

Civility: Limit on Zealous Representation 2022

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Attorney Disciplinary Commission



RESOURCES

Formal Advisory Opinions:

www.in.gov/courts/discipline/opinions/

Request Ethics Guidance:

www.in.gov/courts/discipline/guidance/

General Disciplinary Commission Information &
Attorney Discipline Decisions:

www.in.gov/courts/discipline/



YEAR IN REVIEW

Preventive/Outreach Efforts

- 3 Ethics Advisory Opinions Issued
 - Lawyer Responsibility for Nonlawyer Assistant Notarial Acts (#1-21)
 - Lawyer Public Comments on Pending Matters (#1-22)
 - Detecting & Navigating Conflict of Interest (#2-22)
- Ethics Town Hall Meeting Held
 - 34 representatives of 30 different bar associations
 - Regional Liaisons Created





DON'T DRINK AND DRIVE!!!

Judges and Lawyers Assistance Program:
www.in.gov/courts/jlap



Civility: A Limit on Zealous Representation

CIVILITY: A LIMIT ON ZEALOUS REPRESENTATION

- In the Matter of McClure, 652 N.E.2d 863 (Ind. 1995)
 - Attorney sued in civil court related to corporation owned with wife
 - Opposing party deposed attorney's wife
 - Deposition was heated
 - Wife stated she did not feel well
 - Lawyer threw contents of his soft drink cup at opposing counsel and grabbed opposing counsel around the neck
 - Deposition concluded
 - Result: Supreme Court found that lawyer committed criminal act in violation of 8.4(b) of Rules of Professional Conduct and also violated Rule 3.5(c) by engaging in conduct intended to disrupt a tribunal. **60-day suspension with automatic reinstatement**

CIVILITY: A LIMIT ON ZEALOUS REPRESENTATION

- Smith v. Johnston, 711 N.E. 2d 1259 (Ind. 1999)
 - Lawyer represented plaintiff in medical malpractice claim against doctor
 - Lawyer filed complaint against doctor, who was represented by counsel
 - Complaint was served on the doctor at his office
 - Lawyer did not notify the doctor's counsel about filing of complaint in the trial court
 - Lawyer filed for and was granted default judgment against doctor, citing no response pleadings had been received from doctor
 - Judgment served on doctor but not doctor's counsel
 - Result: **default judgment set aside, and lawyer found to have violated Rule 8.4(d) of Rules of Professional Conduct**

Civility in Communication with Represented Parties



Rule 4.2

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order

”His client representations in both counts involved pervasive fraud, dishonesty, bad faith, obstreperousness, repetitive and frivolous filings, and gross incompetence...Respondent has no prior discipline, but his pattern of misconduct in this case spanned nearly a decade and reflects factors that are endemic to Respondent’s practice and not isolated lapses in judgment.”

**1-Year Suspension w/o
Auto Reinstatement**

MATTER OF M.C.S., 181 N.E.3D 976 (IND. 2022)



- Dispute with friend over educational expenses
- Sends demand letter to friend & his attorney
- Attorney replies to direct all communications to him & cease all contact with R's former friend
- R files lawsuit & sends profanity laced email to friend, threatening to visit in person & demanding he speak directly with R about matter

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MATTER OF M.C.S., 181 N.E.3D 976 (IND. 2022)

Respondent's Arguments


- R. 4.2 does not apply because he was not “representing a client” but instead was representing himself.
- And commentary to Rule 4.2 recognizes that parties generally may communicate with one another, so R’s conduct should be seen from the view as a “party” rather than as an “attorney.”

MATTER OF M.C.S., 181 N.E.3D 976 (IND. 2022)

Majority's Opinion

- Precedent finding ethical violations by pro se lawyers, applying similar language from other Rules
- Policy considerations

“These cases... implicitly recognize that self-representation is still representation, and an attorney who proceeds pro se in a matter functionally occupies the roles of both attorney and client.”



MATTER OF M.C.S., 181 N.E.3D 976 (IND. 2022)

Dissent and Unanswered Question

- Dissent (Slaughter) – Argues that Majority’s interpretation of prefatory language strains plain meaning of term “client”
- What about the conduct of an attorney who is represented in a matter who, as a party, reaches out to the represented opposing party?

“We hasten to add, though, that Respondent continues to be his own worst enemy when it comes to his electronic communications. He has been disciplined twice now for inappropriate emails....” fn. 3

Public Reprimand

MATTER OF P.L.M., 166 N.E.3D 345 (IND. 2021)

- R represented Husband in post-dissolution proceedings with First Wife
- Domestic dispute results in criminal charges against Second Wife & Husband filing for dissolution (from Second Wife)
- First Wife's attorney notices Second Wife for depo in post-dissolution case
- Although she participates in depo, R does not notify Second Wife's counsel about depo
- Obtains incriminating info and info relevant to dissolution case



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MATTER OF P.L.M., 166 N.E.3D 345 (IND. 2021)

Respondent's Argument

- R. 4.2 does not apply to situation because “the matter” in which Second Wife was represented was not the specific proceeding for which she was being deposed.

“The purpose of the rule...is aimed at protection of the rights of a represented person with respect to the subject of the representation ... This need is equally important whether the representation involves the same proceeding, a different proceeding, multiple proceedings, or no proceeding at all.”

Public Reprimand

CIVILITY TO THE TRIER OF FACT



Rule 8.2

Judicial and Legal Officials

(a) 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 officer, or of a candidate for election or appointment to judicial or legal office.

MATTER OF J.M.S., 181 N.E.3D 970 (IND. 2022)

In appellate brief, R made several intemperate & unfounded attacks on integrity of trial court judge

- Judge “intentionally orchestrat[ed] hearings so as to deprive [Defendant] of opportunities to be heard”
- Judge’s “almost submissive interactions with [opposing counsel]...tell a story of extreme partiality”
- Judge’s “bias or prejudice seemed to become an open and obvious weapon designed to convince [Defendant] that his search for impartial review was hopeless”
- Judge cemented his subservience to [Opposing Party] when he submitted a memorandum in his own court . . . “

MATTER OF J.M.S., 181 N.E.2D 970 (IND. 2022)

Respondent's Argument

- R. 8.2 not violated because statements were not made with knowing or reckless falsity
- Cites *Matter of Dixon* for proposition that “attorneys need wide latitude in engaging in robust and effective advocacy on behalf of their client”

“But that ‘wide latitude’ is not a blank check.
Dixon also provides that ‘good faith
professional advocacy’ is a predicate for
application of this ‘least restrictive’ standard.”

**30-Day Suspension w/
Automatic Reinstatement**