QUESTIONS OF RESPECT AND OBSTRUCTION

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On December 7, 1907, attorney Francis Hart wrote the chief justice of the Minnesota Supreme Court, complaining about several decisions,

> The point is this: Is a proper motive for the decision discoverable short of assigning to the court emasculated intelligence, or a constipation of morals and faithlessness to duty?[Ftn1]

Hart was suspended for six months because he "wilfully *[sic]* violated his obligation to maintain the respect due to courts and judicial officers."

Seventy-five years later, North Dakota attorney Robert Snyder wrote a letter to a federal district court judge's secretary, declining to complete further forms for compensation for services, because they involved "extreme gymnastics" and because, "I am extremely disgusted by the treatment of us by the Eighth Circuit. . . ."[Ftn2] The United States Supreme Court reversed the Eighth Circuit's suspension of Snyder, stating,

> A single incident of rudeness or lack of professional courtesy — in this context — does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts.'

In recent months, the Minnesota Supreme Court has discipline two lawyers for disruptive courtroom conduct and statements. On the other hand, the Office of Lawyers Professional Responsibility has recently dismissed several complaints by judges about lawyers' offensive statements. What are the standards for judging the professional responsibility of any lawyer's statements to or about a judge?

The standards are more readily listed than summarized. Francis Hart was suspended for violating the predecessor of Minn. Stat. §481.06(2), that "Every attorney at law shall maintain the respect due to courts of justice and judicial officers." Rule of Professional Conduct 8.2(a) in part provides, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer. . . ." Rule 8.4(d) prohibits "conduct that is prejudicial to the administration of justice." Rule 3.5(h) states, "A lawyer shall not engage in conduct intended to disrupt a tribunal." Rule 3.4(c) in part forbids a lawyer to "knowingly disobey an obligation under the rules of a tribunal. . . ." Rule 4.4 forbids a lawyer to use means that "embarrass, delay, or burden a third person." The Rules of Professional Conduct do not carry forward former DR 7-106(C)(6), forbidding a lawyer during litigation to "engage in undignified or discourteous conduct which is degrading to a tribunal."

Case law has identified several interests to be balanced in determining when attorneys may be disciplined for their statements to a court. These interests include:

1. The attorney's First Amendment rights and the duty to advocate zealously;

2. The benefit to the judicial system and the public of free criticism of the courts by knowledgeable persons;

3. A need to maintain public confidence in the legal system (*See* former EC 8.6); and

4. The unobstructed administration of justice.

Under the Rules of Professional Conduct, the balance among these interests has shifted toward freer expression by attorneys, particularly outside the courtroom.[Ftn3]

> A respondent attorney raised the First Amendment issue in a 1987 Minnesota case:
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> Respondent argues his conduct was an exercise of free speech and to impose discipline would be unconstitutional censorship and would chill effective representation of clients. Respondent would misapply the First Amendment. 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. . . . 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.[Ftn4]

Having rejected the First Amendment claim, and noting the attorney's experience, the court suspended the attorney for repeated courtroom misconduct, including telling an adjudicative officer that he was "a disgrace to our profession." In another 1987 Minnesota case, an attorney was disciplined for disruptive conduct in several courtrooms and chambers, including telling a judge, "You know you're wrong, you're shaking too much."[Ftn5] Attorneys' free-speech rights are not unconstitutionally fettered by appropriate rules of evidence, decorum,[Ftn6] and professional conduct because preventing the obstruction of the administration of justice is a compelling state interest justifying limitations of free speech.

Factors that are considered in determining degree of discipline for obstructive speech in a litigation context include: whether the speech is in or out of court; whether a jury is present; whether the obstructions are repeated and apparently willful; whether the attorney is experienced; the degree to which the judicial process is obstructed; and whether the attorney comes to recognize the misconduct.

In the spectrum of free speech and attorney discipline, statements of opinion made outside the courtroom are broadly protected by the First Amendment. Neither a statement to a newspaper that a judge acted like an "ayatollah," nor an opinion that judges have a conflict of interest in setting certain salaries are the subjects of disciplinary investigation. Eighty years ago the Minnesota Supreme Court in *State Board v. Hart* adopted the view that, "No class of the community. . . ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality, or integrity of judges than members of the bar."

Although the court disciplined Hart for his letter to the chief justice, the court rejected the state board's claim that Hart should also be disciplined for writing letters critical of the Supreme Court to the governor and the press.

