

MONTHLY
LUNCHTIME SEMINAR
SERIES

51ST SESSION:

"STICKS & STONES WON'T
BREAK YOUR BONES, BUT
NAMES MAY LAND YOU
BEFORE THE ARDC"

Judge Lynn M. Egan
Ms. Adria E. Mossing (WBAI President)
Judge Hollis L. Webster (Ret.)

April 12, 2017

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 20 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court-ordered medical exams, attorney-client/work product privileges, sanctions, special interrogatories, examination of experts and damages. She also serves as a mentor for new judges and currently serves on the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 10,000 hours of free CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in Cisarik v. Palos Community Hospital. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

ADRIA EAST MOSSING

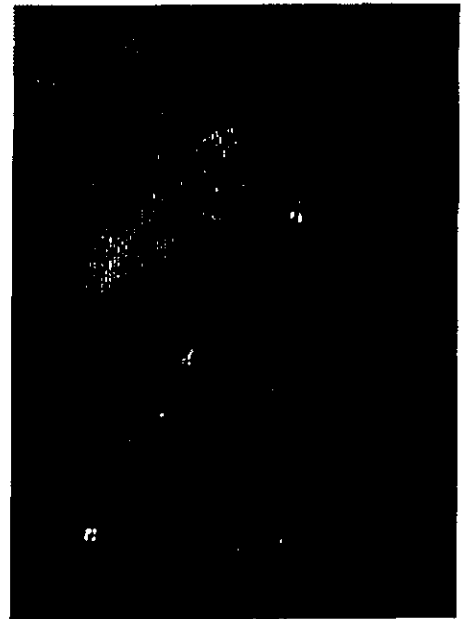
Adria East Mossing founded Mossing & Navarre, LLC along with her partner, Jim Navarre, in 2011. Adria focuses her practice on matters involving personal injury, wrongful death, medical malpractice and nursing home negligence. Prior to starting her own firm, Adria was an equity partner at Hinshaw & Culbertson. Her defense practice included the representation of doctors and hospitals as well as other professionals. Adria currently serves as the President of the Women's Bar Association of Illinois.

Adria is a graduate of Northwestern University (BA 1983) and DePaul University College of Law (JD 1988), where she served as Managing Editor of Notes and Comments on the DePaul Law Review. She also serves on the inaugural DePaul Law Alumni Engagement Board.

She has been honored by Leading Lawyers as one of the Top 10 Women Personal Injury Lawyers in Illinois. She has also been named by Super Lawyers as one of the Top 50 Women Lawyers in Illinois and one of the Top 100 Lawyers in Illinois.

Judge Hollis L. Webster (Ret.)

Appointed in 1991 as an Associate Circuit Judge in DuPage County, Illinois; appointed as Circuit Judge by Illinois Supreme Court in 1995; elected in 1996, retained 2002, 2008 and retired from the bench on December 31, 2012



- Presiding Judge of the Law Division for 11 years
- Chair of the Illinois Supreme Court Committee on Education - faculty/chair for many seminars
- Graduate of the National Judicial College and certified in both Mediation and Advanced Civil Mediation
- Most recent Bar Poll Approval Rating 98%
- Assigned to Law/Jury Civil Division with an individual calendar for 17 years
- Assigned to Domestic Violence, Misdemeanor/Traffic and Divorce for the first 5 years on the bench
- Partner at Hinshaw & Culbertson (DuPage Office) prior to judicial appointment, specializing in medical malpractice defense
- Editor of DuPage County Bar Association Monthly Journal
- Chair and founding member of the Bar Association Law & Literature Committee
- Clerk to Hon. John A. Nordberg, Federal District Court for the Northern Dist. of Illinois
- Author of numerous legal articles in national, state and local journals
- J.D. Loyola University of Chicago
- B.S. Journalism, University of Illinois in Champaign-Urbana
- Varsity Letter Recipient from Women's Intercollegiate Tennis Team
- Married, with three grown children

As of January 1, 2013, I have joined Justice Michael J. Gallagher in our mediation and trial consulting practice. Throughout my judicial career, I maintained a keen interest in mediation and enjoyed significant success in assisting thousands of litigants and attorneys in resolving their disputes short of trial. In addition to handling my own calendar, I was frequently asked to mediate cases from other civil and chancery courtrooms. I have mediated every type of civil dispute including; product liability, medical malpractice, legal malpractice, auto, premises, trade secret, contract, employment, construction, partnership dissolution and real estate disputes. My full resume and bibliography is available upon request.

