FREE SPEECH, CIVILITY AND HARASSMENT

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Few areas of law are currently more volatile than laws surrounding harassment in the workplace. Some believe "harassment law is on a collision course with the First Amendment,"[Ftn 1] citing a 1995 5th Circuit Court of Appeals decision which held, "where pure expression is involved, Title VII steers into the territory of the First Amendment . . . when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content based, viewpoint discriminatory restrictions on speech."[Ftn 2]

On the other hand, state courts, Minnesota among them, have interpreted state anti-discrimination statutes to bar harassment.[Ftn 3] Meanwhile, the U.S. Supreme Court has indicated that there *is* a limit to freedom of speech in the workplace, noting, "where the government does not target conduct on the basis of its expressive content, *acts* are not shielded from regulation merely because they express a discriminatory idea or philosophy" (emphasis added).[Ftn 4] Indeed, as one commentator has documented, "many harassment cases involve truly harrowing abuse, abuse that can shut women and minorities out of the workplace almost as surely as would explicit discrimination in hiring."[Ftn 5] In any case, the U.S. Supreme Court will presumably enlighten us as they address the issue of sexual harassment in the workplace in the current term, only the second time the Court has been heard on this topic since it first addressed the issue of workplace harassment in 1986.[Ftn 6]

Our profession is not immune from the debate over the parameters of acceptable conduct in a work setting. For us, the workplace might be a law office, a conference room, or a courtroom. As a privileged microcosm of the world that surrounds it, the legal community reflects changes that are occurring elsewhere and issues of diversity and freedom of speech have become highly politicized. At one end of the spectrum we have clearly harassing behavior in a professional context; on the other, we have the First Amendment right to be offensive and controversial in speech in a non-harassing manner and in a non-professional context. Underlying the debate lie the current much discussed topics of civility and professionalism and what it means to be a lawyer in the 1990s.

APPLYING THE RULES

With regard to the Minnesota Rules of Professional Conduct, there are two provisions that have been used in the past to address offensive behavior in the professional context, MRPC Sections 4.4 and 8.4(g).[Ftn 7] Section 4.4 sanctions, among other things, conduct aimed at embarrassing another in the representation of a client. With regard to speech, this section is content-neutral, punishing the conduct regardless of the

viewpoint expressed. On the other hand, Section 8.4(g), in existence since 1990, proscribes harassment based on group identity in connection with the lawyer's professional activities.

Since its enactment seven years ago, MRPC 8.4(g) has been cited as a basis for professional misconduct in seven instances. The first six cases involved private admonitions; only the most recent case resulted in a public reprimand.[Ftn 8] Interestingly, but perhaps not surprisingly, all six admonitions involved family law matters and gender-related offensive acts and speech. Four out of six complaints were filed by women (one an attorney) against men; one involved a man (an attorney) against a woman; and one involved a man (not an attorney) against a man. The only case that resulted in public discipline involved a recent complaint made by a woman attorney against a male attorney who uttered an extremely egregious gender-based epithet in a courtroom with other lawyers and her client present.[Ftn 9]

Of these cases, five respondents were also cited for violation of MRPC 4.4, which, as noted, addresses the purpose or intent of the respondent to embarrass the recipient of the speech or act. As a former Director indicated in a previous article, "Rule 4.4 has been vigorously enforced in Minnesota over the years."[Ftn 10] I believe this is a proper use of this provision provided it is used for episodes of speech or conduct evidenced by the clear intent on the part of the respondent to humiliate or embarrass the targeted recipient of the offensive behavior.

In most cases, absent a pattern of offensive speech or acts, that is, where there is an isolated incident, the usual preference of this office is to proceed under MRPC 4.4, not 8.4(g). If the isolated incident involves offensive speech that is not clearly targeted and designed to embarrass the recipient, we may not proceed under either provision. The reasons for this are twofold; free speech is a vital component of our democratic fabric, albeit a disruptive one and attorneys are trained to be zealous advocates. In many cases what is truly offensive is obvious to all, that is, as with Justice Potter Stewart's definition of obscenity, we know it when we see it. Unfortunately, in many other instances it is subjective. Generally, even in a professional setting, comments that are offensive to some should not be a subject of discipline unless they cross the threshold outlined under MRPC 4.4. When there is more than one incident of offensive speech or acts or when there is a particularly aggravated incident in a professional context, standing alone and aimed at another based on their group identity, then MRPC 8.4(g) should be utilized.

Section 8.4(g) limits misconduct to situations "in connection with a lawyer's professional activities" and this is a necessary limitation, given that some commentators feel that all offensive speech aimed at group identity should be sanctioned, whether in the workplace or in public settings.[Ftn 11] Even with this limitation, however, I am troubled by the use of the term "harassment" when it is applied to most situations between attorneys when tempers flare and good judgment disappears. In some cases, one person's harassment is another's provocative comment. Other cases are clearly egregious and deserve sanction for their humiliating and embarrassing impact. As we all should know by now, harassment, typically of the gender variety, is often about power and the abuse thereof. Thus, the relationship between the respondent and the complaining party is often crucial, since a lawyer will be held to a much higher standard when dealing with clients or other non-lawyers or when dealing with an attorney employed in a subordinate position. More often than not, when the offensive speech is between opposing lawyers, it is a matter of civility or lack thereof. And that, of course, raises a whole myriad of other issues.

