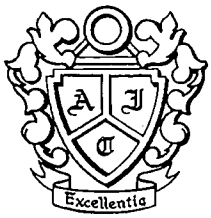

PROFESSIONAL CREED

of the

AMERICAN INNS OF COURT

WHEREAS, the Rule of Law is essential to preserving and protecting the rights and liberties of a free people; and

WHEREAS, throughout history, lawyers and judges have preserved, protected and defended the Rule of Law in order to ensure justice for all; and

WHEREAS, preservation and promulgation of the highest standards of excellence in professionalism, ethics, civility and legal skills are essential to achieving justice under the Rule of Law;

NOW THEREFORE, as a member of an American Inn of Court, I hereby adopt this professional creed with a pledge to honor its principles and practices:

I will treat the practice of law as a learned profession and will uphold the standards of the profession with dignity, civility and courtesy.

I will value my integrity above all. My word is my bond.

I will develop my practice with dignity and will be mindful in my communications with the public that what is constitutionally permissible may not be professionally appropriate.

I will serve as an officer of the court, encouraging respect for the law in all that I do and avoiding abuse or misuse of the law, its procedures, its participants and its processes.

I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems, resolving disputes through negotiation whenever possible.

I will work continuously to attain the highest level of knowledge and skill in the areas of the law in which I practice.

I will contribute time and resources to public service, charitable activities and *pro bono* work.

I will work to make the legal system more accessible, responsive and effective.

I will honor the requirements, the spirit and the intent of the applicable rules or codes of professional conduct for my jurisdiction, and will encourage others to do the same.

Fostering Civility Within the Legal Profession: Expanding the *Inns of Court* Model of Communal Dining

Celeste F. Bremer, J.D., Ed.D.[1]

I. Civility and the Legal Profession

Civility is often confused with ethics and professionalism, yet these three terms are analytically distinct.[2] Civility is defined as "manners, respect, tolerance, concern for the public good[3] and ethics is defined as "moral action, conduct, motive or character."[4] The definition of professionalism has been extended, coming to mean "what a lawyer 'should' do," conveying an ethical responsibility that is not present in the common use of the term.[5] Lawyers may believe that they are acting civilly, when in most cases the lawyer is only acting ethically. The rules of ethics and professional responsibility are only the minimums by which a lawyer must act; civility requires an individual to go a step further.

II. The Impact of Lawyer Incivility and Unethical Conduct on the Legal Profession

As a result of increased incivility and unethical conduct, many legal professionals are pursuing other careers not related to law.[6] For those who remain in the legal profession the increased stress that results from working in our competitive and demanding adversarial system of justice causes attorneys to change their values.[7]

A. Civil Litigation

Lawyers face conflicting ideas about what it means to be a zealous advocate within our adversarial system of justice.[8] A civil litigator is trained to aggressively advocate for a client, while simultaneously abiding by discovery rules that are governed by requirements of disclosure and the release of potentially damaging information.[9] Lawyers can be further confused by informal bar norms that conflict with formal

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1 The author acknowledges the work of former judicial interns John F. Hodges, associate at Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, IA (Drake Law School Class of 2004); and Sarah Hradek, Iowa City (University of Iowa Law School Class of 2006) for their research and feedback on this article.

2 Robert C. Josefsberg, *The Topic is Civility: You Got a Problem With That?*, 59 OR. ST. B. BULL. 19, 19-20 (Jan. 1999) (discussing civility and the misconceptions that lawyers and the public have of its meaning).

3 Christopher J. Piazzola, *Ethical versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 COLO. L. REV. 1197, 1203 (Summer 2003).

4 *Id.* at 1212

5 Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C.L. Rev. 411, 441 (2005) (arguing that the current minimalist standards be redrafted to provide moral, ethical, and practical guidelines for the legal profession).

6 *See generally* Patrick J. Schiltz, *On Being A Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-906 (1999) (discussing reasons legal professionals are choosing to leave the profession).

7 *Id.* at 915-917.

8 *See, e.g.*, Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 818-823 (1998) (discussing conflicts between discovery and some lawyers ideas of what zealous advocacy is).

9 *Id.*

bar rules and may not think their actions to be morally deficient where the conflicting informal norms are followed.[10]

The Seventh Circuit organized a committee on civility, which compiled survey responses of over 1,500 lawyers and judges within its jurisdiction. The committee discovered that of the attorneys who perceive civility to be a problem, ninety-four percent viewed depositions and the discovery process as the catalyst for such incivility.[11] Uncivil behavior in the discovery process includes: misrepresentations by lawyers, failure to respond to document requests, not returning phone calls, scheduling discovery conferences without discussing times with opposing counsel, and canceling discovery at the last moment.[12] These actions have led to "a perception both inside and outside the legal community that civility, candor, and professionalism are on the decline . . . and that . . . scorched-earth tactics are on the rise."[13]