At an intermediate point on the spectrum are complaints by judges about attorney comment made during litigation "about the perceived fairness of judicial proceedings." In one case, dismissed by this office after investigation, an attorney complained in chambers of certain evidentiary rulings and stated:

> [I]f I were on the jury, I would reach one of two conclusions. I believe I would either believe that I was one of the dumbest lawyers that ever hit the county . . . , or I would think that the court wanted my client convicted, one or the other. Either result, I don't think it's going to help this case. . . . I just really question how . . . we are going to have a fair trial here.

In another dismissal, a lawyer, outside the court, asked the judge to assure him that a personal relationship was not affecting certain rulings. The latter statement appeared gratuitous and offensive, but not in violation of the Rules of Professional Conduct. In both cases the attorney comments fell short of being statements regarding judicial integrity covered by Rule 8.2. In neither case did there appear to be any obstruction of the administration of justice, nor was there an ongoing pattern of disrespect or incidents in other courtrooms. In contrast, an attorney was recently disbarred in federal court for writing to a magistrate, while an appeal was pending, that the magistrate's decision was the result either of incompetence or an ethnic bias.[Ftn7]

Attorneys charged with obstructive courtroom statements have on occasion claimed that such charges will prevent zealous advocacy on behalf of clients. This claim is doubly fallacious. First,

> 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.[Ftn8]

Second, the disruptive and disrespectful statement is most often ineffective and indeed harmful to the client.

While many complaints involve attorney speech in some sense (*e.g.*, false statement, disclosure of confidences, etc.), only a handful of complaints each year raise free speech issues very directly. Generally speaking, statements that do not obstruct ongoing litigation and which are not false are given great latitude, particularly when they express an opinion about a matter of public interest.

Perhaps most difficult to assess are remarks made directly to a judge, outside the courtroom, which are disrespectful. A recent Virginia case raised the question of the proper response to an attorney's insulting remark to a judge. An attorney approached a Supreme Court justice as he was leaving a holiday party in 1987 and stated, "I am still pissed off at you, you asshole, for not ruling in my favor in my emergency corporate case a few weeks ago." The justice issued a criminal contempt citation. Eventually, after the attorney apologized and agreed voluntarily to stop practicing for 60 days, the contempt charge was dismissed.[Ftn9] When contempt citations are appropriate is beyond the scope of this article, but the absence of a contempt citation has been noted in an attorney discipline opinion.[Ftn10] Rule 4.4, Rules of Professional Conduct, states in part, "In representing a client, lawyers shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Comments which fall short of being false statements about judicial integrity under Rule 8.2, might nonetheless be sufficiently insulting to violate Rule 4.4.

A bench that is free from intimidation, unobstructed judicial processes, attorneys zealous for their clients, the free expression of opinion on public matters — all of these are essential. Recent caselaw and changes in the Rules of Professional Conduct show that the balance among these essentials has shifted in favor of free speech. Disruptive courtroom tactics, false statements and contemptuous insults remain unprofessional conduct.

NOTES

1. State Board v. Hart, *116 N.W. 212, 214 (1908).*

2. In re Snyder, *105 S.Ct. 2874, 2877 (1985).*

3. See generally *G. Hazard Jr. & W. Hodes,* The Law of Lawyering *552-54 (1985); C. Wolfram,* Modern Legal Ethics *601-03 (1986) Note, "In re Erdmann: What Lawyers Can Say About Judges," 38* Albany L. Rev. *600 (1974) (hereinafter "Albany Note"); Note, "Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights," 56* Notre Dame Law *489 (1981).*

4. In re Williams, *414 N.W.2d 394, 397 (Minn. 1987).*

5. In re Getty, *401 N.W.2d 668, 669 (Minn. 1987).* See also In re Paulrude, *248 N.W.2d 747, 748 (Minn. 1976), involving a disbarment for misconduct including repeatedly telling a court "It's nothing but a goddammed horse's ass."*

6. In re Williams *and Wolfram,* Modern Legal Ethics *at 627, n. 51, both suggest that under Rule 3.4(c), Rules of Professional Conduct, a lawyer could be disciplined for violation of one of the Rules for Uniform Decorum. The rules of decorum are, however, heterogeneous, including for example rules on clothing, objections without argument, and Rule 21, which in part tells lawyers that they "… should caution witnesses not to chew anything when testifying."*

7. In re Evans, *801 F.2d 703 (4th Cir. 1986).* See also In re Williams, *414 N.W.2d 394, 397-8, in which the use of an ethnic slur at deposition was held to warrant a public reprimand.*

8. In re Williams, *414 N.W.2d 394, 397 (Minn. 1987).*

9. *Carter, "Lawyer Accepts Suspension for Remark,"* Nat'l L.J., *Feb. 1, 1988, at 3.*

10. In re Getty, *401 N.W.2d 668, 671 (Minn. 1987).*