REASONABLE PEOPLE

Since we are using a "reasonable person" standard in judging the offensiveness of speech or conduct in the

workplace,[Ftn 12] it would seem that we would be able to easily distinguish between offensive speech and harmless comment between attorneys. Unfortunately this leaves a great deal of room for judging the content of speech and its acceptability. Many cases are better addressed by a discussion of civility and aspirational standards for lawyers rather than being relegated to the files of professional misconduct. In addition, further education on topics of diversity is now mandated for attorneys and we may hope will make clear to some what has been obvious to many: that the American workplace has changed and certain behavior is no longer acceptable.

Nevertheless, when a comment or act in a professional context is specifically designed to humiliate or embarrass another, even another attorney, MRPC 4.4 can and should be used. Four years ago, the Director noted that "Rule 4.4 does not provide the answer to those who lament the erosion of civility in the practice of law."[Ftn 13] It still doesn't nor should it since it primarily addresses outrageous examples of offensive conduct. MRPC 8.4(g) does not provide the answer either, because it generally addresses a pattern of offensive speech or acts aimed at group identity, although in some particularly egregious cases a single act may be a violation. Both provisions, however, help set the parameters of what is acceptable behavior on the part of a professional. Within these parameters lie the issues that need to be addressed by each of us and all of those who call for a greater degree of civility among the members of the bar. There should be no attempt to add a mandatory civility component to the rules since, as it pertains to offensive speech, such rules will run afoul of our duty to be zealous advocates and our constitutional right to freely express ourselves.

There does seem to be a consensus among members of the judiciary and the legal community that incivility is rampant; that previously unheard of and unacceptable speech and acts occur with frequency. It should be remembered that the legal community is a microcosm of the larger world and the larger world is becoming more diverse on a daily basis. Although some misbehavior stems from other sources, increasing acts of incivility are often an intolerant reaction to the rising tides of diversity in the legal profession and in our nation. Sometimes a lawyer just gets angry like anyone else and loses his head. More often, this type of behavior stems from a long-simmering inability to tolerate changes in the world around us, particularly those changes occurring in the professional world.

If we are indeed proud of our profession and if we are responsible community leaders, then we should be leading the way as it pertains to tolerance of different beliefs, appearances, and identities. Violations of these provisions show, that like many non-lawyers, some lawyers fail to grasp what is being asked of them: respect yourself by respecting others.

NOTES

[1] *Hans Bader, "Free Speech Trumps Title VII Suits,"* National Law Journal *(November 24, 1997) p. A19.*

[2] DeAngelis v. El Paso Mun. Police Officers Ass'n, *51 F.3d 591, 596-597 (5th Cir. 1995).*

[3] Continental Can. Co. v. State, *297 N.W.2d 246 (Minn. 1980).* See *Minnesota Statutes Chapter 363.*

[4] R.A.V. v. City of St. Paul, *505 U.S. 377 (1992).*

[5] *Eugene Volokh*, Freedom of Speech and Workplace Harassment, *39 U.C.L.A.Rev. 1791, 1807 (1992).* See also *"A progress report from the racial bias task force,"* Minnesota Lawyer *(November 21, 1997) p. 1, wherein Justice Page relates his observations regarding the continuing problems with racial attitudes within the legal and judicial systems.*

[6] *Since* Meritor Savings Bank v. Vinson, *477 U.S. 57 (1986), the Court has only decided one other case on this issue,* Harris v. Forklift Systems, *510 U.S. 367 (1993).*

[7] *Rule 4.4:*

> *In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

Rule 8.4(g):

> *It is professional misconduct for a lawyer to: . . . harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities.*

There is no provision similar to MRPC 8.4(g) in the ABA Model Rules. Attempts to place anti-bias language in the Model Rules "have proved 'difficult, controversial and divisive'"; two proposed rules "were withdrawn from consideration before the ABA's 1994 midyear meeting." ABA/BNA Lawyer's Manual on Professional Conduct *(November 26, 1997) p. 366.*

[8] In re Starr, *No. C4-97-981*, slip op. *(Minn. Nov. 13, 1997).*

[9] Id.

[10] *Marcia A. Johnson, "'Uncivil' Practice,"* Bench & Bar *(April 1994) p. 15.*

[11] See *Bowman, Street Harassment and Informal Ghettoization of Women,"* 106 Harv.L.R. 517 (1993).

[12] See Harris v. Forklift Systems, *510 U.S. 367 (1993).*

[13] *Johnson*, supra, *n.10.*