B. Criminal Litigation

Although the predominant effects of incivility have been registered in civil practice, the impact of lawyer incivility on criminal litigation is also noteworthy.[14] Over the past few years, discussions have increased regarding the deterioration of civility between the prosecution and defense bars. In a speech on the decline of professionalism, former Chief Justice Warren E. Burger noted his frustration with what he called prosecutors "trying their cases" to television and newspaper reporters.[15]

Incivility exists on the other side of the bar as well. Prosecutors are frustrated with the frequent unsupported allegations of serious ethical misconduct made against them by defense lawyers and are fearful that such allegations will become a common approach to criminal litigation.[16]

C. Lawyer Rhetoric and Adversarial Excess

Proper use of rhetoric can be an extremely powerful tool, but in recent years abusive rhetoric within the legal profession has increased.[17] The uncivil litigator uses this rhetoric as one of the guns in his arsenal.[18]

"The Supreme Court has made it clear that where an attorney's statements do not create a substantial likelihood of materially prejudicing the adjudicatory process, attorney 'speech critical of the State's power lies at the very center of the First Amendment.'"[19] Lawyers have begun to use the adversarial

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10 Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 360-61 (2004).

11 *Interim Rpt. of the Comm. on Civility of the Seventh Fed. Jud. Cir.*, 143 F.R.D. 371, 378 (1991).

12 *Id.* at 383; *see* Duane Benton, *Chief Justice's Address to Members of the Missouri Bar*, 54 J. MO. B. 302, 302 (1998).

13 *Chevron Chem. Co. v. Deloitte & Touche*, 501 N.W.2d 15, 19-20 (Wis. 1993).

14 *See Interim Rpt.*, 143 F.R.D. at 380 (finding forty-eight percent of lawyers surveyed said incivility is most prevalent among civil practitioners, but only three percent said it is most prevalent among criminal lawyers).

15 Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 952 (1995).

16 Vincent J. Marella, *End the War Between Prosecution and Defense*, 10 CRIM. JUST. 34, 34 (Summer 1995).

17 *See generally* Lydia P. Arnold, *Ad Hominem Attacks: Possible Solutions for a Growing Problem*, 8 GEO. J. LEG. ETHICS 1075, 1076-1090 (1995) (discussing personal attacks beyond the bounds of zealous advocacy).

18 Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH, J.L. REFORM 1017, 1022 (2004) (arguing that the diverse system of regulation between jurisdictions and specialities should be reformulated).

19 *See* Barry Tarlow, *RICO Report*, NATL. ASSN. CRIMINAL DEF. LAW. 52 (June 2003) (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 1075 (1991)) (discussing use of rhetoric by attorneys in regard to court decisions).

system as an excuse to overreach and make personal attacks.[20] This overreaching strains relationships between all members of the legal community.[21]

The rise in use of abusive rhetoric in civil litigation has led to the use of the phrase "Rambo Litigator" to describe an individual who extends the boundaries of adversarial representation and employs abusive tactics to achieve goals.[22]

Recently the Indiana Supreme Court sanctioned an attorney who suggested in a footnote of his brief, that the Court of Appeals "was determined to find for [the appellee], and then sa[y] whatever was necessary to reach that conclusion (regardless of whether the facts of the law supported its decision)."[23] The footnote was condemned by the Indiana Supreme Court as "unacceptable" and amounting to "a scurrilous and intemperate attack on the integrity of the Court of Appeals."[24] Lawyers are free to criticize judges' decisions, "but as licensed professionals, they are not free to make recklessly false claims about a judge's integrity."[25] Use of the footnote was not "permissible advocacy," because it went beyond an argument of misapplied facts or law.[26] The footnote became a personal attack; it ascribed bias and favoritism to the judges, and implied that the judges manufactured a false rationale to justify their pre-conceived desired outcome.[27]

The Louisiana Supreme Court recently upheld sanctions from the Office of Disciplinary Counsel against an attorney who sought recusal of a judge based on what the attorney called a "campaign of misrepresenting the truth" by the judge.[28] In another case, the same attorney also moved that all judges in the Fifteenth Circuit recuse themselves based on their association with the opposing party, an attorney who had previously represented the court. He included in his brief an insulting scenario entitled "Hypothetical Telephone Conversation Between Patrick J. Briney And His Clients (Judges of the 15th Judicial District Court)."[29] After a retired judge was brought in to hear the recusal motion against all of the district court judges, the attorney appealed and stated that the judge's decision "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based."[30] The supreme court found evidence of professional misconduct and suspended the attorney from

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20 *Id.*

21 *See Interim Rpt.,* 143 F.R.D. at 378-380 (noting ninety-four percent of judges surveyed reported lawyer-to-lawyer relations to be a problem, and fifty-six percent of judges surveyed mark relations among judges and attorneys as a problem).

22 *See The Tenth Annual Jud. Conf. of the U.S. Ct. of Appeals for the Fed. Cir.,* 146 F.R.D. 205, 216-232 (1992) (discussing the causes and solution to this syndrome); *See generally Final Rpt. of the Comm. on Civility of the Seventh Fed. Jud. Cir.,* 143 F.R.D. 441 (1992) (discussing findings of incivility survey); *Interim Rpt.*, 143 F.R.D. 371 (discussing findings of incivility survey); *See e.g.* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996) (using "rambo" as a keyword, a law review and journal database search on Westlaw yielded over 400 returns).