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UNACCEPTABLE LANGUAGE
&
THE ILLINOIS & ABA MODEL RULES OF PROFESSIONAL CONDUCT

by
Judge Lynn M. Egan
March 2017

I. The Privilege of Practicing Law Creates Special Duties.

The preamble to the Illinois Rules of Professional Conduct notes that a lawyer is not only an officer of the legal system, but also a "public citizen having special responsibility for the quality of justice." *Ill. Rule of Prof Conduct, Preamble, ¶ 1*. Obviously, this responsibility includes professional competence, diligence and honesty. *Ill. Rules of Prof Conduct 1.1 (Competence), 1.3 (Diligence), 3.3 (Candor Toward the Tribunal), 4.1 (Truthfulness in Statements to Others), & 8.4 (Misconduct)*. However, it also requires that every lawyer "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." *Id. at ¶ 5*.

What does this mean on a day-to-day basis? It means that every lawyer must maintain "a professional, courteous and civil attitude toward all persons involved in the legal system." *Id. at ¶ 10*. Lawyers who fail to understand this do so at their own jeopardy because "offensive remarks can legitimately give rise to disciplinary action against attorneys depending on the circumstances in which they are made." *In re Cwik, 89 CH 690 (March 9, 1993)(Hearing Board at 9)*. Because failure to maintain a professional and courteous attitude can trigger disciplinary charges, it is important to understand the precise language and scope of the rules.

II. Several Rules Cover Civility & Professionalism.

Not surprisingly, there is overlap in the Illinois Rules of Professional Conduct, especially as they relate to civility and professionalism by attorneys. It is imperative that attorneys understand the interplay of the rules and the fact that they apply to all aspects of an attorney's practice.

a) Illinois Rule 3.4. Fairness to Opposing Party and Counsel.

*"A lawyer shall not: (a) unlawfully obstruct another party's access to evidence***(d) in pretrial procedure, make a frivolous discovery request..."*

b) Illinois Rule 3.5. Impartiality & Decorum of the Tribunal.

"A lawyer shall not: (d) engage in conduct intended to disrupt a tribunal."

c) Illinois Rule 4.4. Respect for Rights of Third Persons.

"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."

NOTE: Rule 4.4 covers conduct that occurs during the course of representing a client. Therefore, if an attorney-client relationship is absent, "Rule 4.4(a) does not govern." *In re Moore, 2015 PR 76 (September 9, 2016)(Hearing Board at 17)*. However, the rule's prohibition is not limited to objectionable conduct or language directed to clients. It also covers behavior directed to opposing counsel, insurance company employees, court deputy sheriffs and a VA Medical Center director. *Id.* at 12.

Importantly, it is no defense under Rule 4.4(a) that the objectionable conduct occurred in the context of legitimate behavior. *See, In re Moore, supra at 18: "The fact Respondent may have had a valid reason for speaking to Adler does not explain or justify his particular choice of words, which were highly insulting and hostile."*

CAUTION: Professionalism is no joking matter. As a result, it is no defense to claim that offensive language was merely intended as a joke. *See generally, In re Novoselsky, 2011 PR 43 (June 24, 2014)*. "The standard by which [a lawyer's] conduct must be judged is objective, not subjective."¹ *In re Cwik, 89 CH 690 (March 9, 1993)(Hearing Board at 16)*.

d) Illinois Rule 8.2. Judicial and Legal Officials.

"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 or public legal official, or of a candidate for election or appointment to judicial or legal office."

CAUTION: The ARDC regards violations of Rule 8.2 as "extremely serious." *In re Walker, 2014 PR 132 (December 18, 2015)(Hearing Board at 51)*.

