

"Sticks And Stones . . ."

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Remember the mantra we chanted as children, "Sticks and stones will break my bones, but names will never hurt me?" Mom and Dad used to tell us the same thing, encouraging us to grow a thicker skin and to not report every name-calling incident among the siblings.

Now that we have grown up (presumably) and become attorneys, does this old childhood adage still hold true?

Is lack of civility by name-calling a disciplinable offense? The court and the Director recognize that some instances of name-calling are inappropriate and unprofessional, but that for the most part, lawyers should not expect the Director's Office to police every comment by every lawyer. The hard question is where to draw the line between mere boorishness and violation of the Minnesota Rules of Professional Conduct (MRPC). A few examples may help lawyers to recognize the line between tolerable and intolerable name-calling.

Case 1. An attorney represented the plaintiff in a civil lawsuit. The jury trial took several days. During the course of the trial, the attorney scowled or grimaced when he received adverse rulings, threw pencils on the counsel table, turned to his clients and said "error" after adverse rulings, persisted unreasonably in arguing adverse rulings and by his mannerisms distracted and annoyed adverse counsel. In a second matter, after hearing arguments in a motion hearing, the judge indicated that the ruling would be adverse to the attorney. The attorney then told the judge, "I knew how you were going to decide this case before I came into court," and after further heated discussion, "You know you're wrong, you're shaking too much."

When the judge went into his chambers, the attorney pounded on the closed door, saying, "you know you're wrong." In this case, the Minnesota Supreme Court found the conduct in violation of the MRPC and imposed a public reprimand.

The court said: "Conduct of the type demonstrated by [the lawyer] would not be tolerated if displayed by a veteran attorney with many years of experience and, in such a case, would mandate some form of suspension."

Case 2. In a second case, an attorney was present with other attorneys in the courtroom after the close of arguments, and after the judge had left the room. In the presence of his partner, opposing counsel, two of her co-counsel and her client, the attorney referred to female opposing counsel with a highly derogatory gender-based epithet and told her to "shut up."

This conduct violated Rules 4.4 and 8.4(d) and (g), MRPC. The attorney had many years of experience. He, too, received a public reprimand from the court, for a single utterance.

Contrast the two foregoing cases with a case in which the Director issued an admonition, for "isolated and

non-serious" misconduct to the offending (and offensive) attorneys.

Case 3. A young attorney was given a letter by a partner in his firm, requesting scheduling of sworn statements in a matter the firm was defending. The attorney reviewed the letter and determined that most of the witnesses listed had already been deposed. In frustration, the attorney upon reviewing the letter wrote "stupid bitch" several times in the margins of his copy of the letter, which was then placed in his personal correspondence file. An unfortunate mistake occurred which resulted in the attorney's copy, with the margin notes, being included as an exhibit to a response to a motion for discovery. The response and exhibits were filed with the court and mailed to 26 other attorneys of record in the lawsuit.

The attorney never intended his comment to be seen by anyone outside his firm. When the error came to light, the attorney and his firm took steps to apologize. The attorney received an admonition for making the comments primarily because the letter containing the comment was placed in the office file where the attorney's entire office staff had access to it. This violated Rule 4.4, MRPC.

Case 4. Finally, another complainant alleged that an attorney behaved with a lack of civility toward him at a court hearing, calling the complainant (the adverse party) "a contemptible little jerk" or words to that effect.

The DEC investigator found that such angry derogatory comments were uncivil, but did not rise to the level of an ethics violation. The Director agreed.

The complaint was dismissed after investigation.

These cases illustrate that there is a continuum of name-calling, very few of which warrant public discipline; a few more which result in private discipline, and most of which are dismissed. Isolated comments not meant for the ears (or eyes) of many others may result in an admonition, or dismissal, depending on the nature of the comments. Only the most egregious comments, usually delivered in a courtroom setting, have resulted in public discipline.

Names may end up hurting you, if you are the one doing the name-calling, but except in the type of extreme circumstances set out above, the recipient of the name-calling would do well to remember, and abide by, the old maxim.