

Of telephonic homophobia and pigeon-hunting misogyny: some thoughts on lawyer speech

Two recent events, one in Indiana and one in Pennsylvania, make this an opportune time to talk about lawyer speech.

In Pennsylvania, a lawyer leaving a gun club where a live pigeon shoot had taken place verbally attacked a female animal rights protester who, while apparently on public property, videotaped him as he was leaving in his car. The attack was strictly verbal, but entailed the use of graphic street slang for both a sexual act and a female body part. It turned out that the victim of the attack was a staff attorney at a large, national law firm, although that doesn't seem to be particularly relevant. It was reported that the recipient of the verbal onslaught lodged a criminal complaint for disorderly conduct and harassment, and that another person associated with the same animal rights organization filed a grievance with the Pennsylvania bar, alleging that it was criminal conduct reflecting adversely on fitness as a lawyer (the Pennsylvania equivalent of Indiana Rule of Professional Conduct 8.4(b)) and conduct in a professional capacity intended or likely to cause harm (Pennsylvania's Rule 8.4(g), for which there is no Indiana counterpart).

Back home again in Indiana, on May 7, the Supreme Court pub-

licly reprimanded a lawyer for gratuitously asking an agent of a company that had been persistent in trying to speak to her husband about a matter if he was "sweet" or "gay." *In the Matter of Kelley*, 925 N.E.2d 1279 (Ind. 2010). During the conversation with the company

representative, the respondent identified herself as her husband's lawyer. Approving an agreement between the Disciplinary Commission and the respondent, the Court said that this conduct violated Indiana Rule of Professional Conduct 8.4(g), which states:

It is professional misconduct for a lawyer to engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that pre-emptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

While not unique to Indiana, we are one of the few states with language like this in its black-letter professional conduct rules. There is similar language in Comment [3] to ABA Model Rule 8.4 suggesting that speech like this is prejudicial to the administration of justice in violation of Rule 8.4(d), but the ABA comment limits application to acts "in the course of representing a client."

The distinction between acting "in a professional capacity" and "in the course of representing a client" is not clear. In the *Kelley* case, the Court presumably did not have to grapple with that issue, either because the result was stipulated or because Kelley explicitly stated to the company representative that she was acting as her husband's lawyer. In the other two Indiana cases applying Rule 8.4(g), the Court likewise did not need to reach that issue. *See, In the Matter of Thomsen*, 837 N.E.2d 1011 (Ind. 2005) (racial bias or prejudice) and *In the Matter of Campiti*,

905 N.E.2d 408 (Ind. 2009) (national origin and socioeconomic status). In both cases, the lawyer speech occurred while representing clients in open court.

What might acting in a professional capacity mean that is different from representing a client? The phrase "professional capacity" in the Indiana Rules is unique to Rule 8.4(g). Presumably the opposite of professional capacity is "nonprofessional capacity," and that phrase appears once, in the Preamble to the Rules:

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.*, Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See* Rule 8.4.

Preamble at ¶ [3].

The preceding paragraph of the Preamble deals with formal client representations of various kinds. This suggests that by "professional capacity," the Court meant to convey lawyer-related work that is more than a formal client representation, but stops short of including such non-lawyerly pursuits as running a business. Moreover, when Rules of Professional Conduct are meant to apply only to lawyers acting as client representatives, they tend to explicitly say so. *See*, for example, Rules 2.1, 3.3(b), 3.9, 4.1, 4.2, 4.3 and 4.4.



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In light of this, it is interesting to wonder whether Rule 8.4(g) raises the stakes for conduct that would violate Title VII of the Civil Rights Act of 1964 and make it subject to lawyer discipline when the employer is a lawyer and the place of employment is a law office.

When the Indiana Supreme Court promulgated Rule 8.4(g), I thought at the time that it was a laudable expression of nondiscriminatory values, but I didn't expect to see it enforced much. It is surprising that three lawyers have been disciplined under this Rule in the five years it has been in effect. Clearly, this is more than a statement of lofty principle – it has teeth. With more than hortatory phrases at stake, we appear to find ourselves in the midst of that recurring inquiry into when lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients.

As with any limitations on speech, there are bound to be questions about the constitutionality of restrictions on certain types of lawyer speech. That question has yet to be decided by our Supreme Court. Whether Indiana Rule 8.4(g) is constitutional in all circumstances or as applied to situations, for example, where a lawyer is not representing a client – but is otherwise acting in some other “professional capacity” – is beyond the scope of this column. I assume we will have an answer in due course.

Meanwhile, as the Pennsylvania situation unfolds, I've been intrigued by the heated exchanges over whether our pigeon-hunting friend's speech is constitutionally protected. Before that question is even reached, perhaps he was not acting in any professional capacity – the claim is that he was because he continued to

defend his statements from his law office and identified himself as a lawyer – or he did not “cause harm” and is therefore off-limits to Pennsylvania discipline. And perhaps he did not commit any crime under Pennsylvania law. In which event, he is free to go about his misogynistic ways with no criminal or disciplinary repercussions.

Or even if he could otherwise be held to account under state law or lawyer regulation, maybe he has a constitutional privilege to demean women defenders of animal rights.

Regardless of whether Pennsylvania has a counterpart to Indiana's Rule 8.4(g), I'm interested in returning to where

(continued on page 24)

I thought we were back on April 1, 2002 when the Indiana Supreme Court added Rule 8.4(g) to our professional conduct rules – that being a statement of nondiscrimination as an important value of the legal profession. What troubles me is the undertone of recent debate: If our pigeon-hunter’s speech is

constitutional, it must be okay or, at least, above criticism.

As constitutionally protected as bigoted speech might be, there surely is nothing untoward about professional peers standing up for the idea that misogyny and other displays of prejudice have no place in a profession committed to justice

and the rule of law. What an uncivil society this would be if our citizenry took every opportunity to speak at the outer limits of constitutionally protected speech. What a dreadful profession this would be if lawyers took the same liberties. Rule 8.4(g) or not, I suggest that we have a responsibility to exercise our own speech by condemning bigoted or even uncivil speech by other lawyers. Lawyers should be held up as modeling the constructive and peaceful resolution of disputes, not as contributors to an atmosphere of rancor and discord.

It is not that difficult to harmonize the importance of civil speech with simultaneous defense of irresponsible speech from official government censure. Voltaire could: “I disapprove of what you say, but I will defend to the death your right to say it.” Perhaps if he were a witness to the pervasively uncivil discourse in today’s society and on the Internet, Voltaire would add: “And I will not hesitate to tell you when I disapprove.” 🍷