Civility Matters

Presented by the January Pupilage Team
Led by Greg Taylor and Marc Phillips

Delaware Bankruptcy American Inn of Court
January 17, 2012 at 5:30 p.m.
United States Bankruptcy Court for the District of Delaware
824 Market Street, 5th Floor, Courtroom No. 5
Wilmington, Delaware 19801

Rule 4.3. Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

CIVILITY TO THE COURT

"Top Ten" Points to Remember

1. Speak and write civilly and respectfully in all communications with the Court and other parties.

2. Be punctual and prepared for all Court appearances so that all hearings, conferences, and trials may commence on time. If delayed, timely notify the Court and counsel, if at all possible.

3. Be considerate of the time constraints and pressures on the Court and Court staff which are inherent in their efforts to administer justice. Always update the Court as soon as possible when contested matters are resolved prior to the hearing.

4. Act and speak civilly to all Court marshals, Court clerks, Court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

5. Advise clients, co-counsel and witnesses of the proper courtroom conduct that is expected and required in this jurisdiction.

6. Never misrepresent or misquote facts or authorities.

7. Remember that blackberries and other electronic devices should be used in a way that is not obvious or disruptive to the Court and others concentrating on the proceedings.

8. Proper attire should always been wore to Court. A formal business suit or skirt with formal business shirt or blouse.

9. Remember that the opportunity to appear telephonically is a privilege and a convenience, but it is not intended for attorneys making substantive argument. Attorneys who anticipate that argument may be required must appear in person. Any person participating telephonically must be sure to dial in at least 10 minutes prior to the hearing and must leave their phone on the "mute" setting until it is time to speak.

10. Prepare and organize materials such as witness binders and pre-marked exhibits in advance of the hearing so that distribution does not encroach upon the time set aside for the hearing.

Cautionary Cases

In the Matter of Abbott, 925 A.2d 482 (Del. 2007)

Cannon v. Cherry Hill Toyota, 190 F.R.D. 147 (D.N.J. 1999)

Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994)

In re Ramunno, 625 A.2d 248 (Del. 1993)

Goldberg v. Mount Sinai Medical Center of Greater Miami, Inc. (In re South Beach Community Hospital LLC), No. 07-1210-BKC-LMI (Bankr. S.D. Fla. May 21, 2007) (order to show cause).

ORDERED in the Southern District of Florida on May 21, 2007

Laurel Myerson Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE:	CASE NO. 06-10634-BKC-LMI
SOUTH BEACH COMMUNITY HOSPITAL LLC,	Chapter 11
Debtor. /	
IN RE:	CASE NO. 07-1210-BKC-LMI
ALAN L. GOLDBERG, Chapter 11 Trustee for South Beach Community Hospital, LLC,	
Plaintiff,	
vs.	
MOUNT SINAI MEDICAL CENTER OF GREATER MIAMI, INC., a Florida corporation,	
Defendant. /	

ORDER TO SHOW CAUSE WHY WILLIAM P. SMITH, ESQ. SHOULD NOT BE SUSPENDED FROM PRACTICE BEFORE THIS COURT INCLUDING REVOCATION OF HIS CURRENT PRO HAC VICE STATUS

This matter came before this Court *sua sponte*. For the reasons set forth below William P. Smith, Esq. of McDermott Will and Emery is directed to appear to show

cause why he should not be suspended from practice before this Court, including revocation of his current pro hac vice admission. The basis of this Order is as follows:

1. On or about April 25, 2007, the Trustee, Alan Goldberg, filed an Emergency Motion of Chapter 11 Trustee for Temporary Restraining Order (CP #2). Mount Sinai Medical Center of Greater Miami, Inc. ("Mt. Sinai") filed a Response to Motion of Chapter 11 Trustee for Temporary Restraining Order (CP #8).

2. On May 7, 2007, counsel for Mt. Sinai filed a motion to admit William P. Smith, pro hac vice (CP #10), which motion was granted (CP # 11).

3. On Monday May 7, 2007, Mr. Smith appeared before this Court on behalf of Mt. Sinai with respect to the Emergency Motion and a related motion filed by the Trustee in the main case. In response to a statement by this court, Mr. Smith replied "I suggest with respect, Your Honor, that you're a few French fries short of a Happy Meal in terms of what's likely to take place". A copy of the relevant page of the transcript is attached to this Order as Exhibit "A".

4. All attorneys appearing before this Court are governed by the Model Rules of Professional Conduct of the American Bar Association, as modified and adopted by the Supreme Court of Florida, as well as this Court's "Guidelines for Courtroom Decorum." Local Rule 2090-2(1) and (E). All attorneys seeking admission pro hac vice certify and agree to be governed by these rules of professional conduct. Local Rule 2090-1(B)(2).

Accordingly, it is ORDERED and ADJUDGED that

William P. Smith, Esq. of McDermott, Will & Emery shall appear before this Court on June 25, 2007 at 11:00 a.m., U.S. Bankruptcy Court, Courtroom 1409, 51 S.W. First

Avenue, Miami, Florida to show cause why he should not be suspended from practice before this Court, including revocation of his pro hac vice admission in this matter for conduct that appears to be inconsistent with the requirements for professional conduct by which Mr. Smith agreed to be governed when he sought permission to appear before this Court.

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Copies to:
Honorable A. Jay Cristol
Honorable Robert A. Mark
Honorable Paul G. Hyman
Honorable Steven B. Friedman
Honorable Raymond B. Ray
Katherine Gould-Feldman, Clerk of Court
Steven Turner, Asst. U.S. Trustee
William P. Smith, Esq.
Steven Siff, Esq.
Gary Matzner, Esq.
Ross Hartog, Esq.
Alan Goldberg, Trustee
Arthur Rice, Esq.
Patricia Redmond, Esq.
Melinda Thornton, Esq.
Lewis Fishman, Esq.
Stuart Lavin, Esq.
Grant Dearborn, Esq.
Bevin Brown, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Laurel Myerson Isicoff

Chapter 11

CERTIFIED COPY

IN RE: SOUTH BEACH COMMUNITY HOSPITAL, LLC, Debtor.	CASE NO: 06-10634 BKC-LMI
ALAN L. GOLDBERG, Plaintiff, vs. MOUNT SINAI MEDICAL CENTER OF GREATER MIAMI, INC., Defendant.	ADV. NO. 07-1210 BKC-LMI-A

EXCERPT FROM PROCEEDINGS

May 7, 2007

The above-entitled cause came on for hearing before the HONORABLE LAUREL MYERSON ISICOFF, one of the judges in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA at Large, at at 51 SW 1st Avenue, Miami, Dade County, Florida, on May 7, 2007 commencing at or about 3:00 p.m., and the following proceedings were had:

Reported By: Maria Elena Colomer

Exhibit "A"

APPEARANCES:

MARKOWITZ, DAVIS, RINGEL & TRUSTY,
By ROSS R. HARTOG, ESQ.,
On behalf the Trustee.

RICE, PUGATCH, ROBINSON & SCHILLER,
By ARTHUR HALSEY RICE, ESQ.,
On behalf of Regions Bank.

STEARNS, WEAVER, MILLER
By PATRICIA A. REDMOND, ESQ.,
On behalf of South Beach Doctors Hospital, LLC.

McDERMOTT, WILL & EMERY, LLP
By GARY C. MATZNER, ESQ.
and
WILLIAM P. SMITH, ESQ.,
On behalf of Mount Sinai Medical Center of Florida, Inc.

MIAMI-DADE COUNTY ATTORNEY'S OFFICE,
By MINDY THORNTON, ESQ.,
Assistant Miami-Dade County Attorney,
On behalf of Miami-Dade County Tax Collector.

LEWIS FISHMAN, ESQ.,
Special Counsel on behalf of the Trustee.
(via telephone)

STUART LAVIN, ESQ.,
On behalf of Hospital of South Beach, LLC.
(via telephone)

GRANT DEARBORN, ESQ. and BREVIN BROWN, ESQ.,
On behalf of Agency for Health Care Administration.
(via telephone)

ALSO PRESENT: Alan L. Goldberg, Trustee

****

MR. SMITH: How can you possibly assume, based on the evidentiary record before you, this transaction is likely to close?

THE COURT: Because I've previously ruled on a contract that has one condition and one condition only and that's the approval of the CHOW application.

MR. SMITH: And is the Court -- as part of that ruling have you established all the financial bona fides for all the documents sitting in escrow someplace so that all that has to happen is the State of Florida has to issue a decision and magically the documents are automatically disbursed and nothing else happens?

THE COURT: I believe that has all been done, but perhaps it has not. But the only condition to close and forfeiture of the deposit is the transfer of the -- the approval of the CHOW application.

MR. SMITH: I suggest to you with respect, Your Honor, that you're a few French fries short of a Happy Meal in terms of what's likely to take place.

THE COURT: Proceed, counsel.

* *

(Thereupon the proceedings were concluded.)

CERTIFICATION

STATE OF FLORIDA)
) SS:
COUNTY OF MIAMI-DADE)

I, MARIA ELENA COLOMER, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings were taken before me at the date and place as stated in the caption hereto on Page 1; that the foregoing computer-aided transcription is a true record of my stenographic notes of the excerpt from proceedings requested.

WITNESS my hand this 17th day of May 2007.

MARIA ELENA COLOMER,
Court Reporter and Notary Public
in and for the State of Florida at Large
Commission # DD 471400
Expires: 10-4-2009

925 A.2d 482
(Cite as: 925 A.2d 482)

H

Supreme Court of Delaware.
In the Matter of a Member of the Bar of the Supreme Court of the State of Delaware:
Richard L. ABBOTT, Respondent.

No. 676, 2006.
Submitted: Feb. 14, 2007.
Decided: May 2, 2007.

Background: Disciplinary action was brought against attorney.

Holding: The Supreme Court held that statements in opening and reply briefs that were undignified, discourteous, and degrading to the tribunal warranted a public reprimand.

Public reprimand ordered.

West Headnotes

[1] Attorney and Client 45 36(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(1) k. In General. Most Cited Cases

The Supreme Court has the inherent and exclusive authority to discipline members of the Delaware Bar.

[2] Attorney and Client 45 57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases

Although recommendations regarding attorney discipline by the Board of Professional Responsibility are helpful, the Supreme Court is not bound by those recommendations; the Court's role is to review the record independently and determine whether there is substantial evidence to support the Board's factual findings.

[3] Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

Attorney's statements in opening and reply briefs that directly accused a fellow member of the Bar of fabricating the basis of the county board of license, inspection, and review and that suggested that the Superior Court might rule on a basis other than the merits of the case was undignified, discourteous, and degrading to the tribunal in violation of the rules of professional conduct. Rules of Prof.Conduct, Rule 3.5(d).

[4] Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

Attorney's statements in opening and reply briefs that directly accused a fellow member of the Bar of fabricating the basis of the county board of license, inspection, and review and that suggested that the Superior Court might rule on a basis other than the merits was prejudicial to the administration of justice in violation of the rules of professional conduct. Rules of Prof.Conduct, Rule 8.4(d).

[5] Attorney and Client 45 14

925 A.2d 482
(Cite as: 925 A.2d 482)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k14 k. Nature and Term of Office. Most Cited Cases

Attorney and Client 45 ⚿32(6)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(6) k. Limitations on Duty to Client, in General. Most Cited Cases

Although a lawyer has a duty to his or her client, each Delaware lawyer has sworn an oath to practice "with all good fidelity as well to the Court as to the client"; this responsibility to the "Court" takes precedence over the interests of the client because officers of the Court are obligated to represent these clients zealously within the bounds of both the positive law and the rules of ethics.

[6] Attorney and Client 45 ⚿59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In General. Most Cited Cases

Attorney's statements in opening and reply briefs that were undignified, discourteous, and degrading to the tribunal in violation of the rules of professional conduct warranted a public reprimand. Rules of Prof.Conduct, Rules 3.5(d), 8.4(d).

***483** Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **PUBLIC REPRIMAND IMPOSED.**Richard L. Abbott, Abbott Law Firm, Hockessin, DE.

Andrea L. Rocanelli, Office of Disciplinary Counsel, Wilmington, DE.

Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices, constituting the Court en Banc.

PER CURIAM:

This is an attorney discipline matter involving charges of professional misconduct against Richard L. Abbott, Esquire ("Mr. Abbott" or "Respondent") that were filed by the Office of Disciplinary Counsel ("ODC"). This matter originates from the arguments set forth in the opening and reply briefs filed by Mr. Abbott on behalf of his client, 395 Associates, LLC, in an appeal to the Superior Court from a decision of the New Castle County Board of License, Inspection & Review ("LIRB"). The petition filed by ODC alleges that in those briefs, the Respondent's "written advocacy [was] undignified, discourteous, and degrading to the tribunal, as well as prejudicial to the administration of justice." The petition alleges several separate bases for finding a violation of Rules 3.5(d) and 8.4(d) of the Delaware Lawyer Rules of Professional Conduct ("the Rules of Professional Conduct").[FN1]

FN1. Rule 3.5(d) states that "A lawyer shall not: ... (d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."

Rule 8.4(d) states that "It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice."

In a Final Report, the Board on Professional Responsibility ("the Board") determined that there was not sufficient evidence to conclude that Mr. Abbott had violated either Rule 3.5(d) or 8.4(d) of the Rules of Professional Conduct. Accordingly, the Board dismissed all of the above ***484** claims. The Board stated that, although Respondent's briefs used "unnecessary invective and rhetoric" and were "obnoxious," it could not find clear and convincing evidence of a violation of either Rule 3.5(d) or Rule 8.4(d). The Board noted, however, "this has been a difficult case.... The Respondent has come close to crossing the line with respect to unprofessional litigation conduct because many of the words he chose and the tone of his arguments were unnecessarily sarcastic

and strident in tone."

The ODC has filed objections to the Board's Final Report and asked this Court to **sanction** the Respondent for his actions. We have determined that the Respondent's behavior violates both Rules 3.5(d) and 8.4(d) of the Rules of Professional Conduct and goes beyond being *merely* unprofessional. We also conclude that the appropriate **sanction** is a public reprimand.

Standard of Review

[1][2] This Court has the "inherent and exclusive authority to discipline members of the Delaware Bar." [FN2] Although recommendations by the Board of Professional Responsibility are helpful, we are not bound by those recommendations.[FN3] Our role is to review the record independently and determine whether there is substantial evidence to support the Board's factual findings. We review the Board's conclusions of law *de novo.*[FN4]

FN2. *In re Froelich,* 838 A.2d 1117, 1120 (Del.2003) (citations omitted).

FN3. *Id.*

FN4. *Id.* (citations omitted).

Respondent's Conduct

[3] The ODC argues that certain specific acts by the Respondent constituted a violation of the Rules of Professional Conduct. First, the ODC alleges that the Respondent violated these rules by "accusing opposing counsel of fabricating legal grounds for the administrative decision challenged by 395 Associates." Second, the ODC contends that the Respondent also made other improper "inflammatory characterizations in his briefings to the Superior Court." Specifically, the ODC identifies the following statements contained in the Respondent's opening and reply briefs:

• A *fictionalized* account of the hearing written by lawyers.

• Miraculously, with the aid of legal counsel's imaginative and creative writing skills, the supposed reasoning for the LIRB's decision became dramatically more extensive and well-reasoned.

• *Fictional* account of the LIRB hearing prepared weeks later.

• The written decision creates an *imaginary, make-believe* set of reasons for the LIRB's findings.

• The County cites no legal authority to support its assertion that the LIRB's attorney may *fabricate conclusions* of the LIRB in the written decision.

• Certainly the County does not believe that the LIRB's attorney truly has the authority to *write decisions from whole cloth.*

• *Laughably,* the County found that the violation was not resolved based on an *illogical and irrational dissertation.*

• Why would the County want to start making decisions on the merits when it could continue to run 395 into the ground for *sport* based on whatever *whimsical speculation* the County could conjure up?

***485** • The County's argument ... constitutes *pure sophistry.*

• "The County's own answering brief provides the legal authority to quickly dispense with this *ridiculous argument.*"

• Never one to miss an opportunity to deny a party the right to a fair and impartial hearing on the merits.

• Otherwise the County would be permitted to *appoint a group of monkeys* to the LIRB, and simply *allow the attorney to interpret the grunts and groans of the ape members and reach whatever conclusion the attorney wished* from the documents of record.

• [T]he ... Code cannot be *magically transmuted.*

Third, ODC alleges that the Respondent improperly implied that the Superior Court might rule on a basis other than the merits of the case. In support of this allegation, the ODC relies upon the following passage in the Respondent's reply brief:

This is a typical tactic used by the County, in an ef-

fort to prejudice the Court against 395 based on the hope that the Court will decide the matter based upon any potential bias or prejudice that it may have against developer Frank Acierno, rather than on merits.

Accusations Against Counsel/Inflammatory Characterizations

The Respondent's personal attacks against counsel for the County is similar to the conduct discussed in *Cannon v. Cherry Hill Toyota, Inc.*[FN5] In that case, the United States District Court for New Jersey found that **sanctions** were warranted for "unduly inflammatory language in [the attorney's] certifications and briefs," [FN6] and for "his repeated use of inflammatory language in his personal attacks on Plaintiff and her attorneys." [FN7] The court held:

> FN5. *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147 (D.N.J.1999).
>
> FN6. *Id.* at 161.
>
> FN7. *Id.* at 163.

