Let's Talk Civility

By David M. Saperstein

It is difficult to choose just one scene as my personal favorite from the movie *Monty Python and the Holy Grail*. There are so many worthy choices ("bring me a shrubbery", "help, I'm being repressed"). If pushed, I would vote for the scene of the Black Knight. When King Arthur cuts off an arm, this proud knight brushes it off, "'tis but a scratch." The second arm's amputation is "a mere flesh wound." With both legs cut off, the knight offers to call the match a draw.

My children do not agree. Based on the conversations around our kitchen table, the scene that has captured their imagination is the siege of the French castle. The French defenders hurl insult after insult on the British invaders, famously including "your mother was a hamster and your father smelt of elderberries."

What is comedic gold in one context takes on a more sinister character in another. When lawyers are unable to discern the difference between permissible and impermissible advocacy, there can be both financial and ethical consequences.

Monetary Sanctions

Lawyers who insult their opposition or the tribunal certainly put themselves at financial risk. For example, in *Guy Chem Co v. Romaco AG*, 2007 WL 1276909 (WD Pa, 2007), a federal Court awarded over $11,000 in sanctions against an attorney who confused "incivility with aggressiveness", "replaced legal argument with vitriolic rhetoric," and filed a motion "founded primarily on spite." In *Martin v. Essrig*, 277 P3d 857 (Colo App, 2011), the Colorado Court of Appeals upheld monetary sanctions against an attorney because his opening and reply briefs "were suffused with uncivil language, . . . sarcastic and bombastic rhetoric, and inflammatory language."

In *In re First City Bancorporation of Tex, Inc*, 282 F3d 864, 866 (CA 5, 2002), the Fifth Circuit upheld a sanctions award of $25,000 against an attorney on the basis of numerous forms of uncivil behavior over the course of the case, including calling opposing counsel an "underling who graduated from a 29th-tier law school," and referring to the work of other attorneys as "garbage." Finally, a

lawyer was required to pay over $11,000 in sanctions when he called the opposing parties “the grinches of Fairthorne” and said “I don’t know whether their heads are not on just right or their shoes are too tight but something has shriveled their heart and made them bitter and tart.” Using an evocative analogy, the Court in *Fairthorne Maint Corp v. Ramunno*, 2007 WL 2214318 (Del Ch Ct, 2007) reasoned that sanctions were appropriate because, “It is cheap for a party to throw garbage, but it is expensive for the party who must clean up the mess.”

Disciplinary Proceedings

Lawyers who are inappropriately aggressive also run the risk of professional discipline. In *In re Snyder*, 472 U.S. 634, 644–45, 105 S. Ct. 2874, 2880–81, 86 L. Ed. 2d 504 (1985), the United States Supreme Court held that ethical rules are not unconstitutional under the First Amendment simply because they impose limitations on speech. Rather, the Court noted the many privileges of bar membership such as counseling clients, appearing in court, calling nonparties as witnesses, and other pretrial processes. The Court held that the corresponding burden to this license is that members of the bar must not commit “conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts,” or “conduct inimical to the administration of justice.” Although the Court found that the single act of rudeness at issue in that case[i] did not require discipline, it agreed that the restrictions to speech that accompanied membership in the bar included an obligation of civility toward all other participants in the judicial process:

All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.

Abusive Conduct Toward Client

This reasoning has been used to discipline attorneys who have abused their bar privileges to insult others. On occasion, the abusive language has been directed to the lawyer's own client. For example, in *Attorney Grievance Comm of Maryland v. Basinger*, 441 Md. 703, 712–13, 109 A.3d 1165, 1170–71 (2015), when withdrawing from representation, an attorney was disciplined for mailing three letters that, among other misconduct, called his client:

- A TRUE C[**]T" who had "finally f[***]ed up one time too many";
- "a reprehensible human being" with "worthless progeny" and a "pathetic and dysfunctional world";
- lazy and dishonest;
- responsible for her grandson's death; and
- tried to "weasel [her] way out of paying the full amount of [a funeral chapel]'s bill."

Abusive Conduct Toward Tribunal

Other times, the misconduct has been directed toward a tribunal. For example, in *Grievance Administrator v. Fieger*, 476 Mich. 231; 719 N.W.2d 123 (2006), the Michigan Supreme Court disciplined an attorney who had reacted poorly to an appellate decision reversing a significant judgment in favor of his clients. The week after the decision, the attorney made comments on a radio show that mentioned the appellate judges by name, graphically invited abusing them, called the judges "jack***es," and stated that the judges could "kiss [his] ***." The Michigan Supreme Court wrote that Michigan's ethical rules were designed to prohibit "undignified,' "discourteous," and "disrespectful" conduct. The Court held that the ethical rules applied outside the courtroom and that the nature of the graphic comments did "not come close to the margins of the civility or courtesy rules." Moreover, relying on precedent from the United States Supreme Court, the Court opined that: "resort to epithets or personal abuse is not … safeguarded by the Constitution."

