

CIVIL LITIGATION

The Bar's Proscription Against Engaging in Offensive Personality

by Charles A. Gruber

An attorney, at the deposition of his wife in an action concerning her former spouse, baits the opposing counsel with "macho" verbal attacks and makes thinly veiled derogatory remarks concerning the opposing counsel's heritage. An attorney at his homeowners meeting berates a member of the Board, verbally abusing him in the meeting, accusing him of criminal conduct, publicly humiliating him, and threatening to make the Board member's life miserable because he is an attorney and can drag the Board member into court. In the midst of a disagreement, a male attorney faxes a female attorney a letter making gender-specific, vulgar remarks impugning all female attorneys' abilities. This, after the female attorney, using a well-known four-letter word, tells the male attorney what he may do with himself. Another attorney, upset with the opposing party's self-help actions, which result in a utility company cutting off power to the attorney's client's house, curses the opposing party's attorney in a letter in which profanity is used in several places.

Each of these incidents has been the source of complaints to the Utah State Bar's Office of Attorney Discipline. Each is considered unprofessional and offensive. And each is considered an ethics violation. But of what rules?

These examples of "offensive personality" are considered to be violations of a little-known rule that is not a Rule of Professional Conduct, but is one of the Rules for Integration and Management of the Utah State Bar ("RIM"). Rule 21 of the RIM pro-

vides, in part:

Duties of attorneys and counselors. It is the duty of an attorney and counselor: . . . To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which he is charged.

Rule 9 of the Rules of Lawyer Discipline and Disability provides, in part, as follows: "It shall be a ground for discipline for a lawyer to: (a) violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers; . . ." Thus, a violation of Rule 21e, in conjunction with Rule 9 of the Rules of Lawyer Discipline and Disability, constitutes a violation that subjects the attorney to discipline by the Ethics and Discipline Committee of the Utah State Bar.

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What are these Rules for Integration and Management? In 1931, the Utah State Bar was statutorily integrated by making all attorneys licensed to practice law in Utah members of the Bar, subject to the rules and regulations promulgated by the Bar. Since then, all rules and regulations of

the Bar have been subject to approval by the Utah Supreme Court, which has the constitutional power to regulate attorneys in Utah. In 1981, the Supreme Court, to memorialize its relationship to the Bar, promulgated the RIM. Included in the RIM, as amended, is the language of Rule 21e concerning "offensive personality." That language is not merely hortatory, but is a directive from the Supreme Court to practicing attorneys in Utah to be civil, polite, and respectful.

On January 1, 1988 the Supreme Court adopted the Rules of Professional Conduct. Those rules, and in particular Rule 4.4, reiterate the spirit of Rule 21e. Rule 4.4 (Respect for Rights of Third Persons) of the Rules of Professional Conduct states:


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.

The Utah Rules of Professional Conduct are based on the Model Rules of Professional Conduct promulgated by the American Bar Association. The comments following ABA Model Rule 4.4 cite cases from across the country in which Rule 4.4 has been used to sanction attorneys for behavior similar to that described above. Rule 4.4 has been applied to attorneys' actions while representing themselves, representing others, and in their behavior towards opposing counsel, opposing parties, witnesses, judges, court staff, and jurors.

What if it is the client who urges the attorney to engage in offensive acts? Rule

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1.16(a)(1) of the Rules of Professional Conduct mandates that the attorney withdraw from the representation, because such conduct would be a violation of the Rules of Professional Conduct. An attorney may not use the excuse of "following orders" from a client as a rationale for being mean-spirited or abusive.

The Rules of Professional Conduct and the Rules for Integration and Management of the Utah State Bar do not prevent an attorney from aggressively and vigorously representing a client. But the message from the Supreme Court is clear: if an attorney is obnoxious, rude, profane, or bellicose, then that attorney should be disciplined. Civility is not optional; it is a professional requirement, the violation of which can result in sanctions or even possibly the loss of one's license to practice law. 

The Uncivil Litigator

At last we have received a submission for this column. We've fictionalized the name of the offending author (as well as that of the person referred to in the letter) because we realize that this letter was part of a larger and acrimonious dispute between counsel. Nevertheless, we consider it an excellent example of uncivil litigation.

Dear Mr., Mrs., Ms., Miss, Master, or Gender Neutral entity:

From one professional to a P.M.S. handicapped inconsiderate emotionally and intellectually impaired entity, had there been a problem a simple and courteous phone call would have been sufficient to cure the problem[.] I'm sure this simplicity escaped you. . . . Since we did

assume that any law firm would behave professionally and not with an irresponsible emotionally and intellectually handicapped temper tantrum, may we convey our most insincere apologies. . . . Please advise capital directories of Ms. Uninvolved Attorney's new address and please set aside your petty emotionally handicapped differences with Ms. Uninvolved Attorney long enough to inform this office of her new address and phone number. I don't know if this taxes your attention span or not, however your assistance would be appreciated.

I refuse to have a battle of wits with and [sic] unarmed person, yours [sic]!

Jeffrey E. R. King

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