> Use of such language does nothing to assist the Court in deciding the merits of a motion, wastes judicial resources by requiring the Court to wade through the superfluous verbiage to decipher the substance of the motion, does not serve the client's interests well, and generally debases the judicial system and the profession.
>
> The Court is aware that a lawyer has an obligation and a duty to represent his client zealously and with diligence. *See* RPC 1.3. However, "[t]he circumstances of this case ... present the unhappy picture of a lawyer who has crossed the boundary of legitimate advocacy into personal recrimination against his adversary." [FN8]
>
> FN8. *Id.* at 161-62 (quoting *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 123 (D.N.J.1998)).

In this case, we conclude that the Respondent's written statements in his briefs filed with the Superior Court similarly violate Rule 3.5(d). [FN9] First, the Respondent directly accused a fellow member of the Bar of fabricating the basis of the LIRB's decision. Second, the Respondent engaged in "discourteous conduct that is degrading to a tribunal."

> FN9. *In re Ramunno*, 625 A.2d 248, 250 (Del.1993). *See also Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d at 52. In *Paramount*, we explained that had Mr. Jamail been a member of the Delaware Bar, or had been admitted *pro hac vice*, he would have been subject to **sanctions** for violating Rule 3.5(c), which is now Rule 3.5(d).

****486 Judicial Bias Allegation***

The Respondent's briefs also suggested that the Superior Court might rule on a basis other than the merits of the case. We hold that those "unfounded accusations impugning the integrity" of the tribunal violated Rule 3.5(d). In *Peters v. Pine Meadow Ranch Home Ass'n*[FN10] Court of Utah struck the attorney's briefs from the record and awarded fees to opposing counsel because the briefs were "replete with attacks on the integrity of the court of appeals panel that decided the cases below [and were] unfounded, scandalous, irrelevant to the questions upon which we have granted certiorari, and disrespectful of the judiciary." [FN11]

> FN10. *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 2007 WL 79231 (Utah 2007).
>
> FN11. *Id.* 2007 WL 79231 at *7.

In *In re Simon*,[FN12] the Louisiana Supreme Court sanctioned a lawyer with a six month suspension for the following language:

> FN12. *In re Simon*, 913 So.2d 816 (La.2005).

> Judge Simon (Judge *Ad Hoc*) has committed reversible error in the performance of her duties as Judge *Ad Hoc.* Specifically, Judge Simon utilized the wrong standard (subjective) in deciding this issue. *In denying plaintiff's Motion to Disqualify/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based.* Judge Simon's denial undermines the efficacy of

> our jurisprudence, attorney ethics and judicial canons and *serves no other purpose but to promote public disrepute and distrust of our legal system.* Indeed, Judge Simon's denial of plaintiff's motion is *baseless and legally, logically and ethically unsound.*[FN13]

FN13. *Id.* at 819 (emphasis added).

In *In re Wilkins,*[FN14] the Indiana Supreme Court found the following statement, contained in a brief to the court clearly impugned the integrity of a judge in violation of the Rules of Professional Conduct and were worthy of **sanction**. The lawyer wrote that, "[t]he [Court of Appeals] Opinion is so *factually and legally inaccurate* that one is left to wonder whether the Court of Appeals was *determined to find for Appellee* Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." [FN15] In that case, the Indiana Supreme Court decided that public reprimand was considered the appropriate **sanction** in light of several mitigating factors, including the immediate contact and written apology of the attorney, an outstanding and exemplary record, and the fact that the offending language was actually written by out of state co-counsel.

FN14. *In re Wilkins,* 782 N.E.2d 985, 986 (Ind.2003).

FN15. *Id.* at 986 (emphasis added).

Judicial Resources Wasted

[4] The Respondent's conduct also violated Rule 8.4(d) because it was prejudicial to the administration of justice. The Superior Court, in response to the Respondent's use of offensive and sarcastic language, was required to strike *sua sponte* portions of the Respondent's written arguments and to write an opinion explaining its actions.[FN16] Thus, the Respondent caused a waste of judicial resources that otherwise would be devoted to the merits of other ***487** cases before the Superior Court. This Court has previously held that disruptive conduct was prejudicial to the administration of justice.[FN17]

FN16. *395 Assocs., LLC v. New Castle County,* 2005 WL 3194566, at *1 (Del.Super.).

FN17. *See In re Shearin,* 765 A.2d 930, 939 (Del.2000) (holding that the filing of a lawsuit in contradiction to a court order was prejudicial to the administration of justice); *Matter of Mekler,* 669 A.2d 655, 667 (Del.1995) (holding that disruptive conduct that wastes judicial resources can constitute a violation of Rule 8.4(d)).

Delaware Attorney's Oath

The Respondent, like so many before him and so many since, took the following oath upon his admission to the Delaware Bar in 1989:

> "I, ..., do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Delaware; that I will behave myself in the office of an Attorney within the Courts according to the best of my learning and ability and with all good fidelity as well to the Court as to the client; that I will use no falsehood nor delay any person's cause through lucre or malice." [FN18]

FN18. Supr. Ct. R. 54.

This oath is, in its essential language, the same one taken by Delaware lawyers since colonial days. When the very first Delaware lawyer, Thomas Spry, was admitted to the Bar in 1676, his behavior was of paramount importance. Court records reflect the following:

> Upon the petition of Thomas Spry desiring that he might be admitted to plead some people's cases in the court, etc. The worshipful Court have granted him leave so long as the Petitioner Behaves himself well and Carrys himself answerable thereunto.[FN19]

FN19. Randy J. Holland, *Introduction* to *The Delaware Bar in the Twentieth Century* xxi (Helen L. Winslow, et al. eds., 1994).

Thus, the ideal that a Delaware lawyer will "behave ... in the office of an Attorney" is a first principle of the Delaware Bar that dates back a hundred years before the Revolutionary War. Today, that principle remains a fundamental tenet of the American legal profession. As former Chief Justice of the

United States, Warren E. Burger, stated: "lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice ... I suggest the necessity for civility is relevant to lawyers because they are the living exemplars-and thus teachers-everyday in every case and in every court; and their worst conduct will be emulated ... more readily than their best." FN20

FN20. D. Hubert, "Competence, Ethics and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners," Teaching and Learning Professionalism Symposium proceedings, American Bar Association (1996), at 113 (quoting, Address by Justice Warren E. Burger to the American Law Institute (reported in the National Observer (May 24, 1971))).

Zealousness Within Boundaries

[5] All members of the Delaware Bar are officers of the Court. Although a lawyer has a duty to his or her client, each Delaware lawyer has sworn an oath to practice "with all good fidelity as well to the Court as to the client." This responsibility to the "Court" takes precedence over the interests of the client because officers of the Court are obligated to represent these clients zealously *within* the bounds ***488** of both the positive law and the rules of ethics. FN21

FN21. *Nix v. Whiteside*, 475 U.S. 157, 168, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). *See also* Sandra Day O'Connor, *Professionalism*, 78 Or. L.Rev. 385, 387 (1999).

As "officers of the court," lawyers are an integral part of the institutional administration of justice. Adherence to the rule of law keeps America free. Public respect for the rule of law requires the public's trust and confidence that our legal system is administered fairly not only by judges but also by "officers of the court."

[6] Civil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and zealously represent his or her clients. FN22 "Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process." FN23 This Court has frequently quoted the following remarks of Justice Sandra Day O'Connor:

FN22. *See* Sandra Day O'Connor, *Professionalism*, 78 Or. L.Rev. 385, 387 (1999).

FN23. *Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 54 (Del.1994).

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
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> * * * * * *
>
> In my view, incivility disserves the client because it wastes time and energy-time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. FN24

FN24. *See Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 508 (Del.2005). *(citing Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52 n. 24 (Del.1994)) (quoting Justice Sandra Day O'Connor, Remarks to an American Bar Association Group on "Civil Justice Improvements" (Dec. 14, 1993)).

Justice Brent Dickson of the Indiana Supreme Court has appropriately observed that civil law is not an oxymoron. FN25

FN25. *See* Brent E. Dickson and Julia Buntun Jackson, *Renewing Lawyer Civility*, 28 Val. U.L.Rev. 531 (1994).

In this case, the Board struggled with where to draw the line between conduct that was *merely* unprofessional and conduct that was unethical. As a result, the Board found that although the Respondent's briefs were "obnoxious" and used "unnecessary invective and rhetoric," there were no ethical

violations. In this regard, the New Jersey Supreme Court's decision in *In re Vincenti* [FN26] is instructive:

FN26. *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983).

> Under some circumstances it might be difficult to determine precisely the point at which forceful, aggressive trial advocacy crosses the line into the forbidden territory of an ethical violation. But no matter where in the spectrum of courtroom behavior we would draw that line, no matter how indulgent our view of acceptable professional conduct might be, it is inconceivable that the instances of respondent's demeanor that we are called upon to review in these proceedings could ever be countenanced.[FN27]

FN27. *Id.*

As this Court stated more than fifteen years ago, "[s]imply put, insulting conduct ***489** toward opposing counsel, and disparaging a court's integrity are unacceptable by any standard." [FN28]

FN28. *In re Ramunno*, 625 A.2d 248, 250 (Del.1993).

Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyers' Rules of Professional Conduct. "Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone." [FN29]

FN29. *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 162 (D.N.J.1999).

The leading treatise on legal ethics states that "Part 3 of the Model Rules stands as a stern reminder that it is simply not the case that 'anything goes' once a matter reaches a courtroom or other tribunal; even hardball is played according to an exacting set of rules." [FN30] During his confirmation hearing, the Chief Justice of the United States, John G. Roberts, Jr., also used a baseball analogy: "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire is critical. They make sure everybody plays by the rules." [FN31] Like umpires, judges must decide which hits by an advocate are fair and which hard hits by an advocate are foul. In this case, the hits in the briefs filed by the Respondent were not only foul but were so far beyond the boundaries of propriety that they were unethical.

FN30. 2 Hazard & Hodes, *The Law of Lawyering* (3d ed. 2007 supp.) The Lawyer as Advocate, § 26.3, pp. 26-6 (Aspen Law & Business).

FN31. Transcript of Confirmation Hearing of Chief Justice Roberts (September 12, 2005), available at http:// www. asksam. com/ ebooks/ John Roberts/ confirmation_ hearing. asp.

Conclusion

We hold that the appropriate **sanction** for the Respondent in this matter is a public reprimand. The issuance of this opinion will constitute that action.

Del.Supr.,2007.
In re Abbott
925 A.2d 482

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637 A.2d 34, 62 USLW 2530, Fed. Sec. L. Rep. P 98,063
(Cite as: 637 A.2d 34)

Supreme Court of Delaware.
PARAMOUNT COMMUNICATIONS INC., Viacom Inc., Martin S. Davis, Grace J. Fippinger, Irving R. Fischer, Benjamin L. Hooks, Franz J. Lutolf, James A. Pattison, Irwin Schloss, Samuel J. Silberman, Lawrence M. Small, and George Weissman, Defendants Below, Appellants,
v.
QVC NETWORK INC., Plaintiff Below, Appellee.
In re PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION.

Submitted: Dec. 9, 1993.
Decided by Order: Dec. 9, 1993.
Opinion: Feb. 4, 1994.

Following corporation's announcement of merger, competing tender offeror brought suit for injunctive relief. The Court of Chancery, — A.2d — —, granted preliminary injunction. The Supreme Court, Veasey, C.J., held that: (1) sale of control implicated enhanced judicial scrutiny, and (2) directors violated their fiduciary duties.

Affirmed and remanded.

West Headnotes

[1] Appeal and Error 30 1024.2

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.2 k. Provisional remedies. Most Cited Cases

Supreme Court's standard and scope of review as to facts on appeal from preliminary injunction entered by Court of Chancery is whether, after independently reviewing entire record, Supreme Court can conclude that findings of Court of Chancery are sufficiently supported by the record and are product of orderly and logical deductive process.

[2] Corporations and Business Organizations 101 2814

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(G) Anti-Takeover Measures and Devices
101k2812 Fiduciary Duties of Directors and Officers
101k2814 k. Actions by minority shareholders; judicial scrutiny. Most Cited Cases
(Formerly 101k310(1))

Directors' conduct is subject to enhanced scrutiny in situations involving approval of transaction resulting in sale of control, and adoption of defensive measures in response to threat to corporate control.

[3] Corporations and Business Organizations 101 2814

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(G) Anti-Takeover Measures and Devices
101k2812 Fiduciary Duties of Directors and Officers
101k2814 k. Actions by minority shareholders; judicial scrutiny. Most Cited Cases
(Formerly 101k310(1))

Enhanced judicial scrutiny was mandated in sale or change of control transaction, by threatened diminution of current shareholders' voting power, fact that control premium was being sold, and traditional concern of courts for actions which impair or impede shareholder voting rights.

[4] Corporations and Business Organizations 101 2743

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(D) Sale or Transfer of All or Controlling Interest of Stock

101k2741 Authority or Right to Sell or Transfer Stock
101k2743 k. Duties to, rights and remedies of, and actions by, dissenting shareholders. Most Cited Cases
(Formerly 101k1841, 101k310(1))

Key features of enhanced judicial scrutiny applied to sale or change of control transaction are: judicial determination regarding adequacy of decision-making process employed by directors, including information on which directors based their decision; and judicial examination of reasonableness of directors' action in light of circumstances then existing.

[5] Corporations and Business Organizations 101 ⚷2636

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(A) In General
101k2636 k. Rights and remedies of, and actions by, dissenting shareholders. Most Cited Cases
(Formerly 101k320(11))

In sale or change of control situation, directors have burden of proving that they were adequately informed and acted reasonably.

[6] Corporations and Business Organizations 101 ⚷1842

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 k. Business judgment rule in general. Most Cited Cases
(Formerly 101k310(1))

In cases where traditional business judgment rule is applicable and board of directors acted with due care, in good faith and in honest belief that they were acting in best interests of shareholder, court gives great deference to substance of directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if latter's decision can be attributed to any rational business purpose.

[7] Corporations and Business Organizations 101 ⚷1841

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1841 k. In general. Most Cited Cases
(Formerly 101k310(1))

In applying enhanced scrutiny to sale or change of control transaction, courts will not substitute its business judgment for that of directors, but will determine if directors' decision was, on balance, within range of reasonableness.

[8] Corporations and Business Organizations 101 ⚷2743

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(D) Sale or Transfer of All or Controlling Interest of Stock
101k2741 Authority or Right to Sell or Transfer Stock
101k2743 k. Duties to, rights and remedies of, and actions by, dissenting shareholders. Most Cited Cases
(Formerly 101k1841, 101k310(1))

In sale or change of control transaction, enhanced judicial scrutiny is applied, and directors are obligated to seek best value reasonably available for stockholders, regardless of whether there is to be breakup of the corporation.

[9] Corporations and Business Organizations 101 ⚷1841

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General

101k1841 k. In general. Most Cited Cases
(Formerly 101k310(1))

When corporation undertakes transaction which will cause change in corporate control or breakup of corporate entity, directors' obligation is to seek best value reasonably available to stockholders.

[10] Corporations and Business Organizations 101 ⚷1844

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1844 k. Good faith. Most Cited Cases
(Formerly 101k310(2))

Corporations and Business Organizations 101 ⚷1847

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1847 k. Duty to inquire; knowledge or notice. Most Cited Cases
(Formerly 101k310(2))

Corporations and Business Organizations 101 ⚷1850

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1850 k. Degree of care required and negligence. Most Cited Cases
(Formerly 101k310(2))

Having decided to sell control of corporation and faced with two tender offers, directors had obligation: to be diligent and vigilant in critically examining proposed transaction and competing offers; to act in good faith; to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide best value reasonably available to stockholders; and to negotiate actively and in good faith with both prospective purchasers to that end.

[11] Corporations and Business Organizations 101 ⚷2654

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2654 k. Duties of directors and officers in general; business judgment rule. Most Cited Cases
(Formerly 101k310(1))

Enhanced judicial scrutiny of directors' action was implicated by defensive provisions of merger agreement, coupled with sale of control and subsequent disparate treatment of competing bidders.

[12] Corporations and Business Organizations 101 ⚷2654

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2654 k. Duties of directors and officers in general; business judgment rule. Most Cited Cases
(Formerly 101k310(1))

Having entered merger agreement with one corporation, directors violated their fiduciary duties by failing to modify improper defensive provisions of agreement or improve economic terms of agreement when faced with competing higher offer.

[13] Corporations and Business Organizations 101 ⚷2657

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations

101k2655 Agreements for Merger or Consolidation
101k2657 k. Requisites and validity. Most Cited Cases
(Formerly 101k582)

Provision of merger agreement, whereby board of selling corporation agreed that it would not solicit, encourage, discuss, negotiate or endorse any competing transaction unless certain conditions were met, was unenforceable, to extent provision was inconsistent with directors' fiduciary duties.

[14] Corporations and Business Organizations 101 ⚿1841

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1841 k. In general. Most Cited Cases
(Formerly 101k310(1))

To extent that contract, or provision thereof, purports to require board to act or not act in such a fashion as to limit exercise of fiduciary duties, it is invalid and unenforceable.