Similarly, in In re *Disciplinary Action Against Garaas*, 2002 ND 181; 652 N.W.2d 918, 927 (2002), the North Dakota Supreme Court held that the First Amendment did not protect the lawyer from being sanctioned for his unprofessional conduct toward both the tribunal and opposing counsel: "[a] lawyer's right to exercise free speech does not permit a lawyer appearing in a judicial proceeding in open court to call opposing counsel a liar, to threaten a judge with personal liability if he rules a certain way, to accuse an appellate court of false misrepresentation, or to

engage in a lengthy, disruptive, belligerent, and disrespectful exchange with the court."

Abusive Conduct Toward Opponents

Most frequently, an attorney is disciplined for inappropriate comments about opponents. For example, in *In re White*, 391 S.C. 581, 589, 707 S.E.2d 411, 415, *reinstatement gtd*, 393 S.C. 227, 712 S.E.2d 436 (2011), the attorney represented a church. He sent a letter to the client's landlords and town manager that questioned whether the town manager had a soul, stated that the manager had no brain, and called the leadership of the town "pagans," "insane," and "pigheaded." The South Carolina Supreme Court affirmed the suspension of the attorney for 90 days and rejected the defense that the conduct was justified by the attorney's duty to provide zealous representation: "Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes."

In *The Florida Bar v. Martocci*, 791 So. 2d 1074, 1077-78 (Fla. 2001), the lawyer was found guilty of two counts of ethical misconduct not only for his threat to beat the father of the opposing party during a recess, but also for his disparaging and profane remarks to the opposing party, such as calling the opposing party "crazy", a "stupid idiot" and a "nut case," making demeaning facial gestures, and telling her to "go back to Puerto Rico." The attorney also called the opposing attorney a "bush leaguer," told her that depositions are not conducted under "girls rules", and repeatedly told her that she did not know the rules of procedure and that she needed to go back to school. In that case, the Court not only affirmed the findings of ethical violations, it also required a personal appearance before the Florida Bar Board of Governors, and a two-year period of probation, including an evaluation for possible anger management or mental health assistance.

Similarly, in *The Florida Bar v. Uhrig*, 666 So. 2d 887, 888 (Fla. 1996), the Florida Supreme Court disciplined a lawyer for writing a letter to his client's ex-spouse that "was devoid of any purpose other than humiliation and disparagement." The Court illustrated the tone of the letter by referencing the letter's comparison of the opinions of the ex-spouse to body odor.

Abusive Conduct Toward Third Parties

Finally, discipline has been imposed when a lawyer's inappropriate comments were made to third parties other than the opponent. For example, in *Matter of Golden*, 329 S.C. 335, 341–43, 496 S.E.2d 619, 622–23 (1998), the South Carolina Supreme Court affirmed the public reprimand of an attorney for his insulting, threatening, and demeaning comments during two depositions that the Court characterized as "bullying of a mentally unstable witness." The attorney had repeatedly interrupted the first deponent, used a loud volume, and made "rude, or otherwise inappropriate" comments. As to the second deponent, the attorney had commented that this witness was "mean spirited," that someone should be "locked in a room naked" with her, and that he would like to put a bag over her without a hole for her mouth. The Court found that the attorney made these comments in an agitated tone of voice, and that the comments were not an attempt at humor, but "were intended to be insulting and degrading."

It is worth noting that an attorney's good standing in the legal community will not insulate that attorney from discipline. In fact, as the Court pointed out many years ago in *In re Thatcher*, 80 Ohio St. 492, 669, 89 N.E. 39 (1909), such an attorney should know better than to abuse their privileges by vilifying others:

An attorney of more than twenty years' standing at the bar must be presumed to know the difference between respectful, fair and candid criticism, and scandalous abuse of the courts which gave him the high privilege, not as a matter of right, to be a priest at the altar of justice.

Conclusion

Chief Justice Warren Burger once stated that "[a]ll too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters . . . ." Chief Justice Warren E.

Burger, The Necessity for Civility, 52 FRD 211, 213 (May 18, 1971). Such lawyers need to understand that their actions can cause unwanted consequences.

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[i]The conduct at issue involved a letter in which the attorney refused further appointments of indigent criminal defense work. The letter read in part:

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it. [Snyder, supra at 637.]

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