Another Reason Not to Misbehave at the Courthouse

Badly behaved lawyers are in the news again.[1] We looked at some of the consequences lawyers risk by engaging in abusive or disruptive behavior in previous columns.[2] There, we saw that when the Arizona Supreme Court amended its Rules of Professional Conduct,[3] first in 2003 and again in 2008, several changes were ostensibly intended to discourage the unfortunate segment of our profession that seems to believe that bad manners impress clients and help win lawsuits.

The first change, in 2003, was to eliminate the word "zealous" from every sentence found in our ethics rules. This was intended to abandon the troublesome notion of "zealous advocacy" found in the former Code of Professional Responsibility, the predecessor to our current Rules, and to encourage lawyers to instead "act honorably" in pursuing their clients' interests. The 2008 change was to make violations of the Oath of Admission to the Bar and the Lawyer's Creed of Professionalism considered "unprofessional conduct." Unprofessional conduct is not only prohibited under Rule 41(g) but, by virtue of Rule 54(i), gives the State Bar jurisdiction to seek discipline against the offending lawyer. This change was intended to underline the "offensive conduct" discouraged in the Oath and to encourage the obligations of courtesy, civility and cooperation found in the Creed.

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How well all of this has worked in the intervening years is subject to debate. To some of us, apparently, the threat from the discipline authorities is not considered enough of an inducement to avoid the occasional behavioral lapse.[4] But in recent years, a new form of sanction has emerged that gives the court presiding over the case a real hammer over the head of a rude or disruptive lawyer. It's called disqualification.

Court-ordered disqualification of a lawyer, particularly in the middle of a case or where that lawyer's client has invested significant sums in the representation, can result in embarrassment, financial loss and even malpractice liability for the lawyer affected. In certain circumstances, the threat of being thrown off a case can get the offending lawyer's attention much faster than the usual court-imposed sanctions of contempt, fines or referral to disciplinary authorities.[5] And if for any reason you think it might not, just ask Pennsylvania lawyer Nancy K. Raynor.

Ms. Raynor is an experienced lawyer who defends hospitals and doctors against liability claims. She was one of the defense team that defended an emergency room doctor, and the hospital that employed him, for failing to inform a patient of a suspicious nodule that appeared on an X-ray of the patient's lungs. The patient later died of lung cancer, and her estate sued. The case's history is complicated and involved an interlocutory appeal and a retrial, but what got Ms. Raynor in trouble was when it came to light that, just before the first trial of the case, she had sent a letter to the general counsel of the Hospital of the University of Pennsylvania where one of the plaintiff's expert witnesses, an emergency room physician, was employed. The letter, after taking some potshots at the conclusions reached by the expert, warned that although the hospital was not a named defendant in the case, it could suffer in future malpractice cases if its employee, the expert witness, was allowed to testify in support of the plaintiff's theory of liability. The hospital's general counsel contacted the physician, who contacted the plaintiff's counsel, who then brought the matter to the trial court's attention, asking for sanctions. It also developed that Ms. Raynor had one of her associates write follow-up letters to opposing counsel presumptuously asking whether the plaintiff was going to name a new expert and, if so, who it would be.

Finding that the "clear intent" of Ms. Raynor's letter was to pressure the hospital into coercing the expert to either change her opinion or refrain from testifying and that the follow-up letters buttressed that

—continued on p. 64

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conclusion, the court disqualified Ms. Raynor from further participation in the case and sanctioned her almost $45,000—presumably the cost to the plaintiff in bringing the motion to sanction Ms. Raynor's actions. This ruling was upheld on appeal,[6] the court saying that the trial judge "properly disqualified Ms. Raynor because her conduct threatened to impede the [plaintiff's] due process rights to a fair trial and the court's authority to administer justice." The court found that Ms. Raynor had violated three of Pennsylvania's Rules of Professional Conduct, which are essentially the same as ours: ER 3.4(a), which prohibits obstructing another party's access to evidence; ER 4.4(a), which forbids actions that have no substantial purpose other than to embarrass, delay or burden a third person; and ER 8.4(a), which prohibits violating ethics rules through the acts of another, in this case Ms. Raynor's associate. The court acknowledged that disqualification of counsel is a serious remedy that should be used only when due process so requires, and found that the case before it so qualified.

There are other examples of disqualification being used as a sanction against obstreperous lawyers.[7] For the present, lawyers who dare to cross the line in the litigation context need to be aware that they risk not only a reprimand and/or a fine from the court and an invitation to Arizona's system for lawyer regulation. They may get an unpaid vacation from the remainder of the proceedings, as well.

endnotes

1. Samson Habte, *Lawyer's Intimidation of Expert Warranted $45k Sanction*, 32 LAW. MAN. PROF. CONDUCT 679 (Nov. 30, 2016).
2. *When Lawyers Behave Badly*, ARIZ. ATT'Y (April 2008) at 18; *Bad Manners May Lead to Discipline*, ARIZ. ATT'Y (March 2002) at 12.
3. Rule 42, ARIZ.R.S.CT.
4. Examples of all forms of awful lawyer behavior are collected at 61 LAW. MAN. PROF. CONDUCT 903.
5. A description of the various sanctions imposed on misbehaving lawyers can be found at 61 LAW. MAN. PROF. CONDUCT 925.
6. *Sutch et al. v. Roxborough Mem. Hosp. et al.*, 151 A.3d 241 (Pa. Super. 2016).
7. *U.S. v. Merlino*, 349 F.3d 144 (3d Cir. 2003) (court properly disqualified lawyer for attempting to persuade witness represented by other counsel to refrain from testifying against lawyer's client); *Briggs v. McWeeney*, 796 A.2d 516 (Conn. 2002) (affirming disqualification of lawyer who attempted to prevent dissemination and production of report adverse to client's interests); *Comuso v. National R.R. Pass. Corp.*, 267 F.3d 331 (3d Cir. 2001) (lawyer disqualified for shouting profanities at opposing counsel during trial recess); *Carnival Corp. v. Beverly*, 744 So.2d 489 (Fla. Ct. App. 1999) (court affirming defense counsel's disqualification for continually demeaning plaintiff's counsel and suggesting that he had suborned perjury and after court had repeated told offending lawyer to desist); *U.S. v. Greig*, 967 F.2d 1018 (5th Cir. 1992) (lawyer who attempted to persuade his client's co-conspirator not to cooperate with government without informing co-conspirator's counsel had an actual conflict of interest from his own unethical behavior and should have been disqualified); and *Pirillo v. Takiff*, 341 A.2d 896 (Pa. 1975) (upholding disqualification of counsel to prevent him from representing more than one witness before grand jury in order to insure secrecy of grand jury proceedings).