

Ethical Issues: A View from the Bench



Justice David Lillehaug
LPRB Chair Robin Wolpert
MCAA, June 28, 2018

A Court at Full Strength



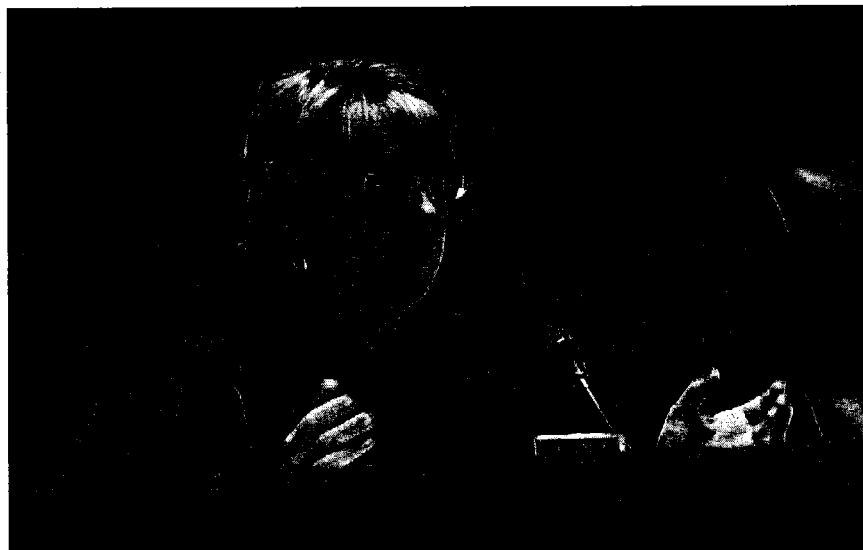
A Diverse Court

- 2 by Pawlenty; 5 by Dayton
- 3 from Court of Appeals, 2 from District Court, 1 from the Legislature, 1 from practice
- 6 different law schools
- 4 women, 1 Black, 1 LGBT, 1 Native