[15] Corporations and Business Organizations 101 ⚿2659

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2655 Agreements for Merger or Consolidation
101k2659 k. Construction, operation, and effect. Most Cited Cases
(Formerly 101k582)

Defensive provision of merger agreement, which granted buyer an option to purchase percentage of seller's outstanding common stock at a fixed price if seller terminated agreement because of competing transaction, if seller's stockholders did not approve merger or if seller's board recommended competing transaction, and which permitted buyer to pay for shares with senior subordinated note of questionable marketability and allowed buyer to elect to require seller to pay seller in cash a sum equal to difference between purchase price and market price of seller's stock, was invalid, insofar as provisions were inconsistent with directors' fiduciary duties.

[16] Attorney and Client 45 ⚿10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of practitioners in different jurisdiction. Most Cited Cases

Although there is no clear mechanism for Supreme Court to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts, consideration will be given to whether it is appropriate and fair to take into account attorney's behavior in event application is made by him in the future to appear pro hac vice in any proceeding in the state. Rules of Prof.Conduct, Rule 3.5(c), Del.C.Ann.

[17] Attorney and Client 45 ⚿10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of practitioners in different jurisdiction. Most Cited Cases

Out-of-state attorney must be admitted pro hac vice before participating in deposition in proceeding pending in state courts.

*35 Upon appeal from the Court of Chancery. AFFIRMED.Charles F. Richards, Jr., Thomas A. Beck and Anne C. Foster of Richards, Layton & Finger, Wilmington, Barry R. Ostrager (argued), Michael J. Chepiga, Robert F. Cusumano, Mary Kay Vyskocil and Peter C. Thomas of Simpson Thacher & Bartlett, New York City, for appellants Paramount Communications Inc. and the individual defendants.

A. Gilchrist Sparks, III and William M. Lafferty of Morris, Nichols, Arsht & Tunnell, Wilmington, Stuart J. Baskin (argued), *36 Jeremy G. Epstein, Alan S. Goudiss and Seth J. Lapidow of Shearman &

637 A.2d 34, 62 USLW 2530, Fed. Sec. L. Rep. P 98,063
(Cite as: 637 A.2d 34)

Sterling, New York City, for appellant Viacom Inc.

Bruce M. Stargatt, David C. McBride, Josy W. Ingersoll, William D. Johnston, Bruce L. Silverstein and James P. Hughes, Jr. of Young, Conaway, Stargatt & Taylor, Wilmington, Herbert M. Wachtell (argued), Michael W. Schwartz, Theodore N. Mirvis, Paul K. Rowe and George T. Conway, III of Wachtell, Lipton, Rosen & Katz, New York City, for appellee QVC Network Inc.

Irving Morris, Karen L. Morris and Abraham Rappaport of Morris & Morris, Pamela S. Tikellis, Carolyn D. Mack and Cynthia A. Calder of Chimicles, Burt & Jacobsen, Joseph A. Rosenthal and Norman M. Monhait of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Daniel W. Krasner and Jeffrey G. Smith of Wolf, Haldenstein, Adler, Freeman & Herz, Arthur N. Abbey (argued), and Mark C. Gardy of Abbey & Ellis, New York City, for the shareholder appellees.

Before VEASEY, C.J., MOORE and HOLLAND, JJ.

VEASEY, Chief Justice.

In this appeal we review an order of the Court of Chancery dated November 24, 1993 (the "November 24 Order"), preliminarily enjoining certain defensive measures designed to facilitate a so-called strategic alliance between Viacom Inc. ("Viacom") and Paramount Communications Inc. ("Paramount") approved by the board of directors of Paramount (the "Paramount Board" or the "Paramount directors") and to thwart an unsolicited, more valuable, tender offer by QVC Network Inc. ("QVC"). In affirming, we hold that the sale of control in this case, which is at the heart of the proposed strategic alliance, implicates enhanced judicial scrutiny of the conduct of the Paramount Board under *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1986). We further hold that the conduct of the Paramount Board was not reasonable as to process or result.

QVC and certain stockholders of Paramount commenced separate actions (later consolidated) in the Court of Chancery seeking preliminary and permanent injunctive relief against Paramount, certain members of the Paramount Board, and Viacom. This action arises out of a proposed acquisition of Paramount by Viacom through a tender offer followed by a second-step merger (the "Paramount–Viacom transaction"), and a competing unsolicited tender offer by QVC. The Court of Chancery granted a preliminary injunction. *QVC Network, Inc. v. Paramount Communications Inc.*, Del.Ch., 635 A.2d 1245, Jacobs, V.C. (1993), (the "Court of Chancery Opinion"). We affirmed by order dated December 9, 1993. *Paramount Communications Inc. v. QVC Network Inc.*, Del.Supr., Nos. 427 and 428, 1993, 637 A.2d 828, Veasey, C.J. (Dec. 9, 1993) (the "December 9 Order").[FN1]

FN1. We accepted this expedited interlocutory appeal on November 29, 1993. After briefing and oral argument in this Court held on December 9, 1993, we issued our December 9 Order affirming the November 24 Order of the Court of Chancery. In our December 9 Order, we stated, "It is not feasible, because of the exigencies of time, for this Court to complete an opinion setting forth more comprehensively the rationale of the Court's decision. Unless otherwise ordered by the Court, such an opinion will follow in due course." December 9 Order at 3. This is the opinion referred to therein.

The Court of Chancery found that the Paramount directors violated their fiduciary duties by favoring the Paramount–Viacom transaction over the more valuable unsolicited offer of QVC. The Court of Chancery preliminarily enjoined Paramount and the individual defendants (the "Paramount defendants") from amending or modifying Paramount's stockholder rights agreement (the "Rights Agreement"), including the redemption of the Rights, or taking other action to facilitate the consummation of the pending tender offer by Viacom or any proposed second-step merger, including the Merger Agreement between Paramount and Viacom dated September 12, 1993 (the "Original Merger Agreement"), as amended on October 24, 1993 (the "Amended Merger Agreement"). Viacom and the Paramount defendants were enjoined from taking any action *37 to exercise any provision of the Stock Option Agreement between Paramount and Viacom dated September 12, 1993 (the "Stock Option Agreement"), as amended on October 24, 1993. The Court of Chancery did not grant preliminary injunctive relief as to the termination fee provided for the benefit of Viacom in Section 8.05 of the Original Merger Agree-

ment and the Amended Merger Agreement (the "Termination Fee").

Under the circumstances of this case, the pending sale of control implicated in the Paramount–Viacom transaction required the Paramount Board to act on an informed basis to secure the best value reasonably available to the stockholders. Since we agree with the Court of Chancery that the Paramount directors violated their fiduciary duties, we have AFFIRMED the entry of the order of the Vice Chancellor granting the preliminary injunction and have REMANDED these proceedings to the Court of Chancery for proceedings consistent herewith.

We also have attached an Addendum to this opinion addressing serious deposition misconduct by counsel who appeared on behalf of a Paramount director at the time that director's deposition was taken by a lawyer representing QVC. [FN2]

> FN2. It is important to put the Addendum in perspective. This Court notes and has noted its appreciation of the outstanding judicial workmanship of the Vice Chancellor and the professionalism of counsel in this matter in handling this expedited litigation with the expertise and skill which characterize Delaware proceedings of this nature. The misconduct noted in the Addendum is an aberration which is not to be tolerated in any Delaware proceeding.

I. FACTS

[1] The Court of Chancery Opinion contains a detailed recitation of its factual findings in this matter. Court of Chancery Opinion, 635 A.2d 1245, 1246–1259. Only a brief summary of the facts is necessary for purposes of this opinion. The following summary is drawn from the findings of fact set forth in the Court of Chancery Opinion and our independent review of the record.[FN3]

> FN3. This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, Del.Supr., 535 A.2d 1334, 1342–41 (1987).

Paramount is a Delaware corporation with its principal offices in New York City. Approximately 118 million shares of Paramount's common stock are outstanding and traded on the New York Stock Exchange. The majority of Paramount's stock is publicly held by numerous unaffiliated investors. Paramount owns and operates a diverse group of entertainment businesses, including motion picture and television studios, book publishers, professional sports teams, and amusement parks.

There are 15 persons serving on the Paramount Board. Four directors are officer-employees of Paramount: Martin S. Davis ("Davis"), Paramount's Chairman and Chief Executive Officer since 1983; Donald Oresman ("Oresman"), Executive Vice–President, Chief Administrative Officer, and General Counsel; Stanley R. Jaffe, President and Chief Operating Officer; and Ronald L. Nelson, Executive Vice President and Chief Financial Officer. Paramount's 11 outside directors are distinguished and experienced business persons who are present or former senior executives of public corporations or financial institutions. [FN4]

> FN4. Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, and director of Pfizer, Inc., Connecticut Mutual Life Insurance Company, and The Bear Stearns Companies, Inc.
>
> Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission, and an Adjunct Professor of Urban Planning at Columbia University
>
> Benjamin L. Hooks, Senior Vice President of the Chapman Company and director of Maxima Corporation
>
> J. Hugh Liedtke, Chairman of Pennzoil Company

Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, and director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich

James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, and director of the Toronto–Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary

Lester Pollack, General Partner of Lazard Freres & Co., Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres, director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and Trustee of New York University

Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc.

Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation

Lawrence M. Small, President and Chief Operating Officer of the Federal National Mortgage Association, director of Fannie Mae and the Chubb Corporation, and trustee of Morehouse College and New York University Medical Center

George Weissman, retired Chairman and Consultant of Philip Morris Companies, Inc., director of Avnet, Incorporated, and Chairman of Lincoln Center for the Performing Arts, Inc.

***38** Viacom is a Delaware corporation with its headquarters in Massachusetts. Viacom is controlled by Sumner M. Redstone ("Redstone"), its Chairman and Chief Executive Officer, who owns indirectly approximately 85.2 percent of Viacom's voting Class A stock and approximately 69.2 percent of Viacom's nonvoting Class B stock through National Amusements, Inc. ("NAI"), an entity 91.7 percent owned by Redstone. Viacom has a wide range of entertainment operations, including a number of well-known cable television channels such as MTV, Nickelodeon, Showtime, and The Movie Channel. Viacom's equity co-investors in the Paramount–Viacom transaction include NYNEX Corporation and Blockbuster Entertainment Corporation.

QVC is a Delaware corporation with its headquarters in West Chester, Pennsylvania. QVC has several large stockholders, including Liberty Media Corporation, Comcast Corporation, Advance Publications, Inc., and Cox Enterprises Inc. Barry Diller ("Diller"), the Chairman and Chief Executive Officer of QVC, is also a substantial stockholder. QVC sells a variety of merchandise through a televised shopping channel. QVC has several equity co-investors in its proposed combination with Paramount including BellSouth Corporation and Comcast Corporation.

Beginning in the late 1980s, Paramount investigated the possibility of acquiring or merging with other companies in the entertainment, media, or communications industry. Paramount considered such transactions to be desirable, and perhaps necessary, in order to keep pace with competitors in the rapidly evolving field of entertainment and communications. Consistent with its goal of strategic expansion, Paramount made a tender offer for Time Inc. in 1989, but was ultimately unsuccessful. *See* Paramount Communications, Inc. v. Time Inc., Del.Supr., 571 A.2d 1140 (1990) ("*Time–Warner* ").

Although Paramount had considered a possible combination of Paramount and Viacom as early as 1990, recent efforts to explore such a transaction began at a dinner meeting between Redstone and Davis on April 20, 1993. Robert Greenhill ("Greenhill"), Chairman of Smith Barney Shearson Inc. ("Smith Barney"), attended and helped facilitate this meeting. After several more meetings between Redstone and Davis, serious negotiations began taking place in early July.

It was tentatively agreed that Davis would be the chief executive officer and Redstone would be the controlling stockholder of the combined company, but the parties could not reach agreement on the merger price and the terms of a stock option to be granted to Viacom. With respect to price, Viacom offered a package of cash and stock (primarily Viacom Class B nonvoting stock) with a market value of approximately $61 per share, but Paramount wanted at least $70 per share.

Shortly after negotiations broke down in July 1993, two notable events occurred. First, Davis apparently learned of QVC's potential interest in Paramount, and told Diller over lunch on July 21, 1993, that Paramount was not for sale. Second, the market value of Viacom's Class B nonvoting stock increased from $46.875 on July 6 to $57.25 on August 20. QVC claims (and Viacom disputes) that this price increase was caused by open market purchases of such stock by Redstone or entities controlled by him.

*39 On August 20, 1993, discussions between Paramount and Viacom resumed when Greenhill arranged another meeting between Davis and Redstone. After a short hiatus, the parties negotiated in earnest in early September, and performed due diligence with the assistance of their financial advisors, Lazard Freres & Co. ("Lazard") for Paramount and Smith Barney for Viacom. On September 9, 1993, the Paramount Board was informed about the status of the negotiations and was provided information by Lazard, including an analysis of the proposed transaction.

On September 12, 1993, the Paramount Board met again and unanimously approved the Original Merger Agreement whereby Paramount would merge with and into Viacom. The terms of the merger provided that each share of Paramount common stock would be converted into 0.10 shares of Viacom Class A voting stock, 0.90 shares of Viacom Class B nonvoting stock, and $9.10 in cash. In addition, the Paramount Board agreed to amend its "poison pill" Rights Agreement to exempt the proposed merger with Viacom. The Original Merger Agreement also contained several provisions designed to make it more difficult for a potential competing bid to succeed. We focus, as did the Court of Chancery, on three of these defensive provisions: a "no-shop" provision (the "No–Shop Provision"), the Termination Fee, and the Stock Option Agreement.

First, under the No–Shop Provision, the Paramount Board agreed that Paramount would not solicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party "makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing"; and (b) the Paramount Board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties.

Second, under the Termination Fee provision, Viacom would receive a $100 million termination fee if: (a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction.

The third and most significant deterrent device was the Stock Option Agreement, which granted to Viacom an option to purchase approximately 19.9 percent (23,699,000 shares) of Paramount's outstanding common stock at $69.14 per share if any of the triggering events for the Termination Fee occurred. In addition to the customary terms that are normally associated with a stock option, the Stock Option Agreement contained two provisions that were both unusual and highly beneficial to Viacom: (a) Viacom was permitted to pay for the shares with a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price (the "Note Feature"); and (b) Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock (the "Put Feature"). Because the Stock Option Agreement was not "capped" to limit its maximum dollar value, it had the potential to reach (and in this case did reach) unreasonable levels.

After the execution of the Original Merger Agreement and the Stock Option Agreement on September 12, 1993, Paramount and Viacom announced their proposed merger. In a number of public statements, the parties indicated that the pending transaction was a virtual certainty. Redstone described it as a "marriage" that would "never be torn asunder" and stated that only a "nuclear attack" could break the deal. Redstone also called Diller and John Malone of

Tele–Communications Inc., a major stockholder of QVC, to dissuade them from making a competing bid.

Despite these attempts to discourage a competing bid, Diller sent a letter to Davis on September 20, 1993, proposing a merger in which QVC would acquire Paramount for approximately $80 per share, consisting of 0.893 shares of QVC common stock and $30 in cash. QVC also expressed its eagerness to meet with Paramount to negotiate the details of a transaction. When the Paramount Board met on September 27, it was advised by Davis that the Original Merger ***40** Agreement prohibited Paramount from having discussions with QVC (or anyone else) unless certain conditions were satisfied. In particular, QVC had to supply evidence that its proposal was not subject to financing contingencies. The Paramount Board was also provided information from Lazard describing QVC and its proposal.

On October 5, 1993, QVC provided Paramount with evidence of QVC's financing. The Paramount Board then held another meeting on October 11, and decided to authorize management to meet with QVC. Davis also informed the Paramount Board that Booz–Allen & Hamilton ("Booz–Allen"), a management consulting firm, had been retained to assess, *inter alia,* the incremental earnings potential from a Paramount–Viacom merger and a Paramount–QVC merger. Discussions proceeded slowly, however, due to a delay in Paramount signing a confidentiality agreement. In response to Paramount's request for information, QVC provided two binders of documents to Paramount on October 20.

On October 21, 1993, QVC filed this action and publicly announced an $80 cash tender offer for 51 percent of Paramount's outstanding shares (the "QVC tender offer"). Each remaining share of Paramount common stock would be converted into 1.42857 shares of QVC common stock in a second-step merger. The tender offer was conditioned on, among other things, the invalidation of the Stock Option Agreement, which was worth over $200 million by that point.[FN5] QVC contends that it had to commence a tender offer because of the slow pace of the merger discussions and the need to begin seeking clearance under federal antitrust laws.

FN5. By November 15, 1993, the value of the Stock Option Agreement had increased to nearly $500 million based on the $90 QVC bid. *See* Court of Chancery Opinion, 635 A.2d 1245, 1271.

Confronted by QVC's hostile bid, which on its face offered over $10 per share more than the consideration provided by the Original Merger Agreement, Viacom realized that it would need to raise its bid in order to remain competitive. Within hours after QVC's tender offer was announced, Viacom entered into discussions with Paramount concerning a revised transaction. These discussions led to serious negotiations concerning a comprehensive amendment to the original Paramount–Viacom transaction. In effect, the opportunity for a "new deal" with Viacom was at hand for the Paramount Board. With the QVC hostile bid offering greater value to the Paramount stockholders, the Paramount Board had considerable leverage with Viacom.