Although attorneys are certainly not subject to a blanket prohibition against criticizing judges or judicial rulings, they must remain mindful of their special role in the judicial system. Because lawyers are officers of the court, they "must accept the imposition of certain standards of conduct" which include "the duty to protect the integrity of the courts, the legal professional and the administration of justice." *In re Walker, 2014 PR 132 (December 18, 2015)(Hearing Board at 19-20)*. As a result, attorneys cannot engage in "unfair criticism, insulting and scurrilous attacks, or other offensive conduct." *In re Amu, 2011 PR 106 (December 13, 2013)(Review Board at 11)*.

¹ Although subjective intent is irrelevant for purposes of determining whether a Rule 4.4 violation has occurred, it can be relevant when determining the appropriate disciplinary sanction. *In re Cwik, 89 CH 690 (March 9, 1993)(Hearing Board at 16)*.

The administration of justice is jeopardized when lawyers unjustly criticize or impugn the integrity of judges because "a suspicious public...relies upon statements made by those who work within the system as to corruption therein. For it is the attorney who, by practicing day in and day out in that system, most closely understands how it operates and when it fails. When an attorney fosters allegations of judicial corruption upon an unknowledgeable public, the public can only respond by assuming such allegations to be true." *In re Palmisano*, 92 CH 109 (October 30, 1992)(Hearing Board at 22). This tends to "destroy public confidence" in the system, which "cannot be permitted." *In re Walker*, *supra* at 51.

NOTE: Needless to say, disagreement or displeasure with a judicial ruling does not justify false statements about the judiciary. *In re Amu*, *supra* at 5, 10. Moreover, it is irrelevant that the lawyer may truly believe a judge is inept or a judicial ruling is improper. A lawyer's subjective belief in this regard is insufficient. See, *In re Walker*, *supra* at 21("subjective belief, suspicion, speculation, or conjecture does not constitute a reasonable belief.") Instead, there must be "a reasonable basis for believing the accusations are true." *In re Walker*, *supra* at 21. Importantly, this means there must be objective facts to support the attorney's statements. *Id.*

e) Illinois Rule 8.4. Misconduct.

*"It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice.***(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer had engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted."*

NOTE: Subsection (d) has been interpreted to require clear and convincing evidence of "actual prejudice." *In re Gerstein*, 99 SH 1 (August 12, 2002)(Hearing Board at 6). Accord, *In re Hoffman*, 08 SH 65 (June 23, 2010)(Hearing Board at 15). This requirement is satisfied by evidence that the conduct necessitated additional proceedings or delayed resolution of pending matters. *Id.* at 7. Significantly, such a showing is not difficult to establish, especially if the conduct prompted motion practice, disruption of a deposition or additional court appearances. A recent ARDC decision defined the concept in the following terms: "An attorney's conduct is prejudicial to the administration of justice if it has an impact on the representation of

a client or the outcome of a case, undermines the judicial process or jeopardizes a client's interests." *In re Moore*, 2015 PR 76 (September 9, 2016)(Hearing Board at 28).

III. ABA Model Rule 8.4(g)

In August 2016, the American Bar Association adopted a new Model Rule 8.4(g), which now reads as follows:

"It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules."

IV. No First Amendment Protection

The ARDC decisions reveal that attorney attempts to excuse unprofessional or vulgar language by invoking the First Amendment fall flat. It is a particularly unpersuasive approach given the fact that the U.S. Supreme Court unequivocally recognized "that resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *In re Gerstein*, 99 SH 1 (August 12, 2002)(Hearing Board at 10).

Moreover, invocation of the First Amendment ignores the special duties and responsibilities imposed on lawyers when they receive a license to practice law. As noted by the ARDC, "although attorneys do not sacrifice completely their First Amendment rights of free speech...it is clear that they do not enjoy the same freedom from restrictions on those rights as do ordinary private citizens, especially with respect to actions undertaken in their professional capacity as attorneys." *Id.*

Thus, both Rules 4.4 and 8.4 have been upheld against constitutional challenge. *Id.* See also, *In re Amu*, 2011 PR 106 (December 13, 2013)(Hearing Board at 11).