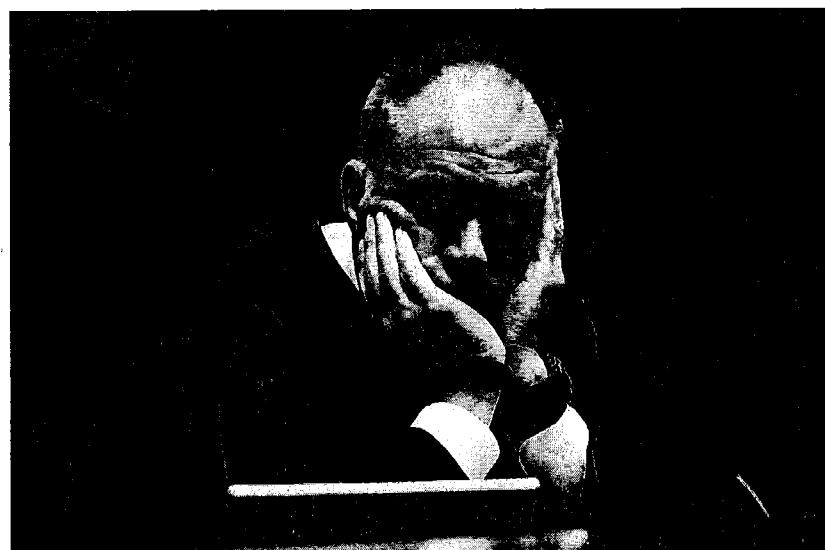
6 Have One Thing in Common



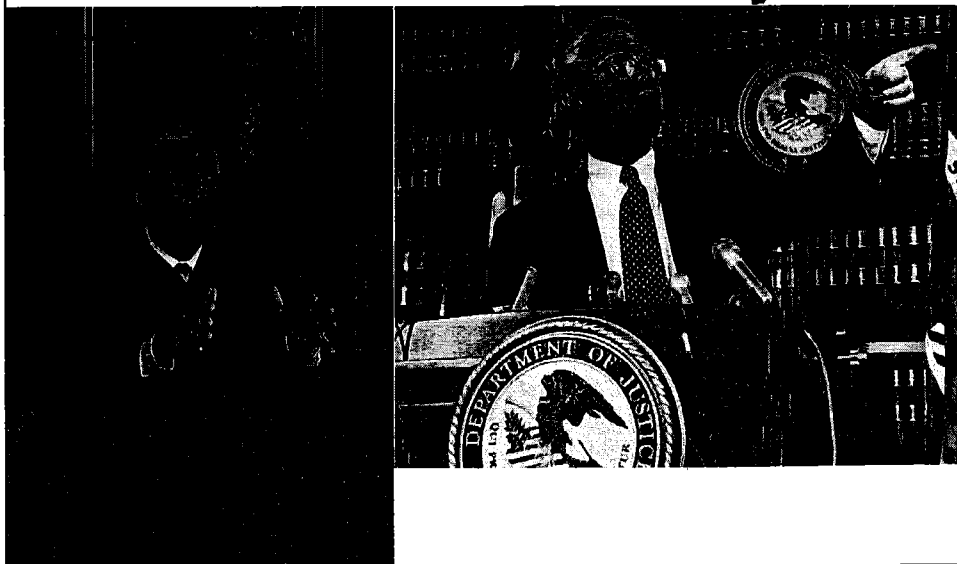
**Chief Justice Gildea –
Former ACA**



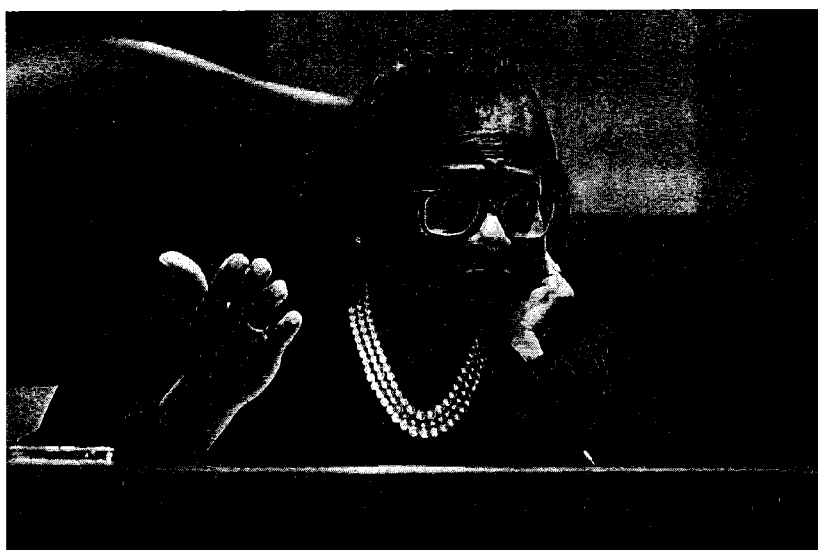
**Justice Barry Anderson –
Former City Attorney**



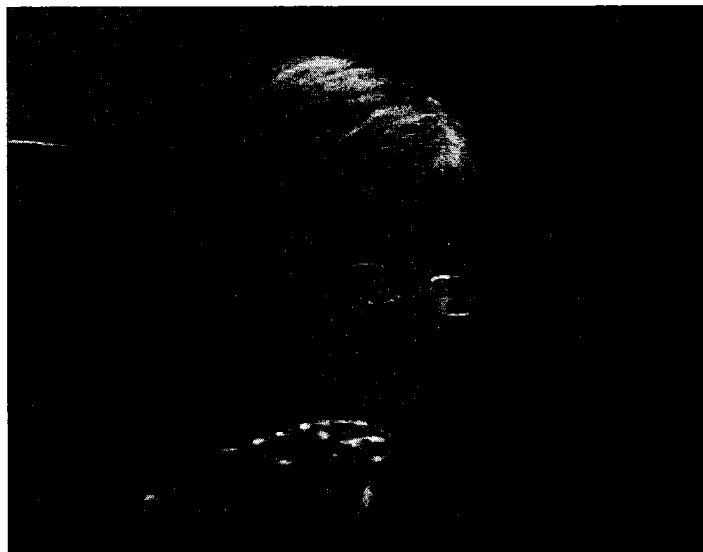
**Justice David Lillehaug
Former U.S. Attorney**



