriating client funds? Even though this hypothetical situation seems to have a strong intuitive force in favor of disclosure, the rules would not allow it.

The confidentiality rule can cause practical problems in other situations as well. Consider the recent *Star Tribune* article. When the reporter called the Director's Office seeking further information about the investigation, the Director was unable to clarify even certain elementary matters for the reporter without Mr. Wersal's consent. For example, the Director could not let the reporter know how ridiculous it was to suggest that "sanctions as severe as the loss of his license to practice law" could ever result from the type of conduct referred to in the article (i.e. alleged misstatements in a judicial election campaign).

A situation that occurred several years ago provides another problem generated by the confidentiality rule. A district ethics committee investigator decided to use his legal assistant to help with a particularly document-heavy investigation. When the Director's Office learned of that fact, it immediately alerted the investigator that such conduct could well violate Rule 20 because the legal assistant was not a member of

the district ethics committee and therefore could not properly be allowed to view the materials relating to the investigation.

There are a number of important benefits of the rule requiring confidentiality of ethics investigations. In addition to protecting the respondent lawyer's reputation, confidentiality also protects certain complainants who may have a legitimate complaint but who might be hesitant to bring the complaint at all if they knew it would be made public. Moreover, the fact that confidentiality will be maintained until an independent confirmation of unethical conduct has been made may well prompt more lawyers to report suspected unethical conduct by other lawyers.

The restraints imposed by confidentiality can sometimes be very subtle and problematic. I have more than once caught myself saying something in another context, such as a CLE presentation on ethics which I suddenly realized could have inadvertently involved confidential information.

While publicizing the details of past private discipline can be positively helpful as a method of educating lawyers about potential ethics pitfalls (see any of the Director's "Summary of Admonitions" columns, published every March in *Bench & Bar*, which can be accessed from the Board's Web page, www.courts.state.mn.us/lprb), we constantly guard against any breach of confidential identifying information.

Finally, and perhaps most important, the general rule of confidentiality also allows for the very existence of private discipline for matters that clearly warrant some discipline, but that are not serious enough to be made public. The possibility of a private resolution (an admonition or probation) for relatively low-level misconduct can provide a valuable incentive for a lawyer to "clean up his act" and avoid problems in the future.

SIDEBAR

MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 20. CONFIDENTIALITY; EXPUNCTION

(a) General Rule. The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

- (1) As between the Committees, Board and Director in furtherance of their duties;
- (2) After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;
- (3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;
- (4) Upon request of the lawyer affected, the file maintained by the

Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected.

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted;

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules.

(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer

(10) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office.

(b) Special Matters. The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;

(3) The fact that the Director has issued an admonition;

(4) The Panel's disposition under these Rules;

(5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e).

(6) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of

responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

(c) Records after Determination of Probable Cause or Commencement of Referee or Court Proceedings. Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule (j)(ii) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

(d) Referee or Court Proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.