First Amendment Does Not Bar Attorney Disciplinary Action

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Reprinted from *Minnesota Lawyer* (February 3, 2003)

Few individual rights are as jealously guarded in this country as that guaranteed by the First Amendment of freedom of speech. People living in the United States may criticize others, and most importantly, their government, without fear of civil or criminal penalties attaching.

There are limits to this freedom, however. Falsely yelling "Fire!" in a crowded theater is the classic example of a limitation on speech that the state may penalize. This is true because this action is foreseeably likely to cause harm to persons in the melee of exiting in a panic. The state may criminalize such "speech" in order to protect the public.

Can an attorney's words subject her to professional discipline? There have been instructive disciplinary cases that reservedly answer that question "yes." Recently, the North Dakota Supreme Court, following the lead of several other states, including Minnesota, was heard on the subject. In *Jacobsen v. Garaas*, 652 N.W.2d 918 (N.D. 2002), the court determined that the First Amendment did not bar disciplinary action against an attorney who made critical statements to the court because the statements were designed to threaten the judge and thereby affect his decision.

The lawyer, in an open court post-appeal hearing, accused opposing counsel of lying, warned the trial judge that he would be "at risk" if he ruled against the lawyer, and stated that the North Dakota Supreme Court had "made a false representation" when it ruled on an earlier appeal in the case.

At the hearing before the disciplinary panel the trial judge characterized the attorney's statements as threatening, defiant and obstructionist. The judge reasonably interpreted the attorney's "at risk" remark as a threat that the judge would be personally sued if he ruled adverse to the attorney. The hearing panel found that the "at risk" remark warranted discipline for violation of North Dakota's Rule 3.5(a) (conduct seeking to influence a judge by means prohibited by law).

The North Dakota Supreme Court found the attorney's statement that the high court had made a false representation was improper because it implied intentional wrongful conduct by the court, thereby

violating the requirement that an attorney maintain respect for courts of justice. This statement, the high court said, "crossed the line" beyond criticism to disrespectful assertion of wrongdoing by the court.

Other lengthy arguments with the trial court were found to be "conduct intended to disrupt a tribunal," in violation of Rule 3.5(b). The attorney was publicly reprimanded and ordered to pay costs of the disciplinary proceedings.

Garaas argued that his statements were protected by the First Amendment and that he could not be disciplined for exercising his right to free speech. The North Dakota Supreme Court disagreed, quoting from the U.S. Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991): "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."

Garaas also argued that his conduct was no more than zealous representation of his client. The court refused Garaas' attempt to excuse his "lawyer excess" and quoted with approval a Minnesota Supreme Court lawyer discipline case.

In *In re Williams,* 414 N.W.2d 394, 397 (Minn. 1987), the court said, "Respondent asserts he has the right, indeed an obligation, to represent his clients vigorously, aggressively, and zealously. To be vigorous, however, does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil."

Williams had argued that he could not be disciplined for exercising his right to free speech. In rejecting this argument, the Minnesota court drew a distinction between inside and outside of the courtroom. "Outside the courtroom the lawyer may, as any other citizen, freely engage in the marketplace of ideas and say all sorts of things, including things that are disagreeable and obnoxious," the court observed. "But here respondent was in the courtroom, an officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment."

Williams was suspended for engaging in conduct intended to disrupt a tribunal, for using means that had no substantial purpose other than to embarrass, delay or burden a third person, and engaging in conduct that was prejudicial to the administration of justice.

Although lawyers do not shed their constitutional rights when entering the courtroom, critical statements made inside the courtroom are clearly subjected to a different level of constitutional scrutiny

than those made elsewhere.