V. ARDC Response

Review of ARDC decisions reveal numerous instances where attorneys have been disciplined for unprofessional, vulgar or discriminatory remarks in the course of litigation. Notably, more recent decisions include suspensions, some until further order of court, rather than censure or reprimand. This is especially noteworthy because suspensions that include "until further order of court" have been described as "the most severe sanction after disbarment." *In re Moore*, *supra* at 32.

In imposing such discipline, the ARDC repeatedly reminds practitioners that the goal of the attorney disciplinary system is not to punish a particular lawyer, but instead, “to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach.” *In re Walker, 2015 PR 132 (December 18, 2015)(Hearing Board at 50)*. Accord, *In re Moore, supra at 29*. Additionally, the ARDC often notes that the specific sanction imposed is designed to have a deterrent effect on other practitioners. *Id.*

i. Don't Blame the Victim

Some attorneys have found it irresistible to point to the conduct of opposing counsel in an effort to excuse or explain their ethical violations. This is extremely unwise and is frequently cited by courts and the ARDC in aggravation.

Such an approach fails because lawyers have an obligation to comply with the Rules of Professional Conduct “even when faced with adversity.” *In re Novoselsky, 2011 PR 43 (June 26, 2014)(Hearing Board at 13)*. Thus, “acrimony fostered by the litigation [does] not give the attorney free reign ‘to make whatever derogatory comments he felt necessary.’” *In re Moore, supra at 12-13*. Accord, *In the Matter of the Discipline of Craddock, 17 MC 27 (January 18, 2017)(“Craddock has falsely accused defense counsel as being equally blameworthy for his misconduct” & “heat-of-the-moment does not mitigate the violations.”)*.

ii. Pattern of Bad Behavior an Aggravating Factor

Not surprisingly, attorneys will suffer more serious consequences if they have previously been disciplined by the ARDC, especially for similar conduct, or engage in a pattern of bad behavior. See, *In re Amu, 2011 PR 106 (December 13, 2013)(Review Board at 14)(“His conduct...was not isolated and continued over the course of many years.”)*. Accord, *In re Walker, 2014 PR 132 (November 4, 2016)(Review Board at 13)(“While acknowledging the length of time between the 1992 misconduct and the present misconduct, the Hearing Board also appropriately noted the commonality between the two matters – Respondent’s attitude. In both matters, he unwaveringly attempted to justify his unacceptable conduct with factually and legally unsupportable arguments.”)*.

Needless to say, an attorney facing disciplinary charges before the ARDC should *never* direct vitriol toward the Hearing Board! Not only does such conduct lend support to the underlying allegations, but will certainly be considered as a matter in aggravation in terms of the type of sanction. See, *In re Hoffman, 08 SH 65 (June 23, 2010)(Review Board at 21)(“Respondent’s conduct during the proceeding below supports the Administrator’s position that a suspension UFO is appropriate. While facing possible discipline for making unfounded accusations and disparaging remarks about Judge Murphy and ALJ Heineken, he continued to make similar remarks about the Hearing Panel’s objectivity and qualifications. This demonstrates to us that the disciplinary process has had no deterrent effect on Respondent, and he does not intend to abide by the Rules of Professional Conduct in the future.”)*.

iii. **If You Can't Manage Contrition, Say Nothing!**

An attorney's failure to acknowledge inappropriate behavior or express remorse is frequently cited as an aggravating factor that justifies a more serious sanction. As a result, when it is clear that the Hearing Board believes an ethical violation has occurred, attorneys are wise to remain mute rather than insisting their behavior was appropriate or justified. See, *In re Amu, supra* at 14 ("*Indeed, Respondent continues, even with the benefit of hindsight, to stand by his statements as '100% correct'. He expresses little comprehension of the harm caused by his conduct.***we are concerned that Respondent, if allowed to practice, would continue to engage in similar misconduct if faced with an adverse ruling by a judge.*").