At a special meeting on October 24, 1993, the Paramount Board approved the Amended Merger Agreement and an amendment to the Stock Option Agreement. The Amended Merger Agreement was, however, essentially the same as the Original Merger Agreement, except that it included a few new provisions. One provision related to an $80 per share cash tender offer by Viacom for 51 percent of Paramount's stock, and another changed the merger consideration so that each share of Paramount would be converted into 0.20408 shares of Viacom Class A voting stock, 1.08317 shares of Viacom Class B nonvoting stock, and 0.20408 shares of a new series of Viacom convertible preferred stock. The Amended Merger Agreement also added a provision giving Paramount the right not to amend its Rights Agreement to exempt Viacom if the Paramount Board determined that such an amendment would be inconsistent with its fiduciary duties because another offer constituted a "better alternative." [FN6] Finally, the Paramount Board was given the power to terminate the Amended Merger Agreement if it withdrew its recommendation of the Viacom transaction or recommended a competing transaction.

FN6. Under the Amended Merger Agreement and the Paramount Board's resolutions approving it, no further action of the Paramount Board would be required in order for Paramount's Rights Agreement to be

amended. As a result, the proper officers of the company were authorized to implement the amendment unless they were instructed otherwise by the Paramount Board.

Although the Amended Merger Agreement offered more consideration to the Paramount stockholders and somewhat more flexibility to the Paramount Board than did the Original Merger Agreement, the defensive measures designed to make a competing bid more difficult were not removed or modified. ***41** In particular, there is no evidence in the record that Paramount sought to use its newly-acquired leverage to eliminate or modify the No–Shop Provision, the Termination Fee, or the Stock Option Agreement when the subject of amending the Original Merger Agreement was on the table.

Viacom's tender offer commenced on October 25, 1993, and QVC's tender offer was formally launched on October 27, 1993. Diller sent a letter to the Paramount Board on October 28 requesting an opportunity to negotiate with Paramount, and Oresman responded the following day by agreeing to meet. The meeting, held on November 1, was not very fruitful, however, after QVC's proposed guidelines for a "fair bidding process" were rejected by Paramount on the ground that "auction procedures" were inappropriate and contrary to Paramount's contractual obligations to Viacom.

On November 6, 1993, Viacom unilaterally raised its tender offer price to $85 per share in cash and offered a comparable increase in the value of the securities being proposed in the second-step merger. At a telephonic meeting held later that day, the Paramount Board agreed to recommend Viacom's higher bid to Paramount's stockholders.

QVC responded to Viacom's higher bid on November 12 by increasing its tender offer to $90 per share and by increasing the securities for its second-step merger by a similar amount. In response to QVC's latest offer, the Paramount Board scheduled a meeting for November 15, 1993. Prior to the meeting, Oresman sent the members of the Paramount Board a document summarizing the "conditions and uncertainties" of QVC's offer. One director testified that this document gave him a very negative impression of the QVC bid.

At its meeting on November 15, 1993, the Paramount Board determined that the new QVC offer was not in the best interests of the stockholders. The purported basis for this conclusion was that QVC's bid was excessively conditional. The Paramount Board did not communicate with QVC regarding the status of the conditions because it believed that the No–Shop Provision prevented such communication in the absence of firm financing. Several Paramount directors also testified that they believed the Viacom transaction would be more advantageous to Paramount's future business prospects than a QVC transaction.[FN7] Although a number of materials were distributed to the Paramount Board describing the Viacom and QVC transactions, the only quantitative analysis of the consideration to be received by the stockholders under each proposal was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them.[FN8]

FN7. This belief may have been based on a report prepared by Booz–Allen and distributed to the Paramount Board at its October 24 meeting. The report, which relied on public information regarding QVC, concluded that the synergies of a Paramount–Viacom merger were significantly superior to those of a Paramount–QVC merger. QVC has labelled the Booz–Allen report as a "joke."

FN8. The market prices of Viacom's and QVC's stock were poor measures of their actual values because such prices constantly fluctuated depending upon which company was perceived to be the more likely to acquire Paramount.

The preliminary injunction hearing in this case took place on November 16, 1993. On November 19, Diller wrote to the Paramount Board to inform it that QVC had obtained financing commitments for its tender offer and that there was no antitrust obstacle to the offer. On November 24, 1993, the Court of Chancery issued its decision granting a preliminary injunction in favor of QVC and the plaintiff stockholders. This appeal followed.

II. APPLICABLE PRINCIPLES OF ESTABLISHED DELAWARE LAW

The General Corporation Law of the State of

Delaware (the "General Corporation Law") and the decisions of this Court have repeatedly recognized the fundamental principle that the management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the ***42** stockholders. 8 *Del.C.* § 141(a); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805, 811–12 (1984); *Pogostin v. Rice,* Del.Supr., 480 A.2d 619, 624 (1984). Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies the deference to which such decisions are entitled. *Aronson,* 473 A.2d at 812.

[2] Nevertheless, there are rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable.[FN9] The decisions of this Court have clearly established the circumstances where such enhanced scrutiny will be applied. *E.g., Unocal,* 493 A.2d 946; *Moran v. Household Int'l, Inc.,* Del.Supr., 500 A.2d 1346 (1985); *Revlon,* 506 A.2d 173; *Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261 (1989); *Gilbert v. El Paso Co.,* Del.Supr., 575 A.2d 1131 (1990). The case at bar implicates two such circumstances: (1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control.

> FN9. Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders. *E.g., Weinberger v. UOP, Inc.,* Del.Supr., 457 A.2d 701, 710–11 (1983); *Nixon v. Blackwell,* Del.Supr., 626 A.2d 1366, 1376 (1993).

A. The Significance of a Sale or Change [FN10] of Control

> FN10. For purposes of our December 9 Order and this Opinion, we have used the terms "sale of control" and "change of control" interchangeably without intending any doctrinal distinction.

When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders. Under the statutory framework of the General Corporation Law, many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders. Such actions include elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. 8 *Del.C.* §§ 211, 242, 251–258, 263, 271, 275. Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights.[FN11]

> FN11. *See Schnell v. Chris–Craft Indus., Inc.,* Del.Supr., 285 A.2d 437, 439 (1971) (holding that actions taken by management to manipulate corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management" were "contrary to established principles of corporate democracy" and therefore invalid); *Giuricich v. Emtrol Corp.,* Del.Supr., 449 A.2d 232, 239 (1982) (holding that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated"); *Centaur Partners, IV v. Nat'l Intergroup,* Del.Supr., 582 A.2d 923 (1990) (holding that supermajority voting provisions must be clear and unambiguous because they have the effect of disenfranchising the majority); *Stroud v. Grace,* Del.Supr., 606 A.2d 75, 84 (1992) (directors' duty of disclosure is premised on the importance of stockholders being fully informed when voting on a specific matter); *Blasius Indus., Inc. v. Atlas Corp.,* Del.Ch., 564 A.2d 651, 659 n. 2 (1988) ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.").

In the absence of devices protecting the minority stockholders, [FN12] stockholder votes are likely to be-

come mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger. *43*Weinberger,* 457 A.2d at 703. Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot. The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.

> FN12. Examples of such protective provisions are supermajority voting provisions, majority of the minority requirements, etc. Although we express no opinion on what effect the inclusion of any such stockholder protective devices would have had in this case, we note that this Court has upheld, under different circumstances, the reasonableness of a standstill agreement which limited a 49.9 percent stockholder to 40 percent board representation. *Ivanhoe,* 535 A.2d at 1343.

In the case before us, the public stockholders (in the aggregate) currently own a majority of Paramount's voting stock. Control of the corporation is not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders. In the event the Paramount–Viacom transaction is consummated, the public stockholders will receive cash and a minority equity voting position in the surviving corporation. Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests. Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.

Because of the intended sale of control, the Paramount–Viacom transaction has economic consequences of considerable significance to the Paramount stockholders. Once control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom–Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available.

B. The Obligations of Directors in a Sale or Change of Control Transaction

The consequences of a sale of control impose special obligations on the directors of a corporation.[FN13] In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably. The obligations of the directors and the enhanced scrutiny of the courts are well-established by the decisions of this Court. The directors' fiduciary duties in a sale of control context are those which generally attach. In short, "the directors must act in accordance with their fundamental duties of care and loyalty." *Barkan v. Amsted Indus., Inc.,* Del.Supr., 567 A.2d 1279, 1286 (1989). As we held in *Macmillan:*

> FN13. We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent. For example, where a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer. *See Pogostin,* 480 A.2d at 627; *Time–Warner,* 571 A.2d at 1152; *Bershad v. Curtiss–Wright Corp.,* Del.Supr., 535 A.2d 840, 845 (1987); *Macmillan,* 559 A.2d at 1285 n. 35. The decision of a board to resist such an acquisition, like all decisions of a

> properly-functioning board, must be informed, *Unocal*, 493 A.2d at 954–55, and the circumstances of each particular case will determine the steps that a board must take to inform itself, and what other action, if any, is required as a matter of fiduciary duty.

It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. **This unremitting obligation extends equally to board conduct in a sale of corporate control.**

***44** 559 A.2d at 1280 (emphasis supplied) (citations omitted).

In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end. The decisions of this Court have consistently emphasized this goal. *Revlon*, 506 A.2d at 182 ("The duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit."); *Macmillan*, 559 A.2d at 1288 ("[I]n a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."); *Barkan*, 567 A.2d at 1286 ("[T]he board must act in a neutral manner to encourage the highest possible price for shareholders."). *See also Wilmington Trust Co. v. Coulter*, Del.Supr., 200 A.2d 441, 448 (1964) (in the context of the duty of a trustee, "[w]hen all is equal ... it is plain that the Trustee is bound to obtain the best price obtainable").

In pursuing this objective, the directors must be especially diligent. *See Citron v. Fairchild Camera and Instrument Corp.*, Del.Supr., 569 A.2d 53, 66 (1989) (discussing "a board's active and direct role in the sale process"). In particular, this Court has stressed the importance of the board being adequately informed in negotiating a sale of control: "The need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan*, 567 A.2d at 1287. This requirement is consistent with the general principle that "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson*, 473 A.2d at 812. *See also Cede & Co. v. Technicolor, Inc.*, Del.Supr., 634 A.2d 345, 367 (1993); *Smith v. Van Gorkom*, Del.Supr., 488 A.2d 858, 872 (1985). Moreover, the role of outside, independent directors becomes particularly important because of the magnitude of a sale of control transaction and the possibility, in certain cases, that management may not necessarily be impartial. *See Macmillan*, 559 A.2d at 1285 (requiring "the intense scrutiny and participation of the independent directors").

Barkan teaches some of the methods by which a board can fulfill its obligation to seek the best value reasonably available to the stockholders. 567 A.2d at 1286–87. These methods are designed to determine the existence and viability of possible alternatives. They include conducting an auction, canvassing the market, etc. Delaware law recognizes that there is "no single blueprint" that directors must follow. *Id.* at 1286–87; *Citron* 569 A.2d at 68; *Macmillan*, 559 A.2d at 1287.

In determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance. *See Macmillan*, 559 A.2d at 1282 n. 29. Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives.[FN14] In addition, the board may assess a variety of practical considerations relating to each alternative, including:

> FN14. When assessing the value of non-cash consideration, a board should focus on its value as of the date it will be received by the stockholders. Normally, such value will be determined with the assistance of experts using generally accepted methods of valuation. *See In re RJR Nabisco, Inc. Shareholders Litig.*, Del.Ch., C.A. No. 10389, 1989 WL 7036, Allen, C. (Jan. 31, 1989), reprinted at 14 Del.J.Corp.L. 1132, 1161.

[an offer's] fairness and feasibility; the proposed or

> actual financing for the offer, and the consequences of that financing; questions of illegality; ... the risk of non-consum[m]ation; ... the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.
>
> *Macmillan,* 559 A.2d at 1282 n. 29. These considerations are important because the selection of one alternative may permanently foreclose other opportunities. While the assessment of these factors may be complex, *45 the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders.

C. Enhanced Judicial Scrutiny of a Sale or Change of Control Transaction

[3] Board action in the circumstances presented here is subject to enhanced scrutiny. Such scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights (see *supra* note 11). In *Macmillan,* this Court held:

> When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal,* before the normal presumptions of the business judgment rule will apply.[FN15]
>
> FN15. Because the Paramount Board acted unreasonably as to process and result in this sale of control situation, the business judgment rule did not become operative.

559 A.2d at 1288. The *Macmillan* decision articulates a specific two-part test for analyzing board action where competing bidders are not treated equally: [FN16]

> FN16. Before this test is invoked, "the plaintiff must show, and the trial court must find, that the directors of the target company treated one or more of the respective bidders on unequal terms." *Macmillan,* 559 A.2d at 1288.

In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.

Id. See also Roberts v. General Instrument Corp., Del.Ch., C.A. No. 11639, 1990 WL 118356, Allen, C. (Aug. 13, 1990), reprinted at 16 Del.J.Corp.L. 1540, 1554 ("This enhanced test requires a judicial judgment of reasonableness in the circumstances.").

[4][5] The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

[6][7] Although an enhanced scrutiny test involves a review of the reasonableness of the substantive merits of a board's actions,[FN17] a court should not ignore the complexity of the directors' task in a sale of control. There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness. *46 *See Unocal,* 493 A.2d at 955–56; *Macmillan,* 559 A.2d at 1288; *Nixon,* 626 A.2d at 1378.

FN17. It is to be remembered that, in cases

> where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and "will not substitute our views for those of the board if the latter's decision can be 'attributed to any rational business purpose.' " *Unocal,* 493 A.2d at 949 (*quoting Sinclair Oil Corp. v. Levien,* Del.Supr., 280 A.2d 717, 720 (1971)). *See Aronson,* 473 A.2d at 812.

D. *Revlon* and *Time–Warner* Distinguished

The Paramount defendants and Viacom assert that the fiduciary obligations and the enhanced judicial scrutiny discussed above are not implicated in this case in the absence of a "break-up" of the corporation, and that the order granting the preliminary injunction should be reversed. This argument is based on their erroneous interpretation of our decisions in *Revlon* and *Time–Warner.*

In *Revlon,* we reviewed the actions of the board of directors of Revlon, Inc. ("Revlon"), which had rebuffed the overtures of Pantry Pride, Inc. and had instead entered into an agreement with Forstmann Little & Co. ("Forstmann") providing for the acquisition of 100 percent of Revlon's outstanding stock by Forstmann and the subsequent break-up of Revlon. Based on the facts and circumstances present in *Revlon,* we held that "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182. We further held that "when a board ends an intense bidding contest on an insubstantial basis, ... [that] action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct." *Id.* at 184.

It is true that one of the circumstances bearing on these holdings was the fact that "the break-up of the company ... had become a reality which even the directors embraced." *Id.* at 182. It does not follow, however, that a "break-up" must be present and "inevitable" before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders. In fact, we stated in *Revlon* that "when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions." *Id.* at 184 (emphasis added). *Revlon* thus does not hold that an inevitable dissolution or "break-up" is necessary.

[8] The decisions of this Court following *Revlon* reinforced the applicability of enhanced scrutiny and the directors' obligation to seek the best value reasonably available for the stockholders where there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation. In *Macmillan,* this Court held:

> We stated in *Revlon,* and again here, that **in a sale of corporate control** the responsibility of the directors is to get the highest value reasonably attainable for the shareholders.

559 A.2d at 1288 (emphasis added). In *Barkan,* we observed further:

> We believe that the general principles announced in *Revlon,* in *Unocal Corp. v. Mesa Petroleum Co.,* Del.Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.,* Del.Supr., 500 A.2d 1346 (1985) govern this case and every case in which a **fundamental change of corporate control** occurs or is contemplated.

567 A.2d at 1286 (emphasis added).

Although *Macmillan* and *Barkan* are clear in holding that a change of control imposes on directors the obligation to obtain the best value reasonably available to the stockholders, the Paramount defendants have interpreted our decision in *Time–Warner* as requiring a corporate break-up in order for that obligation to apply. The facts in *Time–Warner,* however, were quite different from the facts of this case, and refute Paramount's position here. In *Time–Warner,* the Chancellor held that there was no change of control in the original stock-for-stock merger between Time and Warner because Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger:

> If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought

in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as *47 here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of [Nicholas J. Nicholas, Jr., president of Time], neither corporation could be said to be acquiring the other. **Control of both remained in a large, fluid, changeable and changing market.**

The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. **But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated.** The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

Paramount Communications Inc. v. Time Inc., Del.Ch., No. 10866, 1989 WL 79880, Allen, C. (July 17, 1989), reprinted at 15 Del.J.Corp.L. 700, 739 (emphasis added). Moreover, the transaction actually consummated in *Time–Warner* was not a merger, as originally planned, but a sale of Warner's stock to Time.

In our affirmance of the Court of Chancery's well-reasoned decision, this Court held that "The Chancellor's findings of fact are supported by the record and **his conclusion is correct as a matter of law.**" 571 A.2d at 1150 (emphasis added). Nevertheless, the Paramount defendants here have argued that a break-up is a requirement and have focused on the following language in our *Time–Warner* decision:

However, we premise our rejection of plaintiffs' *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon.*

Under Delaware law there are, generally speaking and **without excluding other possibilities,** two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation **initiates an active bidding process seeking to sell itself** or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.

Id. at 1150 (emphasis added) (citation and footnote omitted).

