

# Ethically Speaking



By Charles Slanina, Esquire

## Ethics in Small Doses

**A**lthough there were occasional contributions to *In Re* as far back as 1993, the “Ethically Speaking” column did not debut until January 1994. In this, my fourteenth year, I want to play with the usual format a bit and break down the column into bite-sized portions.

### Attorney Attire

The first column in January of 1994 was titled, “Ethics: After a Fashion” and dealt with attorneys who were sanctioned for their fashion statements. It covered the gamut of whether it was proper for female attorneys to wear pant suits or large hats to court as to issues involving male attorneys wearing turbans and political buttons at trial. Although this was a two-part column which concluded in February 1994 with “Women, Fashion, and the Law,” it has not been necessary to update this column over the years since fashion has been less than a hot topic in the ethics and professional responsibility world – until now.

A Milwaukee County Circuit Court judge was reported by the Associated Press on January 10, 2008 to have held up proceedings for approximately three hours after a prosecutor showed up to court wearing a red ascot in violation of a court rule requiring lawyers to wear neckties. The judge found that the silk, scarf-like loop of cloth worn at the base of the neck did not fall within the definition of a necktie and “borders on contemptuous.” When confronted, the prosecutor told that court that if a jury had been present, he would have worn a necktie. The judge inferred that the prosecutor was implying that he held less respect for the judge than a jury. The judge promised

to hold the prosecutor in contempt if there were a recurrence. The prosecutor, in turn, promised that he would continue rotating his neck wear from long tie to bow tie to ascot.

Look for future updates in this column as the news develops.

### Attorney Taping and More

Immediately following the January/February attorney attire columns, “Ethically Speaking” began a series on surreptitious tape recording by attorneys entitled, “The Tale of the Tape.” This column came to mind in the context of the investigation of professional athletes for alleged steroid usage. Specifically, there was a recent report that New York Yankees pitcher Roger “Rocket Man” Clemens recorded a conversation with his trainer, Brian McNamee, who told authorities that he had provided Clemens with steroids, a charge which Clemens denies. Clemens and McNamee were in New York and Texas respectively which are both one-party states which means that it was legal to record the conversation if a single party (in this case Clemens) consented.

What makes this an “Ethically Speaking” topic is the fact that Clemens had his attorneys in the room during the conversation. Clemens and his counsel knew that McNamee was represented by counsel in connection with the steroid investigation and Clemens and his attorneys were apparently ready to file a law suit against McNamee (and did so two days after the call) in response to the allegations. Delaware Professional Conduct Rule 4.2 (similar to New York’s Rule) states, “In representing a client, a lawyer shall not communicate about the

subject of the representation with a persona 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 to do so by law or a court order.”

Other courts have found that where the client is acting as the agent of or at the direction of an attorney in contacting a litigant known to be represented, the attorney’s conduct is implicated. In *Miano v. AC&R Advertising*, 148F. R.D. 68 (S.D.N.Y. 1993), Miano made secret tape recordings of his litigation opponent. Opposing counsel argued that Miano’s lawyer was “so embroiled in Miano’s conduct as to be considered to have circumvented the disciplinary rules through Miano.” *Id.* at 89. Although the court did not sanction Miano’s attorney, it admonished the lawyer for having come “perilously close to crossing the line.” *Id.* at 89. However, in *Miano*, the court found that the lawyer had not suggested, planned, or supervised the conduct and never advised, counseled or coached Miano regarding the recording.

### Malpractice Insurance Tune-Up

Malpractice insurance for lawyers is not mandatory in Delaware. However, if you’ve gone to the trouble and expense of obtaining coverage, you should make sure that you are not paying more than necessary and that you don’t deny yourself the coverage you have purchased..

The first step is to locate and review your policy. Determine the amount of your coverage, the deductible, and the areas of practice covered. Then, contact your broker or agent to determine if alternatives with competitive rates are available. Discuss whether you have sufficient

or excess liability coverage and whether a higher deductible will result in a lower premium.

Review the areas of practice which you have listed on your policy. Are they still reflective of your practice? As an example, if you have listed personal injury as a practice area but find yourself doing few if any tort cases, you may want to eliminate that practice area and any others from your policy which are deemed higher risk and result in higher premiums. Many attorneys list personal injury on their malpractice coverage even though it is not the focus of their practice for the unlikely event that the million dollar case will wander through their office door. Delaware now permits fee sharing for referrals. Rule 1.5(e). As a result, there is no need to incur the ongoing expense of paying increased premiums for malpractice coverage of a personal injury practice if your practice is limited to referring such cases to other counsel.

On the other hand, you should also review your malpractice policy application or a questionnaire to determine if you are now practicing in areas not listed on that policy.


While you have your policy out, review with your agent whether or not you are covered for disciplinary defense costs. Many policies provide such coverage at little or no additional premium. Typically, disciplinary defense coverage has little or no deductible, although the limits of the coverage can be fairly modest. Be familiar with the policy requirements as to your duties to notify the carrier of claims or potential claims. Do you have a duty to notify the carrier of a disciplinary complaint whether or not you have coverage for disciplinary defense costs? Practicing in areas not disclosed to the carrier or failure to timely notify the carrier of claims in violation of your policy may expose you to a denial of coverage.

Have any other changes occurred since your last malpractice insurance application or questionnaire? In addition to adding or changing practice areas, have you or your firm hired any new attorneys? Was the carrier notified of the new hires? Do the new hires have "tail" insurance from the old firm covering them for claims made based on matters handled at the former firms? If you are the managing

partner of a firm, does the firm have in place a written policy requiring attorneys to notify the firm of claims or potential claims? Does the firm also have a written policy requiring that attorneys notify the firm of disciplinary complaints? Many, many malpractice claims arise as a counterclaim to an attorney's suit to collect fees from a client. Does your firm have a policy with regard to when and if clients can be sued for such collections?

"Ethically Speaking" offers general advice and information on avoiding (and surviving) disciplinary and malpractice complaints. It's comforting to know that adequate and appropriately priced insurance coverage is available in case you missed one of the columns.

*"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at [www.delawgroup.com](http://www.delawgroup.com).*

*"Ethically Speaking" is available online. The columns of approximately the past two years are available on [www.dsba.org](http://www.dsba.org). *