**Justice Natalie Hudson –
Former City Attorney**



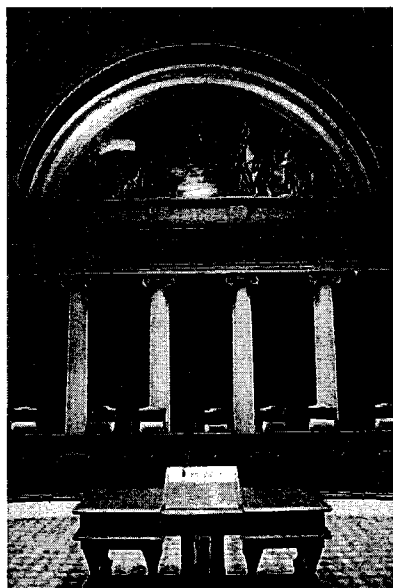
**Justice Margaret Chutich –
Former AAG, AUSA**



**Justice Anne McKeig –
Former ACA**



Capitol Courtroom



Minnesota Judicial Center Courtroom 300



Our Annual Work Product

- Review 800 PFRs; grant 13%.
- 100-125 full opinions per term.
- 70-75% unanimous.
- All opinions are published.
- All arguments are live-streamed and video-archived.

Attorney Discipline Process

- 25,000 active attorneys in Minnesota.
- Discipline cases handled by the Office of Lawyers Professional Responsibility, which has a Director and 11 attorneys.
- OLPR is overseen by the Lawyers Professional Responsibility Board.

The Process (cont.)

- First Level: investigation in-house at OLPR or sent to District Ethics Committees (21, mirroring the 21 bar association districts)
- Second step: whether private or public discipline is warranted. Private discipline may be appealed to Supreme Court.
- Third Level: Petition to Supreme Court for public discipline

The Process (cont.)

- Fourth Level: Referee hearing
- Referee findings reviewed on clearly erroneous standard.
- Referee conclusions of law reviewed de novo.
- Referee recommendation on discipline given some weight.

OLPR Statistics 2017

■ Complaints	1,110	- 9%
■ Advisory Opinions	2,051	+ 8%

Private Discipline 2017

■ Private probation	14	-48%
■ Admonitions	90	-22%

Public Discipline 2017

■ Disbarred	5	
■ Suspended	26	
■ Reprimand	9	
TOTAL	40	-9%

Topic 1: Trial Misconduct

- From 2012-2018, about 300 appellate decisions regarding alleged “prosecutorial misconduct.”
- Key point: misconduct not necessarily a Minn. R. Prof. Conduct violation



Alleged Misconduct

- 72% involved closing argument
- 43% involved presentation of evidence
- 7% involved opening statement.
- 5% involved discovery/nondisclosure
- 1% involved plea bargaining
- Others: grand jury proceedings, charging decisions, media, delay, sentencing.

Misconduct Reversals Are Unusual

- 17 reversals: 1 Supreme Court, 16 COA.
- Some opinions find -- or assume -- objected-to error but apply "harmless beyond a reasonable doubt" analysis.
- Some opinions find -- or assume -- plain error but apply "no substantial rights" analysis.
- Once error is found/assumed, the burden is on the State. **State v. Ramey** (2006).

Recent Reversals

- **State v. Weldon** (COA 2017): misstating the law in closing argument.
- **State v. Hanson** (COA 2017): improperly stating in opening and closing that the defendant had conceded an issue.
- **State v. Cook** (COA 2017): implying that the defendant had the burden of proof and vouching for credibility of the chief witness.

Reversals (cont.)

- **State v. Garza** (COA 2017): eliciting and emphasizing inadmissible testimony.
- **State v. Rosa** (COA 2017): improper questions and argument about defendant's refusal to consent to a warrantless search.
- **State v. Ancke** (COA 2018): cumulative effect, including referencing defendant's failure to testify and displaying a bible in view of the jury.

The Supreme Court's Inherent Authority

- **State v. Beecroft**, 813 N.W.2d 814 (Minn. 2012)
- Prosecutor committed misconduct by “undermining” the defendant’s “access to the assistance of certain medical examiners.”
- Followed by stipulation of violation of Rule 8.4(d) and a public reprimand.