The Paramount defendants have misread the holding of *Time–Warner.* Contrary to their argument, our decision in *Time–Warner* expressly states that the two general scenarios discussed in the above-quoted paragraph are not the **only** instances where "*Revlon* duties" may be implicated. The Paramount defendants' argument totally ignores the phrase "without excluding other possibilities." Moreover, the instant case is clearly within the first general scenario set forth in *Time–Warner.* The Paramount Board, albeit unintentionally, had "initiate[d] an active bidding process seeking to sell itself" by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquiror (QVC) was equally interested in being a bidder.

The Paramount defendants' position that **both** a change of control **and** a break-up are **required** must be rejected. Such a holding would unduly restrict the application of *Revlon,* is inconsistent with this Court's decisions in *Barkan* and *Macmillan,* and has no basis in policy. There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental *48 (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of **each** of these events that justifies: (a) focusing on the direc-

tors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.

[9] Accordingly, when a corporation undertakes a transaction which will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders. This obligation arises because the effect of the Viacom–Paramount transaction, if consummated, is to shift control of Paramount from the public stockholders to a controlling stockholder, Viacom. Neither *Time–Warner* nor any other decision of this Court holds that a "break-up" of the company is essential to give rise to this obligation where there is a sale of control.

III. BREACH OF FIDUCIARY DUTIES BY PARAMOUNT BOARD

We now turn to duties of the Paramount Board under the facts of this case and our conclusions as to the breaches of those duties which warrant injunctive relief.

A. The Specific Obligations of the Paramount Board

[10] Under the facts of this case, the Paramount directors had the obligation: (a) to be diligent and vigilant in examining critically the Paramount–Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.

Having decided to sell control of the corporation, the Paramount directors were required to evaluate critically whether or not all material aspects of the Paramount–Viacom transaction (separately and in the aggregate) were reasonable and in the best interests of the Paramount stockholders in light of current circumstances, including: the change of control premium, the Stock Option Agreement, the Termination Fee, the coercive nature of both the Viacom and QVC tender offers,[FN18] the No–Shop Provision, and the proposed disparate use of the Rights Agreement as to the Viacom and QVC tender offers, respectively.

> FN18. Both the Viacom and the QVC tender offers were for 51 percent cash and a "back-end" of various securities, the value of each of which depended on the fluctuating value of Viacom and QVC stock at any given time. Thus, both tender offers were two-tiered, front-end loaded, and coercive. Such coercive offers are inherently problematic and should be expected to receive particularly careful analysis by a target board. *See Unocal,* 493 A.2d at 956.

These obligations necessarily implicated various issues, including the questions of whether or not those provisions and other aspects of the Paramount–Viacom transaction (separately and in the aggregate): (a) adversely affected the value provided to the Paramount stockholders; (b) inhibited or encouraged alternative bids; (c) were enforceable contractual obligations in light of the directors' fiduciary duties; and (d) in the end would advance or retard the Paramount directors' obligation to secure for the Paramount stockholders the best value reasonably available under the circumstances.

The Paramount defendants contend that they were precluded by certain contractual provisions, including the No–Shop Provision, from negotiating with QVC or seeking alternatives. Such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable. *See Revlon,* 506 A.2d at 184–85.

Since the Paramount directors had already decided to sell control, they had an obligation ***49** to continue their search for the best value reasonably available to the stockholders. This continuing obligation included the responsibility, at the October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount–Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the

Viacom tender offer or other aspects of the Paramount–Viacom transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

B. The Breaches of Fiduciary Duty by the Paramount Board

[11][12] The Paramount directors made the decision on September 12, 1993, that, in their judgment, a strategic merger with Viacom on the economic terms of the Original Merger Agreement was in the best interests of Paramount and its stockholders. Those terms provided a modest change of control premium to the stockholders. The directors also decided at that time that it was appropriate to agree to certain defensive measures (the Stock Option Agreement, the Termination Fee, and the No–Shop Provision) insisted upon by Viacom as part of that economic transaction. Those defensive measures, coupled with the sale of control and subsequent disparate treatment of competing bidders, implicated the judicial scrutiny of *Unocal, Revlon, Macmillan,* and their progeny. We conclude that the Paramount directors' process was not reasonable, and the result achieved for the stockholders was not reasonable under the circumstances.

When entering into the Original Merger Agreement, and thereafter, the Paramount Board clearly gave insufficient attention to the potential consequences of the defensive measures demanded by Viacom. The Stock Option Agreement had a number of unusual and potentially "draconian" [FN19] provisions, including the Note Feature and the Put Feature. Furthermore, the Termination Fee, whether or not unreasonable by itself, clearly made Paramount less attractive to other bidders, when coupled with the Stock Option Agreement. Finally, the No–Shop Provision inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC which had already expressed an interest in Paramount.[FN20]

FN19. The Vice Chancellor so characterized the Stock Option Agreement. Court of Chancery Opinion, 635 A.2d 1245, 1272. We express no opinion whether a stock option agreement of essentially this magnitude, but with a reasonable "cap" and without the Note and Put Features, would be valid or invalid under other circumstances. *See Hecco Ventures v. Sea–Land Corp.,* Del.Ch., C.A. No. 8486, 1986 WL 5840, Jacobs, V.C. (May 19, 1986) (21.7 percent stock option); *In re Vitalink Communications Corp. Shareholders Litig.,* Del.Ch., C.A. No. 12085, Chandler, V.C. (May 16, 1990) (19.9 percent stock option).

FN20. We express no opinion whether certain aspects of the No–Shop Provision here could be valid in another context. Whether or not it could validly have operated here at an early stage solely to prevent Paramount from actively "shopping" the company, it could not prevent the Paramount directors from carrying out their fiduciary duties in considering unsolicited bids or in negotiating for the best value reasonably available to the stockholders. *Macmillan,* 559 A.2d at 1287. As we said in *Barkan:* "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." 567 A.2d at 1288. *See also Revlon,* 506 A.2d at 184 (holding that "[t]he no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder").

Throughout the applicable time period, and especially from the first QVC merger proposal on September 20 through the Paramount Board meeting on November 15, QVC's interest in Paramount provided the **opportunity** for the Paramount Board to seek significantly higher value for the Paramount stockholders than that being offered by Viacom. QVC persistently demonstrated its intention to meet and exceed the Viacom offers, and ***50** frequently expressed its willingness to negotiate possible further increases.

The Paramount directors had the opportunity in the October 23–24 time frame, when the Original

Merger Agreement was renegotiated, to take appropriate action to modify the improper defensive measures as well as to improve the economic terms of the Paramount–Viacom transaction. Under the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No–Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders. Nevertheless, the Paramount Board made no effort to eliminate or modify these counterproductive devices, and instead continued to cling to its vision of a strategic alliance with Viacom. Moreover, based on advice from the Paramount management, the Paramount directors considered the QVC offer to be "conditional" and asserted that they were precluded by the No–Shop Provision from seeking more information from, or negotiating with, QVC.

By November 12, 1993, the value of the revised QVC offer on its face exceeded that of the Viacom offer by over $1 billion at then current values. This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way. Moreover, their uninformed process had deprived their strategic vision of much of its credibility. *See Van Gorkom,* 488 A.2d at 872; *Cede v. Technicolor,* 634 A.2d at 367; *Hanson Trust PLC v. ML SCM Acquisition Inc.,* 2d Cir., 781 F.2d 264, 274 (1986).

When the Paramount directors met on November 15 to consider QVC's increased tender offer, they remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves. Yet, it was not "too late" to reconsider negotiating with QVC. The circumstances existing on November 15 made it clear that the defensive measures, taken as a whole, were problematic: (a) the No–Shop Provision could not define or limit their fiduciary duties; (b) the Stock Option Agreement had become "draconian"; and (c) the Termination Fee, in context with all the circumstances, was similarly deterring the realization of possibly higher bids. Nevertheless, the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was "illusory." This final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was thereby squandered.[FN21]

FN21. The Paramount defendants argue that the Court of Chancery erred by assuming that the Rights Agreement was "pulled" at the November 15 meeting of the Paramount Board. The problem with this argument is that, under the Amended Merger Agreement and the resolutions of the Paramount Board related thereto, Viacom would be exempted from the Rights Agreement in the absence of further action of the Paramount Board and no further meeting had been scheduled or even contemplated prior to the closing of the Viacom tender offer. This failure to schedule and hold a meeting shortly before the closing date in order to make a final decision, based on all of the information and circumstances then existing, whether to exempt Viacom from the Rights Agreement was inconsistent with the Paramount Board's responsibilities and does not provide a basis to challenge the Court of Chancery's decision.

IV. VIACOM'S CLAIM OF VESTED CONTRACT RIGHTS

Viacom argues that it had certain "vested" contract rights with respect to the No–Shop Provision and the Stock Option Agreement.[FN22] In effect, Viacom's argument is that the Paramount directors could enter into an agreement in violation of their fiduciary duties and then render Paramount, and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties. Viacom's protestations about vested rights are without merit. This Court has found that those defensive measures were improperly designed to deter potential bidders, and that ***51** such measures do not meet the reasonableness test to which they must be subjected. They are consequently invalid and unenforceable under the facts of this case.

FN22. Presumably this argument would have included the Termination Fee had the Vice Chancellor invalidated that provision or if appellees had cross-appealed from the Vice Chancellor's refusal to invalidate that provision.

[13][14] The No–Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. *Cf. Wilmington Trust v. Coulter,* 200 A.2d at 452–54. Despite the arguments of Paramount and Viacom to the contrary, the Paramount directors could not contract away their fiduciary obligations. Since the No–Shop Provision was invalid, Viacom never had any vested contract rights in the provision.

[15] As discussed previously, the Stock Option Agreement contained several "draconian" aspects, including the Note Feature and the Put Feature. While we have held that lock-up options are not *per se* illegal, *see Revlon,* 506 A.2d at 183, no options with similar features have ever been upheld by this Court. Under the circumstances of this case, the Stock Option Agreement clearly is invalid. Accordingly, Viacom never had any vested contract rights in that Agreement.

Viacom, a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features of the Stock Option Agreement. It cannot be now heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. As the Nebraska Supreme Court said in rejecting a similar argument in *ConAgra, Inc. v. Cargill, Inc.,* 222 Neb. 136, 382 N.W.2d 576, 587–88 (1986), "To so hold, it would seem, would be to get the shareholders coming and going." Likewise, we reject Viacom's arguments and hold that its fate must rise or fall, and in this instance fall, with the determination that the actions of the Paramount Board were invalid.

V. CONCLUSION

The realization of the best value reasonably available to the stockholders became the Paramount directors' primary obligation under these facts in light of the change of control. That obligation was not satisfied, and the Paramount Board's process was deficient. The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process to the point where the arsenal of defensive measures established at the outset was perpetuated (not modified or eliminated) when the situation was dramatically altered. QVC's unsolicited bid presented the opportunity for significantly greater value for the stockholders and enhanced negotiating leverage for the directors. Rather than seizing those opportunities, the Paramount directors chose to wall themselves off from material information which was reasonably available and to hide behind the defensive measures as a rationalization for refusing to negotiate with QVC or seeking other alternatives. Their view of the strategic alliance likewise became an empty rationalization as the opportunities for higher value for the stockholders continued to develop.

It is the nature of the judicial process that we decide only the case before us—a case which, on its facts, is clearly controlled by established Delaware law. Here, the proposed change of control and the implications thereof were crystal clear. In other cases they may be less clear. The holding of this case on its facts, coupled with the holdings of the principal cases discussed herein where the issue of sale of control is implicated, should provide a workable precedent against which to measure future cases.

For the reasons set forth herein, the November 24, 1993, Order of the Court of Chancery has been AFFIRMED, and this matter has been REMANDED for proceedings consistent herewith, as set forth in the December 9, 1993, Order of this Court.

ADDENDUM

The record in this case is extensive. The appendix filed in this Court comprises 15 volumes, totalling some 7251 pages. It includes*52 substantial deposition testimony which forms part of the factual record before the Court of Chancery and before this Court. The members of this Court have read and considered the appendix, including the deposition testimony, in reaching its decision, preparing the Order of December 9, 1993, and this opinion. Likewise, the Vice Chancellor's opinion revealed that he was thoroughly familiar with the entire record, including the deposition testimony. As noted, *supra* p. 37 note 2, the Court has commended the parties for their professionalism in conducting expedited discovery, assembling and organizing the record, and preparing and presenting very helpful briefs, a joint appendix, and oral argument.

The Court is constrained, however, to add this

Addendum. Although this Addendum has no bearing on the outcome of the case, it relates to a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts.[FN23]

> FN23. We raise this matter *sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings. *See In re Infotechnology, Inc. Shareholder Litig.*, Del.Supr., 582 A.2d 215 (1990); *In re Nenno*, Del.Supr., 472 A.2d 815, 819 (1983); *In re Green*, Del.Supr., 464 A.2d 881, 885 (1983); *Delaware Optometric Corp. v. Sherwood*, 36 Del.Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer*, 25 Del.Ch. 420, 22 A.2d 397 (1941). Normally our supervision relates to the conduct of members of the Delaware Bar and those admitted *pro hac vice*. Our responsibility for supervision is not confined to lawyers who are members of the Delaware Bar and those admitted *pro hac vice*, however. *See In re Metviner*, Del.Supr., Misc. No. 256, 1989 WL 226135, Christie, C.J. (July 7, 1989 and Aug. 22, 1989) (ORDERS). Our concern, and our duty to insist on appropriate conduct in any Delaware proceeding, including out-of-state depositions taken in Delaware litigation, extends to all lawyers, litigants, witnesses, and others.

[16] The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation.[FN24] One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated.

> FN24. Justice Sandra Day O'Connor recently highlighted the national concern about the deterioration in civility in a speech delivered on December 14, 1993, to an American Bar Association group on "Civil Justice Improvements."
>
> > I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
> >
> > ....
> >
> > ... In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.
>
> The Honorable Sandra Day O'Connor, "Civil Justice System Improvements," ABA at 5 (Dec. 14, 1993) (footnotes omitted).

On November 10, 1993, an expedited deposition of Paramount, through one of its directors, J. Hugh Liedtke,[FN25] was taken in the state of Texas. The deposition was taken by Delaware counsel for QVC. Mr. Liedtke was individually represented at this deposition by Joseph D. Jamail, Esquire, of the Texas Bar. Peter C. Thomas, Esquire, of the New York Bar appeared and defended on behalf of the Paramount defendants. It does not appear that any member of the Delaware bar was present at the deposition representing any of the defendants or the stockholder plaintiffs.

> FN25. The docket entries in the Court of Chancery show a November 2, 1993, "Notice of Deposition of Paramount Board" (Dkt 65). Presumably, this included Mr. Liedtke, a director of Paramount. Under Ch. Ct. R. 32(a)(2), a deposition is admissible against a party if the deposition is of an officer, director, or managing agent. From the docket entries, it appears that depositions of third party witnesses (persons who were not directors or officers) were taken pursuant to the issuance of commissions.

Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he

was not admitted *pro hac vice*.[FN26] ***53** Under the rules of the Court of Chancery and this Court,[FN27] lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules,[FN28] and are required to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles").[FN29] During the Liedtke deposition, Mr. Jamail abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter.

FN26. It does not appear from the docket entries that Mr. Thomas was admitted *pro hac vice* in the Court of Chancery. In fact, no member of his firm appears from the docket entries to have been so admitted until Barry R. Ostrager, Esquire, who presented the oral argument on behalf of the Paramount defendants, was admitted on the day of the argument before the Vice Chancellor, November 16, 1993.

FN27. Ch.Ct.R. 170; Supr.Ct.R. 71. There was no Delaware lawyer and no lawyer admitted *pro hac vice* present at the deposition representing any party, except that Mr. Johnston, a Delaware lawyer, took the deposition on behalf of QVC. The Court is aware that the general practice has not been to view as a requirement that a Delaware lawyer or a lawyer already admitted *pro hac vice* must be present at all depositions. Although it is not as explicit as perhaps it should be, we believe that Ch.Ct.R. 170(d), fairly read, requires such presence:

> (d) Delaware counsel for any party shall appear in the action in which the motion for admission pro hac vice is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the Court, Clerk of the Court, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.

See also *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, Del.Super., 623 A.2d 1099, 1114 (1991). (Super.Ct.Civ.R. 90.1, which corresponds to Ch.Ct.R. 170, "merely excuses attendance of local counsel at depositions, but does not excuse non-Delaware counsel from compliance with the *pro hac vice* requirement.... A deposition conducted pursuant to Court rules is a proceeding."). We believe that these shortcomings in the enforcement of proper lawyer conduct can and should be remedied consistent with the nature of expedited proceedings.

FN28. It appears that at least Rule 3.5(c) of the Delaware Lawyer's Rules of Professional Conduct is implicated here. It provides: "A lawyer shall not ... (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a tribunal."

FN29. The following are a few pertinent excerpts from the Statement of Principles:

> The Delaware State Bar Association, for the Guidance of Delaware lawyers, **and those lawyers from other jurisdictions who may be associated with them,** adopted the following Statement of Principles of Lawyer Conduct on [November 15, 1991].... The purpose of adopting these Principles is to promote and foster the ideals of **professional courtesy, conduct and cooperation....** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession.... [A] lawyer ... **should treat** all persons, including **adverse lawyers** and parties, **fairly and equitably.... Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice....** Respect for the court requires ... emotional self-control; [and] the absence of scorn and superiority in words of demeanor.... A lawyer should use pre-trial

> procedures, including discovery, solely to develop a case for settlement or trial. **No pre-trial procedure should be used to harass an opponent or delay a case.... Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge....** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such investigation as is required to form an informed conviction that the lawyer to be admitted is ethical and competent, and should furnish the candidate for admission with a copy of this Statement.
>
> (Emphasis supplied.)

