TWO DECISIONS, TWO LESSONS

BY EDWARD J. CLEARY

The Minnesota Supreme Court regularly issues opinions relating to professional responsibility issues and to the imposition of professional discipline. In recent months, two of these decisions stand out as directives from the Court on two important issues pertaining to the profession. One case, involving a motion to exclude minority cocounsel based on racial identity, resulted in a finding of serious misconduct on the part of the prosecutor in violation of MRPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).[1] The other case, involving a defendant's challenge to the admissibility of a statement made to law enforcement officials in a criminal case, resulted in a partial suppression of the statement on the grounds that it was taken in violation of MRPC 4.2 (communicating with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the lawyer).[2] Both cases offer lessons that go well-beyond the factual circumstances that gave rise to the Court's holdings.

AN ILL-CONCEIVED MOTION.

Convinced that the criminal prosecution of an African-American male was based primarily on race, a public defender indicated to a prosecutor that "she was thinking about bringing in an African-American public defender from another county to assist in trying the case."[3] This set into motion a chain of events that resulted in another prosecutor filing a motion *in limine* asking for "an Order from this Court prohibiting counsel for the defendant to have a person of color as cocounsel for the sole purpose of playing upon the emotions of the jury."[4] (The motion was later withdrawn).

Putting aside the troubling implications of a prosecutor infringing on a defendant's right to be represented by counsel of his choice, it seems clear, as the court noted, that "counsel's race should never be used as a basis for calling for or placing any limits on that counsel's participation in any court proceeding."[5]

The facts surrounding this case and the decision itself remain controversial to many observers. Some think the Court (and this office) went too far in finding

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the actions of the attorney "serious"; others feel that more serious discipline should have resulted (the Court imposed private discipline). It may well be that this case provides one of those instances where many lawyers who are not minorities are unable or unwilling to recognize the damage that can be inflicted when "misguided" instances of racial bias are left unchecked. The lesson here is not that the prosecutor was unusually prejudiced or deserved severe punishment; in this instance, she was representative of a much larger issue: how far we need to go to create a race-neutral justice system. The attorney involved was not asking for special treatment, quite the opposite; he was asking to be treated the same as any other defense counsel. The Court used this case to remind us that more than political correctness is at stake here and that we need to consider the ramifications of our actions. We would do well to remember that a guarantee of basic constitutional rights for all starts with a recognition of our professional responsibility toward each other, inside and outside the courtroom.

NOT "AUTHORIZED BY LAW."

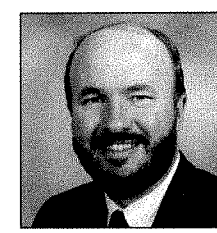
There has been, and continues to be, an ongoing debate concerning the parameters and application of MRPC 4.2, which prohibits an attorney from communicating with a party the attorney knows to be represented by counsel, without that attorney's consent. In *State v. Miller* the Minnesota Supreme Court once again addressed the issue.

Following the execution of a search warrant at the office of a landfill operator, a law enforcement official interviewed the general manager. Contacted by counsel for the employee, the law enforcement official refused to terminate the interview or allow counsel to talk to his client. Later the trial court suppressed the portion of the statement taken from the general manager after counsel had contacted the official. The Court of Appeals reversed, holding that the conduct of the prosecutor's team was "not so egregious as to warrant exclusion" citing the noncustodial nature of the interrogation, among other factors.

The case was presented to the Supreme Court on cross-appeal. The appellant wanted the trial court's order reinstated, while the respondents wanted the Court to acknowledge that their investigative techniques were "authorized by law." The Court at the outset distinguished the Sixth Amendment right *to* counsel from the right *of* counsel under 4.2 to be present during any communication between counsel's client and opposing counsel, noting that since this right belongs to the attorney, the client could not waive the application of the no-contact rule. Without such an interpretation, attorneys or their agents would be allowed to regularly contact and question represented parties even when their counsel objected, unless the parties themselves invoked the right to counsel.

Second, the Court noted that although the Rules of Professional Conduct apply only to lawyers and even though the party's statement was taken by a nonlawyer (as is often the case), the scope of 4.2 encompasses such delegation by way of MRPC 5.3(c)(1),[6] when the lawyer orders or ratifies the nonlawyer's conduct. In this case, the Court found that the prosecutors involved "knew or at least had clear reason to know, that appellant . . . was represented by counsel."[7] This would seem to limit the ability of attorneys to insulate themselves from the prohibition contained

EDWARD J. CLEARY is director of the Office of Lawyers' Professional Responsibility. He has practiced both privately and as a public defender for 20 years and is past president of the Ramsey County Bar Association. His book, Beyond the Burning Cross, won a national award in 1996.



within 4.2 by using investigators to take statements.

Seven years earlier, the Court admonished prosecutors that "justice is a process, not simply a result."[8] Here the Court again stated that "MRPC 4.2 applies to prosecutors involved in custodial interviews of a charged suspect," although, the Court went on to note, there is no "automatic" exclusionary rule for a violation of Rule 4.2 by a prosecutor. Instead, the Court interpreted the "authorized by law" exception to 4.2 to mean that "legitimate investigative processes may go forward without violating MRPC 4.2 even when the target of the investigation is represented by counsel" unless "the process goes beyond fair and legitimate investigation and is so egregious that it impairs the fair administration of justice,"[9] in which case it is not authorized by law. In this case, the initial stages of the interviews may well have been part of a "legitimate investigative process" but the refusal to allow counsel to talk to his client went beyond "fair and legitimate." Consequently, the Court found that the actions of the prosecutor were "sufficiently egregious to implicate concerns relating to the fair administration of justice."[10] The Court's sanction for the violation of 4.2 was to reinstate the trial court's original order, excluding the portion of the statement made after counsel had requested that the law enforcement official not interview his client.

CONCLUSION

With these two decisions, the Court has interpreted several provisions of the Minnesota Rules of Professional Conduct and has done so in a way calculated to get the attention of the legal community. With the first case, the Court has reminded us that as diversity increases within the legal profession, there is a need for lawyers to be aware of latent attitudes towards the role of others within the legal community when their gender or race is different than our own. The second decision is a reminder to lawyers (particularly those involved in law enforcement) that there is a limit to investigative techniques when they violate the age-old prohibition against the undermining of the attorney-client relationship through the interrogation of a party known to be represented by counsel without counsel's consent.

In each case, the Court upheld the rights of an attorney. In one case, the Court upheld the right of a minority attorney not to be subjected to removal from a court proceeding based on his color; in the other, the Court reaffirmed the right of an attorney to be present when his client is

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being questioned. The obviousness of these propositions is belied by the need for the Court to remind us of certain basic principles as they pertain to the way lawyers treat other lawyers. □

NOTES

1. In re Charges of Unprofessional Conduct Contained in Panel File 98-26, *597 N.W.2d 563 (Minn. 1999). Rule 8.4(d), MRPC. "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice; . . . ."*
2. State v. Robert Dale Miller, *1999 WL 681685, 598 N.W.2d ___ (Minn. 9/2/99). Rule 4.2. Communication with Person Represented by Counsel. "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel."*
3. *597 N.W.2d at 565.*
4. *597 N.W.2d at 566.*
5. *597 N.W.2d at 568.*
6. *Rule 5.3(c)(1), MRPC. "With respect to a nonlawyer employed or retained by or associated with a lawyer: . . . (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or . . ."*
7. *598 N.W.2d at ___.*
8. State v. Lefthand, *488 N.W.2d 799, 802 (Minn. 1992).*
9. *598 N.W.2d at ___.*
10. *598 N.W.2d at ___.*