To Avoid Misconduct . . .

- Create your personal file of prosecutorial misconduct cases.
- Generate and memorize your own set of phrases on burden of proof, witness credibility, and what the evidence proves (non-vouching).
- Be reasonable about curative instructions.
- Be aware of cues from the trial judge.

Topic 2: Pretrial Publicity

- Leading MN case: **State ex rel. Pittman v. Tahash**, 170 N.W.2d 445 (Minn. 1969).
- Relied on guidelines issued by Fair Trial-Free Press Council of Minnesota.

Limitations on Statements About . . .

- Character or reputation of the accused.
- Confessions or refusal to give statement.
- Test results or test refusals.
- Expected testimony or credibility.
- Plea negotiations.
- "Other statements relating to the merits, evidence, arguments, opinions or theories of the case."

ABA Standards on Fair Trial: Further Limitations

- Prior criminal record.
- Personal opinion of the prosecutor as to guilt or innocence of any person.
- Physical evidence expected.
- Identity, race, ethnicity, creed, religion, or sexual orientation of witnesses.
- Information inadmissible at trial.

ABA Standards Allow . . .

- Existence and scope of investigation.
- Facts of arrest.
- Identity of victim if not harmful to victim.
- “General nature of the charges”; must explain defendant presumed innocent.
- Name, age, occupation of accused.
- Schedule of proceedings.
- Legitimate law enforcement purpose.

Minn. R. Prof. Conduct 3.6

- (a) “A lawyer . . . shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter.”
- (b) Safe harbor “to protect a client from the substantial undue prejudicial effect of recent publicity”

Recent Case: State v. Parker, 901 N.W.2d 917 (Minn. 2017)

- At press conference, County Attorney commented on victim’s character and on defendant’s criminal history and silence.
- Court assumed without deciding that plain-error review applied.
- Court applied **Ramey**, putting the burden on the prosecution to show defendant’s substantial rights not affected.

Parker (cont.)

- Held: State carried its burden to show no effect on defendant's substantial rights; no impact on jury selection or trial.
- Footnote 9: references district court's view that statements were "argumentative" and "inappropriate"; court of appeals' view that it "had some concerns." Supreme Court: "We do not disagree with these characterizations."

Topic 3: Confidentiality

Rule 1.6: (a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information *relating to the representation* of a client.



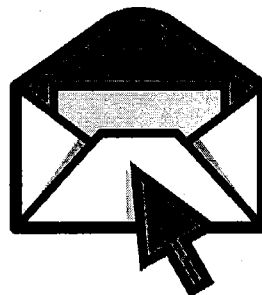
This is broader than privileged communications or work product!

Exceptions to Confidentiality

- (b) Exceptions: (1) informed consent; (2) not protected by privilege, confidentiality not requested, not embarrassing or detrimental; or (3) disclosure impliedly authorized.
- Not an exception: the information was in the public record.

Recent Case on Confidentiality

- *In re Charges of Unprofessional Conduct in Panel File No. 41310* (Minn. 2017).
- Attorney in negotiations with insurance adjuster. Client terminates representation.
- Attorney emails adjuster.



The Email

“I was notified yesterday that [client] is terminating my representation and . . . not accepting the settlement offer. . . . I advised him that he already accepted it, there is no rescinding I’m assuming you will be having legal bring a motion to enforce the settlement. He’s been advised of all of this. Sorry for the inconvenience, but he is a very difficult client.”

In the Supreme Court

- Attorney conceded it was “information relating to the representation” but argued disclosure was harmless because it was “not that much of a revelation” and did not have “any conceivable effect on the claim.”
- Held: private admonition affirmed.




Dangerous Times



- Discussions with opposing or allied counsel, especially in negotiations.
- Bar association meetings, conventions.
- Parties, dinners with friends/relatives.
- Conversations with classmates.
- Restrooms, hotel lobbies, airplanes, trains.

Danger with Devices

- Cell phones in public places.
- Social media.
- Failing to keep track of keys, passcards.
- Failure to adhere to device use policies, especially anti-phishing.
- Leaving devices in cars, restaurants.