VI. Examples

- *In the Matter of the Discipline of Craddock, No. 17 MC 27 (January 18, 2017)*: Attorney violated Rule 8.4(g) by directing lewd & misogynistic slurs toward opposing counsel. Suspended from the General Bar of Federal Court for 12 months, stricken from the Trial Bar and referred to Illinois ARDC.
- *In re Walker, 2014 PR 132 (November 4, 2016)*: Attorney violated Illinois Rules 8.2(a) and 8.4(d) by attacking integrity of several appellate court justices. Suspended for two years and until further order of court.
- *In re Moore, 2015 PR 76 (September 9, 2016)*: Attorney violated Illinois Rule 4.4(a) by leaving derogatory, threatening & racist voicemail messages for a third person. Suspended for sixty days.
- *In re Novoselsky, 2011 PR 42 (June 26, 2014)*: Attorney violated Illinois Rules 4.4 & 8.4 by repeatedly making offensive comments to opposing counsel & a deputy sheriff. Suspended for six months and until further order of court.
- *In re Amu, 2011 PR 106 (December 13, 2013)*: Attorney violated Illinois Rules 8.2(a) & (c) by making baseless accusations against four judges over a period of several years. Suspended for three years and until further order of court.
- *In re Guadagno, 2010 PR 65 (January 13, 2012)*: Attorney violated Illinois Rules 8.4(a)(3) & (5) by directing homophobic slurs toward other lawyers. Suspended for five months, with all but first 30 days stayed in favor of a two-year period of probation.
- *In re Hoffman, 08 SH 65 (June 23, 2010)*: Attorney violated Illinois Rules 4.4, 8.2(a) & 8.4(a)(5) by falsely attacking the integrity of a Circuit Court judge and an Administrative Law judge. Suspended for six months and until further order of court.

- *In re Muller, 04 CH 139 (September 21, 2006)*: Attorney violated Illinois Rules by leaving offensive & threatening telephone messages for another attorney & asking a deponent whether she engaged in prostitution. Censure & attorney required to complete the Commission's Professionalism Seminar.
- *In re Gerstein, 99 SH 1 (August 12, 2002)*: Attorney violated Illinois Rule 4.4 by sending opposing counsel letters that contained abusive & insulting language. Suspended for thirty days.
- *In re Cwik, 89 CH 690 (March 9, 1993)*: Attorney violated Illinois Rules by sending opposing counsel a vulgar & threatening letter. Reprimand.

Course Evaluation Form

Title of Course: "STICKS AND STONES WON'T BREAK YOUR BONES, BUT NAMES
MAY LAND YOU BEFORE THE ARDC"

Date of Course: April 12, 2017 Location: Thompson Center Assembly Hall
Auditorium

Directions: On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

Rate how well this course satisfied your personal objectives 5 4 3 2 1
Comments: _____

Rate how well the environment contributed to the learning experience 5 4 3 2 1
Comments: _____

Rate how well the written materials contributed to the learning experience 5 4 3 2 1
Comments: _____

Rate the level of significant intellectual, educational or practical content 5 4 3 2 1
Comments: _____

Please rate the faculty using the same 1 – 5 scale:

Name: JUDGE LYNN M. EGAN

Comments: _____

Name: JUDGE HOLLIS WEBSTER (Ret.)

Comments: _____

Name: MS. ADRIA MOSSING

Comments: _____

Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1

SUGGESTIONS FOR FUTURE SEMINARS:

**STICKS & STONES WON'T BREAK YOUR
BONES, BUT NAMES MAY LAND YOU
BEFORE THE ARDC**

Judge Lynn M. Egan

Ms. Adria E. Mossing (WBAI President)

Judge Hollis L. Webster (Ret.)

April 12, 2017

STARTING POINT: LAWYERS ARE SPECIAL

A lawyer is not only an officer of the legal system, but also a “public citizen having special responsibility for the quality of justice.”

Ill. Rule of Prof Conduct, Preamble, ¶ 1

This special responsibility mandates that every lawyer “demonstrate respect for the legal system & for those who serve it, including judges, other lawyers & public officials.”

Id. at ¶ 5

HOW DOES THIS APPLY DAY-TO-DAY?

In addition to the obvious obligation to be competent, diligent, honest & avoid misconduct, the Illinois Rules of Professional Conduct also mandate that every lawyer maintain...