To illustrate, a few excerpts from the latter stages of the Liedtke deposition follow:

A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter].... I think I did read it, probably.

....

Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don't answer that.

How would he know what was going on in Mr. Oresman's mind?

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

***54** MR. JOHNSTON: No. Joe, Joe—

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

MR. JOHNSTON: Let's just take it easy.

MR. JAMAIL: No, we're not going to take it easy. Get done with this.

MR. JOHNSTON: We will go on to the next question.

MR. JAMAIL: Do it now.

MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.

MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.

MR. JAMAIL: Well, go on and shut up.

MR. JOHNSTON: Are you finished?

MR. JAMAIL: Yeah, you—

MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing.

Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

MR. JOHNSTON: Are you finished?

MR. THOMAS: Come on, Mr. Johnston, move it.

MR. JOHNSTON: I don't need this kind of

abuse.

MR. THOMAS: Then just ask the next question.

Q. (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, ... I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D–1, and my question—

A. No.

Q. —to you, sir, is whether you've seen that?

A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

Q. —I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

MR. JAMAIL: Come on with your next question. Don't even talk with this witness.

MR. JOHNSTON: I'm trying to move forward with it.

MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?

MR. JOHNSTON: I heard you fine.

MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.

(JA 6002–06).[FN30]

FN30. Joint Appendix of the parties on appeal.

Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jamail on the record of the Liedtke deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature. It happens that in this case there was no application to the Court, and the parties and the witness do not ***55** appear to have been prejudiced by this misconduct.[FN31]

FN31. We recognize the practicalities of litigation practice in our trial courts, particularly in expedited proceedings such as this preliminary injunction motion, where simultaneous depositions are often taken in far-flung locations, and counsel have only a few hours to question each witness. Understandably, counsel may be reluctant to take the time to stop a deposition and call the trial judge for relief. Trial courts are extremely busy and overburdened. Avoidance of this kind of misconduct is essential. If such misconduct should occur, the aggrieved party should recess the deposition and engage in a dialogue with the offending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified. *See* Ch.Ct.R. 37. It should also be noted that discovery abuse sometimes is the fault of the questioner, not the lawyer defending the deposition. These admonitions should be read as applying to both sides.

Nevertheless, the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions.[FN32] While the specter of disciplinary proceedings should not be used by the parties as

a litigation tactic,[FN33] conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief under the trial court's rules, including Ch. Ct. R. 37. Under some circumstances, the use of the trial court's inherent summary contempt powers may be appropriate. *See In re Butler,* Del.Supr., 609 A.2d 1080, 1082 (1992).

FN32. *See In re Ramunno,* Del.Supr., 625 A.2d 248, 250 (1993) (Delaware lawyer held to have violated Rule 3.5 of the Rules of Professional Conduct, and therefore subject to public reprimand and warning for use of profanity similar to that involved here and "insulting conduct toward opposing counsel [found] ... unacceptable by any standard").

FN33. *See Infotechnology,* 582 A.2d at 220 ("In Delaware there is the fundamental constitutional principle that [the Supreme] Court, alone, has the sole and exclusive responsibility over all matters affecting governance of the Bar.... The Rules are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.").

Although busy and overburdened, Delaware trial courts are "but a phone call away" and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct.[FN34] It is not appropriate for this Court to prescribe in the abstract any particular remedy or to provide an exclusive list of remedies under such circumstances. We assume that the trial courts of this State would consider protective orders and the sanctions permitted by the discovery rules. Sanctions could include exclusion of obstreperous counsel from attending the deposition (whether or not he or she has been admitted *pro hac vice*), ordering the deposition recessed and reconvened promptly in Delaware, or the appointment of a master to preside at the deposition. Costs and counsel fees should follow.

FN34. *See Hall v. Clifton Precision,* E.D.Pa., 150 F.R.D. 525 (1993) (ruling on "coaching," conferences between deposed witnesses and their lawyers, and obstructive tactics):

> Depositions are the factual battleground where the vast majority of litigation actually takes place.... Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.
>
> 150 F.R.D. at 531.

[17] As noted, this was a deposition of Paramount through one of its directors. Mr. Liedtke was a Paramount witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been represented at the deposition by a Delaware lawyer or a lawyer admitted *pro hac vice.* A Delaware lawyer who moves the admission *pro hac vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except depositions when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing***56** *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer.[FN35] Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a deposition, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding.

FN35. *See, e.g.,* Ch.Ct.R. 170(b), (d), and (h).

Counsel attending the Liedtke deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of that proceeding. The record of the deposition as a whole (JA 5916–6054) demonstrates that, not only Mr. Jamail, but also Mr. Thomas (representing the Paramount defendants), continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers

to questions,[FN36] and constantly pressed the questioner for time throughout the deposition.[FN37] As to Mr. Jamail's tactics quoted above, Mr. Thomas passively let matters proceed as they did, and at times even added his own voice to support the behavior of Mr. Jamail. A Delaware lawyer or a lawyer admitted *pro hac vice* would have been expected to put an end to the misconduct in the Liedtke deposition.

FN36. Rule 30(d)(1) of the revised Federal Rules of Civil Procedure, which became effective on December 1, 1993, requires objections during depositions to be "stated concisely and in a non-argumentative and non-suggestive manner." *See* Hall, 150 F.R.D. at 530. *See also Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, D.Del., C.A. No. 79–182, Steel, J. (Dec. 12, 1980); *Cascella v. GDV, Inc.*, Del.Ch., C.A. No. 5899, 1981 WL 15129, Brown, V.C. (Jan. 15, 1981); *In re Asbestos Litig.*, Del.Super., 492 A.2d 256 (1985); *Deutschman v. Beneficial Corp.*, D.Del., C.A. No. 86–595 MMS, Schwartz, J. (Feb. 20, 1990). The Delaware trial courts and this Court are evaluating the desirability of adopting certain of the new Federal Rules, or modifications thereof, and other possible rule changes.

FN37. While we do not necessarily endorse everything set forth in the *Hall* case, we share Judge Gawthrop's view not only of the impropriety of coaching witnesses on and off the record of the deposition (*see supra* note 34), but also the impropriety of objections and colloquy which "tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony." *See* 150 F.R.D. at 530. To be sure, there are also occasions when the questioner is abusive or otherwise acts improperly and should be sanctioned. *See supra* note 31. Although the questioning in the Liedtke deposition could have proceeded more crisply, this was not a case where it was the questioner who abused the process.

This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case. Nevertheless, consideration will be given to the following issues for the future: (a) whether or not it is appropriate and fair to take into account the behavior of Mr. Jamail in this case in the event application is made by him in the future to appear *pro hac vice* in any Delaware proceeding; [FN38] and (b) what rules or standards should be adopted to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts.

FN38. The Court does not condone the conduct of Mr. Thomas in this deposition. Although the Court does not view his conduct with the gravity and revulsion with which it views Mr. Jamail's conduct, in the future the Court expects that counsel in Mr. Thomas's position will have been admitted *pro hac vice* before participating in a deposition. As an officer of the Delaware Court, counsel admitted *pro hac vice* are now clearly on notice that they are expected to put an end to conduct such as that perpetrated by Mr. Jamail on this record.

As to (a), this Court will welcome a voluntary appearance by Mr. Jamail if a request is received from him by the Clerk of this Court within thirty days of the date of this Opinion and Addendum. The purpose of such voluntary appearance will be to explain the questioned conduct and to show cause why such conduct should not be considered as a bar to any future appearance by Mr. Jamail in a Delaware proceeding. As to (b), this Court and the trial courts of this State will undertake to strengthen the existing mechanisms for dealing with the type of misconduct referred*57 to in this Addendum and the practices relating to admissions *pro hac vice.*

Del.,1994.
Paramount Communications Inc. v. QVC Network Inc.
637 A.2d 34, 62 USLW 2530, Fed. Sec. L. Rep. P 98,063

END OF DOCUMENT

625 A.2d 248
(Cite as: 625 A.2d 248)

H

Supreme Court of Delaware.
In the MATTER OF L. Vincent RAMUNNO, Appellant.

Submitted: April 6, 1993.
Decided: June 1, 1993.

After remand, 609 A.2d 669, appeal was taken from finding of the Board on Professional Responsibility that misconduct occurred and imposing private admonition. The Supreme Court held that referring to opposing counsel in vulgar terms in office conference before judge and engaging in insolent colloquy with judge, resulting in contempt convictions, is unprofessional conduct, warranting public censure.

So ordered.

West Headnotes

[1] Attorney and Client 45 ⚿57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases

On appeal, Supreme Court reviews factual findings of Board on Professional Responsibility to determine whether record contains substantial evidence to support those findings.

[2] Attorney and Client 45 ⚿59.8(3)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(3) k. Commission of Crime. Most Cited Cases
(Formerly 45k58)

Referring to opposing counsel in vulgar terms in office conference before judge and engaging in insolent colloquy with judge, resulting in contempt convictions, is unprofessional conduct, warranting public censure. Rules of Prof.Conduct, Rule 3.5(c), Del.C.Ann.; Board on Professional Responsibility Rule 9(f), Del.C.Ann.; 11 Del.C. § 1271(1).

***248** L. Vincent Ramunno, Ramunno & Ramunno, Wilmington, for appellant.

Charles Slanina, Disciplinary Counsel, Wilmington, for the Board on Professional Responsibility.

Before VEASEY, C.J., HORSEY and MOORE, JJ.

PER CURIAM.

Respondent L. Vincent Ramunno appeals a finding of the Board on Professional Responsibility (herein the "Board") that he violated Delaware Lawyer's Rule of Professional Conduct 3.5(c) ("Rule 3.5(c)") [FN1] for undignified and discourteous behavior, during a court proceeding, directed to the judge and opposing counsel. The Board imposed a private admonition. Pursuant to our review under Board Rule 9(e),[FN2] we consider such a sanction to be inadequate for two reasons. First, the public nature of these proceedings under Rule 9(e) negates the whole concept of a private admonition. Second, the seriousness of Mr. Ramunno's misconduct, and the fact that he was previously reprimanded by this Court for a similar impropriety, require a public reprimand. While we affirm the Board's finding that Mr. Ramunno engaged in unprofessional conduct, we reverse the sanction of a private***249** admonition and impose a public reprimand. This opinion, therefore, will constitute that public censure.

FN1. Rule 3.5(c) provides:

> A lawyer shall not:
> * * * * * *
> (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a

625 A.2d 248
(Cite as: 625 A.2d 248)

tribunal.

FN2. Board Rule 9(e) provides:

> (e) **Review by the Court.** The respondent may file objections to the report within 20 days from the date of service. The Board's dismissal of a complaint, or imposition of probation or reprimand to which no objections have been filed, shall be final, unless otherwise ordered by the Court within 30 days of the last date for filing objections. All other matters shall be determined by the Court. The review will be pursuant to the rules governing civil appeals in the Supreme Court, with the respondent deemed the appellant.

I.

The circumstances which led to the finding that Mr. Ramunno had engaged in misconduct are not seriously in issue.

In an office conference on January 16, 1990, before a Superior Court Judge, Mr. Ramunno referred to opposing counsel in a crude, but graphic, anal term. Although the opposing counsel did not hear the insult, the judge did, and cited Mr. Ramunno for contempt. Then, during a second pretrial hearing which took place the following day, Mr. Ramunno moved to disqualify the trial judge on the ground that the contempt citation predisposed the judge against Mr. Ramunno's client. The following pertinent colloquy occurred:

Mr. Ramunno: ... and I also got a situation where your [sic] found me in contempt.

The Court: I sure did.

Mr. Ramunno: Fine, which I think of course, is obviously, unreasonable and abuse of discretion. And I got-I mean, I'm paying 150 dollars with a letter that is coming over that you may not like. And if you are already mad at me, you may be mad at me even more.

The Court: Mr. Ramunno, I don't get mad, sir.

Mr. Ramunno: You don't?

The Court: No. Sir, I don't.

Mr. Ramunno: You get even? Is that what you're saying.

The Court: Mr. Ramunno, that comment is an insult to the Court. I again find you in contempt.

Mr. Ramunno: Fine, Your Honor.

The Court: And sui spontae [sic] fine you 150 dollars. It's an insult to my authority, sir.

The Court has affirmed those two findings of contempt. *In the Matter of L. Vincent Ramunno,* Del.Supr., No. 60, 1990, Walsh, J. (December 19, 1990) (ORDER). After the Superior Court trial, opposing counsel referred this matter to the Board which subsequently charged Mr. Ramunno with violating two counts of Rule 3.5(c) by engaging in undignified or discourteous conduct which is degrading to the tribunal. After an evidentiary hearing, the Board dismissed the charges on the basis that there had not been a clear and convincing showing that Mr. Ramunno engaged in misconduct warranting the additional sanctions.

This Court remanded the matter to the Board, however, ruling (1) that its finding was inconsistent with Board Rule 9(f) which provides that proof of Mr. Ramunno's conviction for any crime is conclusive evidence of the commission of that crime and (2) that the Board erred in determining an allegedly appropriate sanction before deciding whether any professional misconduct had occurred. *In the Matter of L. Vincent Ramunno,* Del.Supr., No. 419, 1991, Holland, J. at 3 (August 2, 1991) (ORDER). On remand, the Board issued a new report, found that misconduct had occurred and imposed a private admonition.

Following receipt of the Report after Remand and Mr. Ramunno's objection, this Court once again remanded the matter to the Board. This Court explained that its previous order did not direct a finding of misconduct on Mr. Ramunno's part, but instead only required the Board to examine the question of misconduct (1) on the merits; (2) within the scope of the rules; and (3) with due consideration of any defenses. *In the Matter of L. Vincent Ramunno,*

Del.Supr., No. 419, 1991, Holland, J. at 3 (March 17, 1992) (ORDER). After this, the second remand, the Board again found Mr. Ramunno to have engaged in misconduct and again imposed a private admonition. Significantly, however, the Board stated in its report that:

[It] was persuaded by the sincerity of the Respondent's testimony that the utterance which led to the Superior Court's first contempt finding had been made in frustration and without Respondent's intending that it be heard by anyone.... [It was] also persuaded that the conduct which led to the second contempt finding was more an indelicate handling of a delicate application (a motion to disqualify) than it was an intentional affront to the Court.

***250** *In the Matter of L. Vincent Ramunno,* Board on Professional Responsibility, No. 6, 1990, Report After Second Remand (August 28, 1992).

In his appeal, Mr. Ramunno relies on the above language to show that the Board's findings of fact are inconsistent with its findings of guilt. Mr. Ramunno argues that if, as the Board stated, both his utterance and subsequent colloquy with the court were unintentional, then he cannot be found guilty of intentional disruptive or degrading conduct towards a tribunal under Rule 3.5(c). Mr. Ramunno concludes, therefore, that the Board's findings of fact require a consistent finding of not guilty as to both counts of misconduct.

[1][2] On appeal, this Court reviews the Board's factual findings to determine whether the record contains substantial evidence to support those findings. *Matter of Higgins,* Del.Supr., 565 A.2d 901, 906-07 (1989). In this case, it is uncontroverted that Mr. Ramunno referred to opposing counsel in vulgar terms and, in a manner which regardless of whether it was intentional or negligent, was communicated to a third party-the presiding judge. It is also undisputed that Mr. Ramunno engaged in an insolent colloquy with the trial judge on the following day which, implicitly if not explicitly, challenged the court's integrity.

In light of these events, it is irrelevant whether Mr. Ramunno intended to cause a disruptive effect. Instead, the sole question before this Court is whether Mr. Ramunno's rude and uncivil behavior was degrading to the court below. DLRPC 3.5(c). In this context, Rule 9(f) of the Rules of the Board on Professional Responsibility is instructive. In pertinent part, Rule 9(f) provides that "proof of a conviction of the respondent for any crime shall be conclusive evidence of the commission of that crime." In this case, the defendant was convicted of two counts of contemptuous conduct under 11 *Del.C.* § 1271(1). The elements of this offense require proof beyond reasonable doubt that the defendant engaged in:

[D]isorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority.

11 *Del.C.* § 1271(1).

As a result of his conviction under Section 1271, and in the absence of any countervailing defenses, it is clear that Mr. Ramunno's disorderly, contemptuous and insolent behavior interrupted the proceedings of the court and impaired the respect due its authority. The fact that the Board, in the sole context of determining an appropriate sanction, also opined that Mr. Ramunno acted unintentionally, neither alters the fact that his unprofessional conduct ultimately degraded the tribunal nor suggests any inconsistency in the Board's holding. Simply put, insulting conduct toward opposing counsel, and disparaging a court's integrity are unacceptable by any standard.

Finally, we are not persuaded that Mr. Ramunno's misconduct was an isolated event in the heat of battle. This is not the first time he has been required to answer for his intemperate actions during a court proceeding. In 1983 this court privately reprimanded Mr. Ramunno for uncivil conduct that did "not measure up to acceptable professional standards". *See Weber v. State,* No. 197, 1981, slip op. (January 17, 1983) (per curiam), which we attach as part of this opinion. We again find his conduct totally unacceptable. Future misconduct of this type on the respondent's part may lead to more serious consequences than the imposition of a public reprimand.