Topic 4: The Truth

Three things cannot be long hidden:

the sun, the moon, and the Truth.

Buddha

Rule 3.3: (a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made
- (3) offer evidence that the lawyer knows to be false . . . [and] shall take reasonable remedial measures

Rule 3.4: “A lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act”



Rule 3.4: A lawyer shall not: (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law



Rule 3.4: A lawyer shall not: (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party

Rule 4.1: In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.

Comment: Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Rule 8.4: It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(Need not be in the course of law practice)

Examples

- *In re Walsh*, 872 N.W.2d 741 (Minn. 2015). Attorney lied to opposing counsel.
- *In re Karlsen*, 778 N.W.2d 307 (Minn. 2010). Attorney lied to client.
- *In re Pierce*, 706 N.W.2d 749 (Minn. 2005). Attorney lied to Director of OLPR.
- Settlement negotiations are not exempt.

Topic 5: Lawyer Well-Being

- Lawyer chemical dependency and mental illness are contributors to violations of the Minnesota Rules of Professional Conduct.
- A national effort is underway to promote lawyer well-being. In August 2017, the National Task Force on Lawyer Well-Being released a report on reducing “the level of toxicity” in the legal profession.

Law Student Survey - Alcohol

- One-quarter at risk for alcoholism
- 15 law schools
- 3,300 law students

	Law Students	Other Grad Students
Got drunk prior 30 days	53%	39%
Binge drank at least once prior 2 weeks	43%	36%
Binge drank at least twice	22%	21%

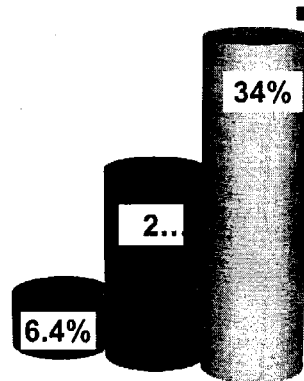
Law Student Survey – Mental Health

- 17% depression
- 14% severe anxiety
- 23% mild/moderate anxiety
- 6% suicidal thoughts in last year

Factors that Discourage Law Student Help-Seeking

- Threat to job or academic status
- Perceived threat to bar admission
- Social stigma
- “I can handle it myself”

Lawyer Study – Problematic Drinking



Lawyer Study – Mental Health

- 28% depression
- 19% severe anxiety
- 11.5% suicidal thoughts during career

Young/New Lawyers at Risk

- The younger the lawyer, the greater the likelihood of:
 - Substance Use Disorder
 - Depression

- Opposite of current perception

Barriers to Seeking Help

- Not wanting others to find out they needed help

- Concerns regarding privacy or confidentiality

- = Stigma



LAWYERS CONCERNED FOR LAWYERS

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**GET CONFIDENTIAL HELP
NOW**

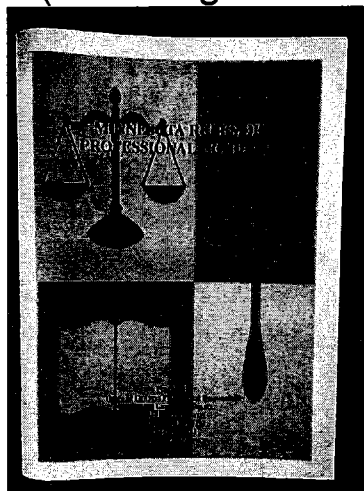
**FOR IMMEDIATE
ASSISTANCE CALL:**

651-646-5590

Or 1-866-525-6466

Ethical Hygiene

- Read the Rules (including Comments) once a year.



Ethical Hygiene (cont.)

- Ask yourself: Is it legal *and* professional *and* moral?
- Don't keep ethical issues to yourself, or delay confronting them.
- Don't keep well-being issues to yourself, or delay confronting them.
- Have a privileged consultation with designated office ethics counsel.

The OLPR Can Help

- Call or email for an advisory opinion.
- Opinions are confidential.
- Opinion is based on the facts you give.
- No opinions on past conduct.
- No opinions on conduct of other lawyers.
- Opinions can't bind or influence courts.

**Thanks for Your Time
and Attention!**