“a professional, courteous and civil attitude toward all persons involved in the legal system.”

Ill. Rule of Prof Conduct, Preamble, ¶ 10

Offensive remarks can give rise to disciplinary action!

In re Cwik, 89 CH 690 (March 9, 1993)

DON'T LOOK TO FIRST AMENDMENT

- Lawyers “do not enjoy the same freedom from restrictions on [free speech] rights as do ordinary citizens, especially with respect to actions undertaken in their professional capacity as attorneys.” *In re Gerstein*, 99 SH 1 (August 12, 2002).
- The use of vulgar, abusive or racist/sexist language “is not in any proper sense...safeguarded by the Constitution.” *Id.*
- Rule 4.4 & 8.4 have both been upheld against constitutional challenge. *Id.* See also, *In re Amu*, 2011 PR 106 (December 13, 2013).

KNOW THE RULES

1) Illinois Rule 3.4 – Fairness to Opposing Party & Counsel

*“A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence***(d) in pretrial procedure, make a frivolous discovery request...”*

2) Illinois Rule 3.5 – Impartiality & Decorum of the Tribunal

“A lawyer shall not: (d) engage in conduct intended to disrupt a tribunal.”

KNOW THE RULES

3) Illinois Rule 4.4 – Respect for Rights of Third Persons

“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.”

KEY POINTS:

- This rule covers conduct that occurs during the course of representation. If no attorney-client relationship, “Rule 4.4(a) does not govern.” *In re Moore, 2015 PR 76 (Sept. 9, 2016).*
- Covers behavior directed toward wide spectrum of people, including opposing counsel, insurance company reps, deputy sheriffs & a VA Medical Center director. *Id.*
- Joke around at your own peril. Your conduct will be judged by an objective standard. *In re Cwik, 89 CH 690 (March 9, 1993).*

KNOW THE RULES

4) Illinois Rule 8.2 – Judicial & Legal Officers

“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 or public legal official, or of a candidate for election or appointment to judicial or legal office.”

BEWARE

The ARDC regards violations of this rule as “extremely serious.” *In re Walker, 2014 PR 132 (December 18, 2015).*

WHY CAN'T LAWYERS GO AFTER JUDGES?

- Lawyers have a special duty to protect the integrity of the courts, legal profession & administration of justice.
- This is jeopardized when lawyers engage in unfair criticism or make insulting or offensive remarks about judges because...

“a suspicious public...relies upon statements made by those who work within the system as to corruption therein. For it is the attorney who, by practicing day in and day out in that system, most closely understands how it operates and when it fails. When an attorney fosters allegations of judicial corruption upon an unknowledgeable public, the public can only respond by assuming such allegations to be true.” In re Palmisano, 92 CH 109 (October 30, 1992).

RULE 8.2 – JUDICIAL OFFICERS

- Disagreement or displeasure with a judicial ruling does not justify false statements about a judge.
- Irrelevant that the lawyer may genuinely believe a judge is incompetent or corrupt. Subjective beliefs are insufficient.
- There **must be objective facts** that support a reasonable belief about the validity of the accusations.

KNOW THE RULES

5) Illinois Rule 8.4 – Misconduct

“It is unprofessional for a lawyer to:

- (d)** Engage in conduct that is prejudicial to the administration of justice; and
- (j)** Violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer.

NOTE: No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency...has found that the lawyer had engaged in an unlawful discriminatory act, & the finding...has become final...& any right of judicial review has been exhausted.”

RULE 8.4

- The ARDC defined the concept of “prejudicial to the administration of justice” as follows:

“An attorney’s conduct is prejudicial to the administration of justice if it has an impact on the representation of a client or the outcome of a case, undermines the judicial process or jeopardizes a client’s interests.” In re Moore, supra.

- Subsection (d) has been interpreted to require clear & convincing evidence of “actual prejudice.” *In re Gerstein, supra.*
- This can be satisfied by showing the conduct necessitated additional proceedings or delayed resolution of pending matters.