ATTACHMENT
IN THE SUPREME COURT OF THE STATE OF DELAWARE
PAUL E. WEBER, Defendant Below, Appellant,
v.

625 A.2d 248
(Cite as: 625 A.2d 248)

STATE OF DELAWARE, Plaintiff Below, Appellee.
No. 197, 1981
Submitted: November 12, 1982
Decided: January 17, 1983

Before McNEILLY, QUILLEN and HORSEY, Justices.

***251** Upon Rule to Show Cause; Reprimand Given.
L. Vincent Ramunno (argued), Wilmington.

PER CURIAM (not to be officially reported):

During the processing of this case, on October 12, 1982, counsel for the defendant attempted to file a reply brief in excess of the page limit under Supreme Court Rule 14(d). Briefs exceeding designated limits under the Rules increasingly had become a problem and the Chief Justice had issued two administrative directives on the subject. See Appendix A. The directives in essence say briefs over the designated page limits will not be accepted.

As a result of the attempted filing, a telephone conversation took place between the Chief Deputy Clerk and defense counsel which, at the request of the Court, became a subject of an October 18, 1982 memo from the Chief Deputy Clerk to the Court. See Appendix B. The memo gave rise to an October 26, 1982 order directing issuance of a rule to show cause why sanctions should not be imposed against defense counsel. See Appendix C. A hearing on the rule was held on November 12, 1982. See Appendix D. The hearing on this matter was deliberately segregated from the case on the merits.

Under Supreme Court Rule 102(b), attorneys "are expected to present all matters and papers to the Court with the highest professional competence". Supreme Court Rule 33 provides for sanctions in the following language:

RULE 33.
SANCTIONS

Upon failure of a party to comply with any rule or order, the Court may enter an appropriate sanction against the offending party or his counsel, or both, after notice and opportunity to be heard. Such sanction may include the award of reasonable attorneys' fees and the determination of an appeal against the offending party. Disciplinary action, including imposition of a fine, may be taken against any offending counsel.

We think it clear that Rule 33 covers the attorney agent as well as the party litigant and the Court can impose sanctions directly on the attorney agent.

Upon the conclusion of the hearing on the rule to show cause, we confess we had some astonished disbelief that defense counsel's oral performance had occurred. We had an initial reaction that reference to the Board on Professional Responsibility would be appropriate. But, on reflection, it seemed of little value to burden the Board with the annoying chore of determining who said what to whom. We were also mindful that "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate" [*Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546 (1947)] and determined not to act hastily without a careful review of the items attached hereto as appendices.

Having contemplated the matter, we have concluded that defense counsel's conduct in attempting to file the reply brief with excessive pages, in conversing with the Chief Deputy Clerk (in accordance with defense counsel's own version), and in presenting his position orally before the Court falls below an acceptable professional standard. The practice of law involves more than being learned in the law. It involves respect for procedures and civility in professional functions. Perhaps the best test of a professional is how he treats nonprofessionals. We see no benefit in characterizing the conduct in this case. The record set forth in the appendices speaks for itself. We simply conclude that it does not measure up to acceptable professional standards.

Defense counsel is hereby reprimanded.

APPENDIX A

July 8, 1982

ADMINISTRATIVE DIRECTIVE
To: The Clerk

To: Chief Deputy Clerk

To: All Deputy Clerks

Certain violations and evasions of Rule 14, governing the length of briefs, have ***252** become more

frequent and more gross. Briefs are being filed (1) ignoring the Rule altogether; or (2) misconstruing the Rule; or (3) abusing or misconstruing the terms of an Order granting an enlargement; or (4) filing a motion for enlargement simultaneously with the brief violating the Rule.

This lack of compliance with the Rules of the Court on the part of certain members of the Bar must be rectified in order to promote due discipline and to avoid undue difficulty for the Court and other counsel.

Accordingly, effective July 15, 1982, the following procedures will be strictly followed by all Clerks:

(1) Immediately upon presentation, the receiving Clerk will inspect each brief for compliance with the pagination limitation of Rule 14(d), before accepting the brief for filing. If there is non-compliance, and if a copy of an Order of a Justice authorizing such non-compliance does not accompany the brief, the Clerk will reject the brief forthwith and decline to accept it for filing. This Directive will be displayed as authority for such action.

(2) The attorney presenting the brief will be told to see the most available Motion Justice about the matter, without delay, if desired.

(3) The rejection of a brief hereunder will not be deemed to toll the due date of the brief.

/s/ Daniel L. Herrmann

Chief Justice

DLH:jo

cc: Justice McNeilly

cc: Justice Quillen

cc: Justice Horsey

cc: Justice Moore

October 7, 1982

ADMINISTRATIVE ORDER

To: The Clerk

To: Chief Deputy Clerk

To: All Deputy Clerks

Announced procedures are apparently needed to enforce Rules regarding signing, service, and pagination of notices of appeal, motions, and other documents filed in this Court.

Effective October 15, 1982, the following procedures will be followed by all Clerks:

(1) Promptly upon filing, all notices of appeal shall be examined for timeliness, i.e., filed within 30 days after the order or judgment appealed, as provided in Rule 6. If it is manifest that the 30-day limitation has been exceeded, the matter will be brought to the attention of the Motion Justice forthwith.

(2) Upon presentation for filing, all notices of appeal, motions, and other documents shall be examined (a) for proof of service of copy upon every other party as required by Rule 10(a) and (c) (b) for an original signature by local counsel or *pro se,* as required by Rule 12(a); and (c) for page limitations, under Rule 14(d) in the case of briefs and Rule 30(a) in the case of motions. Violations as to briefs will be governed by Administrative Directive dated July 8, 1982. Violations as to other documents will be brought to the attention of the Motion Justice forthwith.

/s/ Daniel L. Herrmann

Chief Justice

DLH:jo

cc: Justice McNeilly

cc: Justice Quillen

cc: Justice Horsey

cc: Justice Moore

625 A.2d 248
(Cite as: 625 A.2d 248)

APPENDIX B

Memo

October 18, 1982

To: Justice Horsey

From: Steve Taylor

Re: *October 12th telephone conversation*

Re: *with L. Vincent Ramunno*

Pursuant to your request, the following is a synopsis of my telephone encounter ***253** with L. Vincent Ramunno, Esquire on Tuesday, October 12, 1982.

Upon my return from oral arguments on Tuesday, JoAnne showed me a reply brief from Mr. Ramunno that exceeded the 20 page limit under Supreme Court Rule 14(d). She had not rejected it immediately because Mr. Townsend said to let me deal with it upon my return from Dover.

I checked the brief and confirmed that it exceeded 20 pages. Furthermore, I checked the docket to see if Mr. Ramunno had filed a motion under Rule 14(d) which he had not. The brief was never formally stamped in and filed with the Court.

I called Mr. Ramunno and informed him that his brief had been rejected by the Court for violating Rule 14(d) as well as the Chief Justice's Administrative Directive of July 8, 1982. I would describe my demeanor toward Mr. Ramunno as formal and succinct since my previous experiences with him have been quite unpleasant.

Before I had finished relaying my message to Mr. Ramunno, he became agitated and began to use profanity while telling me not to be in such a hurry to get off the telephone. I told him that if that was his attitude that I had been instructed by the Court to hang up on any rude and abusive people. Mr. Ramunno launched into a mocking tirade stating that all he had said was hell and that he did not realize that I was so delicate. My memory is that Mr. Ramunno began using profanity at the start of his response to my message; however, I have no clear recollection as to the exact words that he used.

Nevertheless, I informed him that if he could not be civil that I would hang up on him as instructed. Mr. Ramunno's response was that he knew that he had to genuflect to Judges but that he did not know he had to genuflect to clerks as well. Finally, he said to hang up if I wanted to do so, but he only wanted to ask a question.

I told Mr. Ramunno that it was always the same with him, that he was always right and everyone else was always wrong. For some reason, he seemed to calm down after my statement. I immediately noticed the difference in his tone and said that if he was now going to be civil instead of rude that I would answer his question.

He wanted to know how to rectify his error in order that his brief would be accepted by the Court. I told him that it was too late to file a Motion under Rule 14(d) and that he would have to contact Justice Horsey as to how to proceed. I gave him the telephone number for Justice Horsey's office.

The entire conversation took place at 4:50 and lasted approximately 3 minutes. I have omitted parts of Mr. Ramunno's remarks to me since I did not clearly hear them as he was attempting to talk over my voice.

SDT:ldt

cc: Honorable Daniel L. Herrmann

cc: Honorable John J. McNeilly

cc: Honorable William T. Quillen

cc: Honorable Andrew G. T. Moore, II

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Paul E. Weber,
Defendant Below, Appellant,
v.
State of Delaware, Appellee.
No. 197, 1981

ORDER DIRECTING ISSUANCE OF RULE TO SHOW CAUSE

And Now to Wit this 26th day of October, 1982, it appearing from the attached memorandum of the Chief Deputy Clerk of this Court, Stephen D. Taylor, dated October 18, 1982 (prepared at the request of the Court) that L. Vincent Ramunno, Esquire, in a telephone conversation on October 12, 1982 with the Chief Deputy Clerk relating to a violation of Supreme Court Rule 14(d), acted in a profane, abusive and disrespectful manner unbecoming to a member of the Bar of this Court; that L. Vincent Ramunno,***254** Esquire thereby evidenced gross discourtesy to another officer of the Court who was carrying out his delegated duties; and it further appearing that L. Vincent Ramunno, Esquire may have misbehaved in violation of his oath of admission to the Bar of this Court, Rule 102(d) of this Court, and The Delaware Lawyer's Code of Professional Responsibility: DR 1-102(A)(1) and (5) and 7-106(C)(6);

NOW, THEREFORE, the Clerk of this Court is directed to issue to L. Vincent Ramunno, Esquire a Rule to Show Cause directing him to appear before the Supreme Court at 12:30 p.m. on Monday, November 8, 1982 to show cause why sanctions under Rule 33 should not be imposed against him for his conduct on October 12, 1982.

BY THE COURT:

/s/ Henry R. Horsey

Justice

SUPREME COURT OF DELAWARE
Paul E. Weber,
Defendant Below, Appellant,
vs.
State of Delaware,
Plaintiff Below, Appellee.
No. 197, 1981

TO: L. Vincent Ramunno, Esq.

TO: 10th & French Streets

TO: Wilmington, DE 19801

The Court directs that, you appear before the Supreme Court of Delaware, in the Court Room, on Monday, November 8, 1982 at 12:30 p.m., to show cause why sanctions under Rule 33 should not be imposed against you for your conduct on October 12, 1982.

/s/ T.E. Townsend, Jr.

Clerk

October 26, 1982

Date

APPENDIX D
IN THE SUPREME COURT OF THE STATE OF DELAWARE

- - -

Paul E. Weber,
Defendant Below, Appellant,
v.
State of Delaware,
Plaintiff Below, Appellee.
No. 197, 1981

Court Below: Superior Court of The State of Delaware in and For New Castle County Cr. A. Nos. IN81-03-117; 118

- - -

November 12, 1982 (corrected)
Dover, Delaware
10:00 a.m.

- - -

BEFORE:

JUSTICE JOHN J. McNEILLY

JUSTICE HENRY R. HORSEY

JUSTICE WILLIAM T. QUILLEN

- - -

APPEARANCE:

L. VINCENT RAMUNNO, ESQ.

10th and French Streets

Wilmington, Delaware 19801

Counsel for Defendant Below, Appellant

625 A.2d 248
(Cite as: 625 A.2d 248)

- - -

RETURN OF RULE TO SHOW CAUSE
November 12, 1982 (corrected)

10:00 a.m.

Supreme Court Chambers

PRESENT:

As noted.

- - -

JUSTICE McNEILLY: Mr. Ramunno, would you come forward, please?

***255** JUSTICE HORSEY: Mr. Ramunno, this is the extended time for the return of the Rule to Show Cause, and you're familiar with the rule. I won't read the rule, but in connection with that rule you wrote a letter to me asking that I disqualify myself because I had discussed the matter with our Chief Deputy Clerk, Mr. Taylor, and because I had asked him to write a synopsis of his telephone conversation with you, which is the basis for this rule having been issued.

I decline to recuse myself. I don't think you stated grounds. I was the Motion Justice in October. It was my duty to handle matters, all matters, and matters of this nature. Someone in the court had to do it. I undertook to do it; I don't think I've shown my prejudice by virtue of the fact that I've issued the rule and requested Mr. Taylor to submit memorandum.

JUSTICE McNEILLY: It should also be made clear on the record that the rule is not Justice Horsey's rule; it's the Court's rule.

MR. RAMUNNO: Very well.

JUSTICE McNEILLY: In your letter you referred to the rule as being Justice Horsey's rule, which is not proper.

MR. RAMUNNO: I understand.

JUSTICE McNEILLY: Now, Mr. Ramunno, this is the morning for the return of the rule. What do you have to say?

MR. RAMUNNO: I guess if I could-I have a lot of things to say, I'll try-

JUSTICE McNEILLY: It's your time to speak.

MR. RAMUNNO: Well, you can rest assured, Your Honor, that I will speak-maybe the best way to start is to tell you what happened factually rather than getting into the legal issues, which I will also get into. The-factually what happened is that whatever day that was, October 12th, we filed our brief in this Weber case, which was a murder case, and a very serious one, of course. And I received a call from Mr. Taylor who told me-that conversation was something like, "We have your brief and it violates the rules; it's in excess of the pages required; and by administrative directive of the Chief Justice of the Supreme Court it's rejected, and you can either pick it up or we can throw it away.

"Do you want to pick it up or do you want us to throw it away?"

And I said something like, "Wait a minute, wait a minute, what's going on, wait a minute." And he repeated himself again by going on and saying that it was by directive of the Chief Justice of the Supreme Court and so forth and so on, and repeated himself. I said, "Wait a minute, wait a minute." I said, "wait a minute" two or three times. And he-

JUSTICE McNEILLY: Now, Mr. Ramunno-

MR. RAMUNNO: I thought you-

JUSTICE McNEILLY: -before you go too extensively into this-

MR. RAMUNNO: Yes.

JUSTICE McNEILLY: -we're not sitting here this morning as a fact-finding body.

MR. RAMUNNO: Well, then what are you sitting as if you're not sitting as a fact-finding-

JUSTICE McNEILLY: But what we want to

know is what you have to say in response to this rule.

JUSTICE McNEILLY: All right.

MR. RAMUNNO: I'm telling you what happened. You have before you a memorandum from Mr. Taylor that tells you what happens. And I'm telling you what happened.

JUSTICE McNEILLY: Are you disputing those facts?

MR. RAMUNNO: Of course.

JUSTICE McNEILLY: All right.

MR. RAMUNNO: Thank you.

Now-so he said-he continued to talk in such a manner that he was talking as if not only in like a robot that was simply repeating himself, but he was talking in such a way that it was like if I dare to say anything against the administrative directive of the Chief Justice.

***256** JUSTICE McNEILLY: Now wait a minute.

MR. RAMUNNO: Yes.

JUSTICE McNEILLY: You understand, do you not, that the practice of law in this State, it's a privilege and not a right?

MR. RAMUNNO: No, I don't understand that. I-

JUSTICE McNEILLLY: You don't understand that?

MR. RAMUNNO: No. I didn't think it was a privilege. I thought-

JUSTICE McNEILLY: You think you have a right to practice law?

MR. RAMUNNO: Certainly, as long as I abide by the laws and so forth, I have a right. You going to take that right away from me because I told the law clerk something like "hell"? Is that what you're going to tell me?

JUSTICE McNEILLY: This court grants the privilege and this court can take that privilege away.

MR. RAMUNNO: Well, if you think that I did something to take it away, then you take it away, Chief Justice, because I didn't do a thing to have it taken away. But if you want me to continue, I will. If you don't want to hear it, I won't go any further.

JUSTICE McNEILLY: All right, continue.

MR. RAMUNNO: Fine. He continued to talk as if I dared to even question what he was saying, the Chief Justice's foot was going to come through that roof and swat me as I sat there as an insignificant fly, insignificant bug.

I finally said to him, I said-and he sort of like corroborates-"Wait a minute. What's your hurry to get off the phone? What's going on?" I said, "What the hell is going on?" And I raised my voice, no question about it. I'm not saying that I didn't. Just like I raise my voice sometimes in this court and other courts when I talk to people that are unreasonable and act like bureaucrats. In any event-so I raised my voice and he started getting excited. "This is profane. I don't have to take this profanity." And, as he says, I said to him, I said, "I didn't realize"-you know-"I'm sorry if 'hell' upset you. I didn't realize you were that delicate that 'hell' would upset you." And that's the only word that I used, was "hell."

And as you can see in his memo, he has absolutely no other word that he could point to, because there was no other word used. So at that point, after that all happened, I said, "Look, all I want to do is ask a question." And then he said, "Oh, what's your question?" And then everything calmed down. I asked him the question, he told me the answer. I apologized for losing my temper. He said, "Fine, no problem," and that was the end of it. The next thing I know I get a letter from the Rule to Show Cause. And that's what happened and I'll be glad to talk about the law if you want.

JUSTICE McNEILLY: All right. Let's hear the law.

