By Martin Cole

When Incivility Crosses the Line

"You can't legislate morality."[1] However true this may or may not be, it has spawned an understanding among lawyers to the effect that you cannot legislate civility in the practice of law, at least not via the lawyer discipline system. A recent Florida discipline case shone a spotlight on this concept. In *Florida Bar v. Norkin*,[2] the Florida Supreme Court imposed a two-year suspension on Jeffrey Norkin for what it described as "appalling and unprofessional behavior" throughout the litigation of a matter, a sanction greater than that which anyone was asking for. The court also required that the attorney receive a public reprimand to be administered before the court—an unusual and old-fashioned-sounding form of public humiliation. What possibly could Mr. Norkin have done to generate such a response?

Norkin engaged in several forms of misconduct, including challenging the integrity of judges by statements made with reckless disregard for their truth (such as accusing a judge of participating in a conspiracy against Norkin's client), and disrupting a tribunal by conduct such as yelling/screaming at judges on several occasions. Here too in Minnesota, we've seen the occasional tirade against a judge leading to public discipline for violating Rule 8.2, Minnesota Rules of Professional Conduct (MRPC).[3] Norkin also was found to have engaged in conduct in violation of Florida's rule equivalent to Rule 3.5(h), MRPC ("a lawyer shall not engage in conduct intended to disrupt a tribunal"), in part for the same screaming and use of an unnaturally loud voice throughout proceedings. Again, Minnesota occasionally has seen such courtroom misconduct.[4] Such misconduct, while serious, has not to date generated in Minnesota a suspension of the length imposed by Florida in this matter.

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Opposing Counsel

Mr. Norkin's misconduct did not stop there. And in my opinion, the more noteworthy (if perhaps not more serious) misconduct for which Florida disciplined him was that aimed at his opposing counsel. Norkin repeatedly attacked the character of his aged (and well-respected) opposing counsel, referring to him as a "scumbag" in front of other lawyers, calling him dishonest to the judge and stating in an email that, "you will join the many attorneys who have ... lived to regret their incompetent, unethical and improper litigation practices." In one hearing, Norkin screamed (again) to the court that, "He is a liar. He's lying." And in another email, he wrote, "I think I have never litigated with an attorney who is as disingenuous as you. This really is fun and so from that standpoint, I thank you." There were several other incidents identified by the court.

Does any of this sound like any Minnesota lawyers you've encountered? We'd all like the answer to be "no," but at the same time it regrettably may strike close to home. Is there a line up to which we tolerate such rude, baiting conduct ... and beyond which we shouldn't have to tolerate it? Lawyers have 1st Amendment rights to speak, but especially in courtroom proceedings there can and must be reasonable limits. Are these limits best imposed just by judges or by disciplinary rule or by aspirational goals?

Florida has a unique version of Rule 8.4(d), which here in Minnesota (and as part of the ABA Model Rules as adopted in most states) says that it is misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. While a violation of this rule has been found for many differing types of conduct, it most obviously has been applied to conduct connected with court proceedings that misuses or wastes judicial resources.

Florida has added an extra "kicker" to its rule, such that it involves conduct prejudicial to the administration of justice, but specifically includes "to knowingly, or through callous indifference, disparage or humiliate other lawyers on any basis." This was the rule on which the Florida court spent considerable time, since much of Norkin's conduct was clearly documented through a series of emails between counsel. To the Florida court, Mr. Norkin clearly disparaged and at least sought to humiliate opposing counsel. This crossed the line of incivility and increased public discipline was deemed appropriate.

Could a lawyer in Minnesota face similar discipline for such conduct? Well, very likely yes, but not of course using similar rule language, which Minnesota has not adopted. Other rules may apply, however. A lawyer was publicly reprimanded for "contacting a party represented by counsel and disparaging their choice of counsel,"[5] but the discipline was as much for the improper contact of a represented party (Rule 4.2, MRPC) as for the content of the contact. In another matter, an attorney was found to have violated Rule 4.4, MRPC (conduct with no substantial purpose other than to embarrass or burden a third person), for repeatedly questioning opposing counsel's intelligence and for being overly confrontational and personalizing the parties' dispute, all of which was found to be "harassing and insulting."[6]

Still, the lawyer discipline system always walks a fine line when seeking to enforce various forms of lawyer civility. Speech can be limited only in certain situations.[7] Conduct is more susceptible of regulation within the practice of law, especially within the courtroom, but often there is some hesitancy to restrict after the fact an advocate's words or even methods of presenting their client's case.

Aspirational Goals

Short of regulation, there remains the more informal "self-policing" of the profession by lawyers; the sort of peer pressure to maintain a reputation for honesty and character that once seemed automatic. Minnesota's Professionalism

Aspirations, that have been approved and endorsed by the Minnesota Supreme Court, deal more with "lawyer to lawyer" issues than with any other aspect of professionalism. The Aspirations state:

> A lawyer owes courtesy, candor, cooperation, and compliance with all agreements and mutual understandings to opposing counsel, in the conduct of an office practice and in pursuit of the resolution of legal issues. As professionals, ill feelings between clients should not influence our conduct, attitude, or demeanor toward opposing counsel. Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. A lawyer owes the same duty to an opposing party who is *pro se*.

We like to believe that "Minnesota nice" actually exists. Certainly, courtesy can be difficult to maintain every day in the "rough and tumble" world of practicing law, especially litigation. But before the Minnesota lawyer discipline system is faced with a "Norkin-like" set of facts and the choice of whether a lengthy suspension is warranted, perhaps a reaffirmation by each of us to heed the words of the Professionalism Aspirations in our dealings with opposing counsel is appropriate.

Sounds like a reasonable New Year's resolution! ▲

Notes

[1] A Google search credited Scottish sociologist and educator R. M. MacIver as being the first to use the phrase (though not the exact same words) in 1926. This well-worn quote subsequently has been used by individuals as diverse as Rev. Dr. Martin Luther King, Jr. and Jesse Ventura.

[2] *Florida Bar v. Norkin*, SC11-1356 (Florida 10/31/2013).

[3] *See, e.g., In re Nett*, A12-1442 (Minn. 11/27/2013).

[4] *In re Getty*, 401 N.W.2d 668 (Minn. 1987).

[5] *In re Peterson*, 584 N.W.2d 773 (Minn. 1998).

[6] *In re Ulanowski*, 800 N.W.2d 785, 789 (Minn. 2011).

[7] *See*, Cleary, "Free Speech, Civility, and Harassment," *Bench & Bar of Minnesota*, February 1998.