ABA MODEL RULE 8.4(g)

In August 2016, the ABA adopted a new Rule 8.4(g), which provides as follows:

“It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

EXAMPLES

While representing a client in a criminal case, counsel attempted to obtain additional fees & left the following voice messages for the defendant's father:

"You are a piece of garbage. All black people are alike. You're slovenly, ignorant."

"You better give me my money or your son's case is going to be delayed."

*"I'm sick of you, you piece of sh**. I don't know who's the biggest bit**. You or your family. I'm going to lock you up."*

ATTORNEY DEFENSE: The father had been very disrespectful to him.

ARDC RESPONSE: Rule 4.4(a) violation; attorney suspended.

"Respondent's use of derogatory, threatening & racially offensive language had no purpose other than to embarrass & burden [the father]."

EXAMPLES

In four separate cases, attorney sent opposing counsel letters in which he expressed displeasure over some action or position they had taken in the pending litigation. He included the following comments:

“You have your head so far up your anus you think it’s a rose garden.”

He suggested that opposing counsel eat their own correspondence or “place them in that bodily orifice into which no sun shines.”

He referred to opposing counsel as “fool,” “idiot,” “punk,” “boy,” “honey,” “sweetheart,” “sweetie pie,” & “babycakes.” He also used the words “ass,” “crap,” & “piss me off.”

ATTORNEY DEFENSE: No violation of Rule 4.4 because the “strong language” in his letters served a substantial purpose “by grabbing the reader’s attention & vividly demonstrating his point. Retained an expert witness (grad student/TA in business writing at U of I).

ARDC RESPONSE: Rule 4.4(a) violation & attorney suspended. Prior discipline for similar behavior & fact that he sent a series of letters served as aggravating factors.

EXAMPLES

In the context of a civil suit, attorney repeatedly directed the following language to female opposing counsel:

“Nice dress, slut,” “whore,” “mommy dearest,” “bitch,” “child molester,” “Still hanging around the bars & picking up the DePaul students?”

The attorney directed the following remark toward male opposing counsel:

“Idiot,” repeatedly stated he had seen opposing counsel snorting cocaine in the courthouse bathroom & referred to him as a “coke head” & asserted “the cocaine has got you.”

ATTORNEY DEFENSE: Some comments simply reflect “ribbing” between the attorneys & others were a result of opposing counsel “baiting” or “provoking” him.

ARDC RESPONSE: Violation of Rule 4.4(a); attorney suspended for 6 months & UFO.

EXAMPLES

In a child custody petition, attorney made the following remarks about the judge:

“You appear to have serious mental issues involving extreme narcissism & illusions of grandiosity which effectively interferes with your ability to act as a Judge.”

“It is extremely difficult to comprehend any justification...for requiring the appearance of counsel other than the interjection of your personal vendetta in an attempt to rationalize your own mistake in summarily placing a 14 year old child with a drug & alcohol addict.”

ATTORNEY DEFENSE: He felt justified in his comments based on his internet research of the judge & discussions with other attorneys. He also did not believe the remarks attacked the judge’s integrity.

ARDC RESPONSE: Violation of Rule 8.2 & attorney suspended for six months & UFO.

EXAMPLES

Over the course of a lengthy period of time in Traffic Court proceedings, attorney referred to other attorneys practicing in the same courts as follows:

“Our gay lawyer,” “fag,” “faggot,” “gay scum.”

ATTORNEY DEFENSE: Discipline on consent.

ARDC RESPONSE: Violation of Rule 8.4(a)(5); attorney suspended for five months (all but 30 days stayed in favor of 2 years probation) & anger management counseling.

EXAMPLES

In the context of a debt collection proceeding, attorney accused opposing counsel of acting unethically & made the following remark:

“You must be from a Jewish law firm.”

ATTORNEY DEFENSE: Denied making the remark, but also invoked the protection of the First Amendment.

ARDC RESPONSE: Violation of Rule 8.4(a)(5); attorney suspended for six months & UFO.

NEXT SESSION:

“Selected Issues in Commercial Cases”

May 23, 2017

Judge John Griffin

Judge Brigid McGrath

Judge Thomas Mulroy

***APPROVED** by Illinois MCLE Board for 1 hour general
CLE credit.