JUSTICE HORSEY: Well, before you get to the

law-

MR. RAMUNNO: Sure.

JUSTICE HORSEY: -Mr. Taylor says in his memo-and I'm quoting him-"Mr. Ramunno's response was that he knew he had to genuflect to judges but he did not know he had to genuflect to clerks as well." Is that substantially correct?

MR. RAMUNNO: Substantially. I think I may have said something like I know that some judges expect me to genuflect, but I didn't realize that I have to genuflect to clerks, yes, that's substantially correct. That was in the (inaudible)

So, so far as the law is-first of all-this is issued under Rule 33. Rule 33 talks about party-upon failure of a party to comply with any rule or order of this Court. And I suppose that you're saying I violated Rule 102(d) of this Court, which there is no such rule. There is no 102(d) that I could find, and I've looked and looked. There is a 102(b) and I suspect that whoever drafted the order must have meant 102(b), but I don't know if that's true. 102(b) talks about things like the ***257** attorneys shall conduct themselves in a manner consistent with the letter and spirit of the rules, no unreasonable delays and so forth So I don't know-so we get back to the only other rule that I can think of that's been cited is the D.R. Rules, and the D.R. Rules there is 102(a)(1) and 102(a)(1) talks about a lawyer shall not violate a disciplinary rule. I don't know what disciplinary rule I violated. And (a)(5) talks about engage in conduct that is prejudicial to the administration of justice. And I don't know what's prejudicial to the administration of justice what I did, I mean, not the conversation I had with Mr. Taylor. And then Rule-the other one cited is Rule D-7106, which talks about trial conduct. And that's what it's labeled as. And 6 says engage in undignified or discourteous conduct which is degrading to a tribunal. This was not in a courtroom. It was a telephone conversation with a clerk and, you know, I don't know how that could be degrading to a tribunal.

But there are many cases that courts have talked about what an attorney says or can say outside the courtroom and attorneys have the right to say anything they want, just like any other individual. I don't give up my right to speak and freedom of speech and get to tell you what I think or tell the clerk what I think just because I'm an attorney. I mean, in fact, in the case of New York Justice of Appellate Division v. Erdman decided in 1973 by the New York Court of Appeals, the attorney wrote an article in Life which called judges whores. He said the Appellate Judges are whores who become madames, he says, and I would like to be a Judge. And went to say-there were some worse things than that which I don't particularly need to repeat here.

And the Court says-this is nothing that's sensible about this, that is, that he has a right to speak and give his opinion. And, frankly, in that case-in this case-all I was doing was telling Mr. Taylor that he shouldn't treat me like an insignificant fly or an insignificant-that he was some kind of bureaucrat that could just go boom, boom, boom because he had the administrative directive of the Chief Justice of the Supreme Court telling him to do that, he could have said it differently. I mean, he could have said to me "I'm sorry," you know, "but this is not acceptable." He didn't have to act like some kind of a robot doing boom, boom, boom and couldn't wait to get off the phone.

So I reacted and I reacted the way that, you know, I react in other situations. And I didn't do a thing that was wrong or a thing that was a violation of the rules or a thing that was unprofessional. If you're going to do this to me, then any time I talk to a clerk at Superior Court, Superior Court can do it, and Magistrate Court can do it, and every other Court can do it. We're not talking about me acting as-in violation of the law. We're talking about you being concerned about what I said to your law clerk.

I can't-you know, I can talk to-I can call up the Governor and tell him to go to hell, and I certainly think I have a right to call up the law clerk-I didn't call him; he called me-and tell him what I think if I don't agree with what he says.

That's all I have to say.

JUSTICE McNEILLY: All right. We've heard your position, Mr. Ramunno and you'll be hearing from the Court. We have the matter under advisement.

MR. RAMUNNO: Thank you.

625 A.2d 248
(Cite as: 625 A.2d 248)

Del.,1993.
Matter of Ramunno
625 A.2d 248

END OF DOCUMENT

SUBGROUP 5 – CIVILITY TOWARDS OPPOSING COUNSEL

FACT PATTERN

On January 3, 2012, Greenacres Development, LLC ("Greenacres"), filed for chapter 11 relief in the United States Bankruptcy Court for the District of Delaware. Greenacres consists of a single asset – 116 acres of partially developed real property located in New Castle County, Delaware (the "Asset"). With financing obtained from Big Bank, N.A. ("Bank") in 2007, Greenacres was in the process of constructing 60 luxury homes when it sought chapter 11 protection. Bank holds a properly perfected first priority lien on the Asset and all improvements thereto as security for Greenacres' obligations. Bank's lien is evidenced by a timely recorded mortgage on file with the New Castle County Recorder of Deeds.

An official committee of unsecured creditors (the "Committee") was appointed on January 10, 2012 and retained Big Law Firm ("Big") as counsel. Bank has retained Bigger Law Firm ("Bigger") as its counsel.

On January 13, 2012, the Committee filed and served a request for a 2004 Examination (the "2004 Exam") of Bank, seeking information related to Bank's loan to Greenacres and its lien on the Asset. The 2004 Exam contained document requests covering 62 different topics dating back to 2002. The Committee also requested that the documents be produced by January 20, 2012.

Rules Relevant to Delaware Counsel Working with Co-Counsel

(1) Local Court Rules

Key Points:

- Delaware counsel shall be required to file all papers [NOTE: When Delaware counsel efiles a pleading with the Court, such filing constitutes an original signature of such document subject to rule 11 of the F.R.C.P, Bankruptcy Rule 9011 and state court equivalents];
- Delaware counsel shall attend all proceedings before the Courts;
- Admission of co-counsel pro hac vice does not relieve Delaware counsel of his or her duty to comply with rules and orders of the Court; and
- Delaware counsel vouches for the reputation and competence of co-counsel.

Excerpts:

- *Delaware Local Bankruptcy Rule 9010-1(c)*:

Unless otherwise ordered, an attorney not admitted to practice by the District Court and the Supreme Court of the State of Delaware may not be admitted pro hac vice unless associated with an attorney who is a member of the Bar of the District Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel").Consistent with CM/ECF Procedures, Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court.

- *Delaware Local District Court Rule 83.5(d)*:

Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted *pro hac vice* in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). Consistent with CM/ECF Procedures, Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court.

- *Chancery Court Rule 170*:

(b) …The admission of an attorney pro hac vice shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court.

(c) Any attorney seeking admission pro hac vice shall certify the following in a statement attached to the motion: . . . (ii) That the attorney shall be bound by the Delaware Lawyers' Rules of Professional Conduct and has reviewed the Statement of Principles of Lawyer Conduct;

. . .

(h) The Delaware Counsel filing a motion pro hac vice for the admission of an attorney not a member of the Delaware Bar shall certify that the Delaware attorney finds the applicant to be a reputable and competent attorney, and is in a position to recommend the applicant's admission.

(2) Principles of Professionalism for Delaware Lawyers *(jointly adopted by the Delaware State Bar Association and the Delaware Supreme Court, effective November 1, 2003)*

Key Points:

- Delaware counsel should make inquiry to determine the reputation and competence of co-counsel;
- Zealous advocacy does not include conduct that unnecessarily delays matters, or is abusive, rude or disrespectful.

Excerpts:

- *Principles § C*:

Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy these Principles.

- *Principles § A.4*:

A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice.

(3) The Delaware Lawyers' Rules of Professional Conduct

Key Points:

- Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers;
- Zealous advocacy does not include conduct that unnecessarily delays matters, or is abusive, rude or disrespectful;
- Delaware counsel should consult directly with the client if the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law;

- a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law;
- a lawyer may in most cases withdraw from representing a client if a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- A lawyer may be responsible for another lawyer's violation of the Rules of Professional Conduct if he or she ratifies the conduct involved;
- A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority;
- A lawyer violates the Rules of Professional Conduct by engaging in, or assisting another in, dishonesty, fraud, deceit or misrepresentation, or conduct that is prejudicial to the administration of justice.

Excerpts:

- *Preamble: A lawyer's responsibilities*

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

- *Rule 1.4. Communication*

(a) A lawyer shall:

...

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- *Rule 1.16. Declining or terminating representation*

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;

...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
...
(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
...
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

- *Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers*

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved. . .

- *Rule 8.3. Reporting professional misconduct*

(a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

Case Law Relevant to Delaware Counsel Working with Uncivil Co-Counsel

Two lines of cases:

(1) Cases discussing the role, duty, and responsibility of "local" counsel in general

- *State Line Ventures, LLC v. RBS Citizens*, N.A. Civ. A. No. 4705-VCL, 2009 WL 4723372 (Del. Ch. Dec. 2, 2009)
  - Vice Chancellor Laster's letter to counsel dismissing the notion of "local counsel"
  - The letter asked the Court's permission to "substitute local counsel" in light of a scheduling conflict
  - While the Court declined to answer the letter as it would constitute in impermissible advisory opinion, the Vice Chancellor elaborated on the role of Delaware (not local) counsel:
    - "Our rules make clear that the Delaware lawyer who appears in an action always remains responsible to the Court for the case and its presentation." *Id.* at *1 (citing Ct. Ch. R. 170(b)).
    - "If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyers that takes the positions set forth therein. This is regardless of who prepared the initial draft or how the underlying work was allocated." *Id.* at *1.
    - "It is the Delaware lawyer's responsibility to ensure the arguments being made are appropriate." *Id.*
    - " A Delaware lawyer cannot abdicate his or her obligations or cede them to forwarding counsel." *Id.*

- *Christian v. Counseling Res. Assocs., Inc.*, Civ. A. No. 09C-10202 PLA, 2011 WL 3300166 (Del. Super. Ct. July 28, 2011)
  - This case involves the Judge Ableman's decision to grant summary judgment to the Defendants in a medical malpractice case due to Plaintiffs' failure to timely produce an expert report in accordance with the scheduling order
  - Among other excuses, Plaintiffs' counsel attributed the delay to the fact that lead counsel changed during the course of the litigation
  - The Court dismissed Plaintiffs' argument because Plaintiff's Delaware counsel remained constant throughout the litigation. Specifically, the Court held that:
    - "Plaintiffs' argument ignores several crucial facts and relies upon a wholly erroneous understanding of the duties of Delaware counsel." *Id.* at 7.
    - "The participation of out-of-state co-counsel in no way relieved Delaware counsel of his responsibilities to comply with this Court's rules and orders, including its scheduling order." *Id.* (citing Super. Ct. Civ. R. 90.1(a) and *State Line Ventures, LLC v. RBS Citizens*, N.A. Civ. A. No. 4705-VCL, 2009 WL 4723372 (Del. Ch. Dec. 2, 2009)).

        - "When [Delaware counsel] accepted this case, Plaintiffs had found 'Delaware counsel willing to become involved' with their case, whether or not he recognized the obligations that involvement entailed." *Id.* at *7.

- *In re Midwest Props. of Shawano, LLC*, 442 B.R. 278, 291 (Bankr. D. Del. 2010)
    - Recognizes the requirement for out-of-state counsel to associate with Delaware counsel pursuant to Del. Bankr. L.R. 9010-1(c).
    - While the Court dismissed the case for other reasons not directly related to Local Rule 9010, it barred the Debtors "from filing any further pleading or petitions in this Court unless filed by counsel admitted to practice in this jurisdiction in accordance with L.B.R. 9010–1." *Id.* at 291.
    - This case exhibits the important role that this Court places on Delaware counsel in this jurisdiction

(2) Cases discussing "local" counsel's duty when faced with ethical violations of "lead" counsel

- Option 1: Inform the client

    - *Curb Records v. Adams & Reese, L.L.P.*, 203 F.3d 828 (5th Cir. 1999)
        - This case addresses the issue of whether local counsel has a legal duty to bypass lead counsel and report directly to the client on instances of lead counsel's misfeasance
            - Answer: Yes
        - The case involved local counsel who was hired by lead counsel and instructed that his "role was limited to filing and forwarding pleadings, discovery, and orders. Furthermore [lead counsel] specifically instructed [local counsel to deal directly with the client." *Id.* at *1.
            - During litigation, lead counsel failed to respond to a series of Court-ordered discovery requests and, consequently, the Court struck several of Plaintiff's defenses. This resulted in a less than favorable settlement for Plaintiff.
        - Plaintiff sued lead and local counsel for legal malpractice as Plaintiff did not know of the discovery violations
        - The District Court granted summary judgment to local counsel based on agency law that the local counsel had no duty to the Plaintiff; rather, his duty extended only to the lead counsel
            - In a matter of first impression, the Fifth Circuit reversed the District Court and held that "the duties owed by an attorney to his client transcend the bounds of an ordinary contractual relationship." *Id.* at *4.
            - The Court then looked to Louisiana state law on professional duty and held that local counsel had a duty to the Plaintiff.

- *Hsu v. Great Seneca Fin. Corp.*, Civ. A. No. 08A-10-003 MMJ, 2010 WL 2635771 (Del. Super. Ct. June 29, 2010), *aff'd*, *HSU v. Great Seneca Fin. Corp.*, Civ. A. No. 454,2010, 2010 WL 4923262 (Del. Dec. 3, 2010)
  - Delaware law – like Louisiana law in the *Curb Records* case – supports the position that local counsel has a duty to the client, not the lead counsel:
    - "The authority of Delaware counsel stems from the client, not from forwarding counsel."

- Option 2: Inform the Court

  - *Chambers v. Heidelberg, USA, Inc.*, Civ. A. No. 04-583 (RBK), 2007 WL, 1544255 (D.N.J. May 25, 2007)
    - This case involved an out-of-state lead counsel who filed a pleading electronically with the Court with local counsel's electronic signature, but without his knowledge or consent
      - Lead counsel attributed her actions to inability to contact local counsel and the need to file a notice of appeal before the deadline expired
      - Local counsel claimed that he was never contacted by lead counsel from the time of the Court's ruling to the appeal deadline and was away on vacation when the pleading was filed by lead counsel with his electronic signature
    - Local counsel, upon discovery of lead counsel's actions, immediately notified the Court via letter
    - The Court *sua sponte* imposed sanctions on lead counsel consisting of revoking her *pro hac vice* admission and notifying all other districts in which she was admitted
      - Relying on Third Circuit precedent set in *Rep. of the Phil. v. Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1994), the Court held that it had the authority to *sua sponte* impose sanctions
      - The Court held that lead counsel committed a misrepresentation when she filed the pleading without local counsel's consent
      - Moreover, the Court ordered lead counsel's telephone provider to produce telephone records which proved that lead counsel never contacted local counsel between the time of the Court's ruling to the appeal deadline

- Option 3: Improve internal firm regulations

  - *In re Porcheddu*, 338 B.R. 729 (Bankr. S.D. Tex. 2006); *In re Allen*, Case No. 06-60121, 2007 WL 115182 (Bankr. S.D. Tex. Jan. 9, 2007); *In re Parsley*, 385 B.R. 138 (Bankr. S.D. Tex. 2008)
    - These case involve a series of decision by three different bankruptcy judges in the Southern District of Texas (Judge Isgur, Judge Steen, and

Judge Bohm, respectively) concerning various inaccurate pleadings in consumer bankruptcy lift stay motions filed by the same local counsel and lead counsel associated with Countrywide Home Loans

- Following the decisions, the local counsel made several internal changes to its firm regulations and procedures, including:
  - It would no longer accept referrals from lead counsel that prohibited direct communication with the client;
  - It would no longer file a lift stay motion without attaching an affidavit from the servicer or lender attesting to accuracy and current status of the loan that is the subject of the motion
  - It conducted in-house trainings, including training in ethics and attorney due diligence;
  - It required additional CLE for its staff;
  - It made changes to and developed new software;
  - It required greater involvement and review by senior attorneys

Relevant Articles on the Role of Local Counsel in Controlling Uncivil Co-counsel

Francis Pileggi, *Delaware Court of Chancery Dispels Myths and Addresses "Local Counsel" Definition*, DELAWARE CORPORATE AND COMMERCIAL LITIGATION BLOG (Dec. 2, 2009), http://www.delawarelitigation.com/2009/12/articles/chancery-court-updates/delaware-court-of-chancery-dispels-myths-and-addresses-local-counsel-definition/

- This case provides authority for the proposition that Local Counsel is empowered (and required) to ensure Lead Counsel's compliance with Delaware rules, regulations, and customs
- Local Counsel is "fully responsible for every pleading filed, every discovery request or reply, and every argument made to the Court."

Gregory Werkheiser, *Some Local Flavor on the Role of Local Counsel in Large Bankruptcy Cases*, 8 ETHICS & PROFESSIONAL COMPENSATION COMMITTEE – ABI COMMITTEE NEWS, June 2011, available at http://www.abiworld.org/committees/newsletters/ethics/vol8num3/flavor.html.

- Discusses *State Line Ventures LLC*
- Inherent responsibility of Local Counsel to ensure that Lead Counsel is following correct procedures, is aware of local rules and standing orders
- In some instances, Local Counsel is directed by the Court to ensure compliance by Lead Counsel (likely a drastic step)

Amy E. Morgan, *The Compleat Local Counsel: Best Practices for Serving Your Lead Counsel Well*, THE VOICE, Sept. 14, 2011, available at http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=7540&id=897

- To avoid conflict, set the tone from the outset by defining roles and explaining obligations and expectations
- Cast any objections to lead counsel's behavior in the form of assisting them to properly serve the client and meet the expectations of the court, rather than as a battle of wits or wills