23 *In the Matter of Michael A. Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003).

24 *Michigan Mut. Ins. Co. v. Sports, Inc.*, 706 N.E.2d 555, 555 (Ind. 1999) (case for which Michael A. Wilkins authored the brief containing the above mentioned footnote, which later lead to the ethical violations at issue in *Wilkins,* 782 N.E.2d 985).

25 *Wilkins,* 782 N.E.2d at 986.

26 *See id.* (stating that if footnote had only made claim that the Court of Appeals decision was factually or legally inaccurate, the footnote would have been permissible advocacy).

27 *Id.*

28 *In re Simon*, 2005 La. LEXIS 2108, 1-2 (2005).

29 *Id.* at 4.

30 *Id.* at 9.

practice for six months, deferring all but thirty days of the suspension on the condition that he complete the Louisiana State Bar Association's Ethics School program.[31]

III. Addressing the Problem of Incivility in the Law

A. Civility Codes of Conduct

In the fall of 1989, after Chief Judge William J. Bauer of the Seventh Circuit Court of Appeals expressed concern over the rise in uncivil behavior, The Committee on Civility of the Seventh Circuit was formed.[32] The Committee's interim report, published in 1991, revealed "[w]idespread dissatisfaction among judges and lawyers at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations."[33] The Committee concluded its report by making some recommendations that included proposed standards of professional conduct for lawyers practicing law within the Seventh Circuit.[34] Behavioral norms within the court system have been notoriously tricky to conceptualize.[35] These findings and recommendations marked the first time that judges and lawyers came to a common understanding of how they should treat each other.[36] The ABA Model Rules of Professional Responsibility, The Iowa Rules of Court: Standards for Professional Conduct, the current Iowa Rules of Professional Responsibility, and the proposed Iowa Rules of Professional Responsibility all in some way touch on the requirements of civility within the legal profession. The following are ethics provisions pertaining to civility and courtesy, with emphasis added to relevant segments.

1. American Bar Association Model Rules of Professional Responsibility

EC 7-10

The duty of a lawyer to represent a client with zeal does not militate against a *concurrent obligation* to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

DR 7-106: Trial Conduct

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(5) Fail to comply with known local customs of *courtesy* or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in *undignified or discourteous conduct* which is degrading to a tribunal.

2. Iowa Rules of Court: Standards for Professional Conduct

Chapter 33: Standards For Professional Conduct

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31 *Id.* at 27.

32 *See Interim Rpt.*, 143 F.R.D. at 374.

33 *Id.* at 375.

34 *Id.* at 377; *see also Final Rpt.*, 143 F.R.D. at 447 (making recommendations on how to remedy incivility).

35 Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct*, 58 SMU L. Rev. 3, 24 (noting that incongruence between different state and federal rules of conduct can lead to challenges for attorneys) (2005).

36 Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 Stetson L. Rev. 253, 256 (1998).

Rule 33.1. Preamble

(1) A lawyer's *conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms*. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a

truth-seeking process designed to resolve human and societal problems in a *rational, peaceful and efficient manner*.

(3) Conduct that *may be characterized as uncivil, abrasive, abusive, hostile or obstructive* impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. *Such conduct tends to delay and often to deny justice*.

(4) The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants, and to the system of justice, and thereby achieve the *twin goals of civility and professionalism*, both of which are hallmarks of a learned profession dedicated to public service.

(5) We expect *judges and lawyers will make a mutual and firm commitment to these standards*. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout the state.

(6) Lawyers are alerted to the fact that, while the standards refer generally to matters which are in court, the same standards also *apply to professional conduct in all phases of the practice of law*.

Rule 33.2. Lawyers' Duties to Other Counsel

(1) We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. *We will treat all other counsel, parties and witnesses in a civil and courteous manner*, not only in court, but also in all other written and oral communications.

Rule 33.3. Lawyers' Duties to the Court

(1) We will speak and write *civilly and respectfully* in all communication with the court.

Rule 33.4. Courts' Duties to Lawyers

(1) We will be *courteous, respectful and civil to lawyers, parties, and witnesses*. We will maintain control of the proceedings, recognizing that judges have both the obligation and authority to *ensure that all litigation proceedings are conducted in a civil manner*.

Rule 33.5. Judges' Duties to Each Other

(1) We *will be courteous, respectful and civil in opinions*, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
(2) In all written and oral communications, we will *abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments* about another judge.

(3) We will endeavor to work with other judges in an effort to foster a *spirit of cooperation* in our mutual goal of enhancing the administration of justice.

3. Iowa Rules of Professional Conduct (adopted April 20, 2005)

Rule 32.3.4. Fairness to Opposing Party and Counsel

(e) A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

Drafting Committee Notes Regarding Rule 3.4

"Paragraph (e) substantially incorporates Iowa Disciplinary Rule 7-106(C)(1), (2), (3), and (4). Iowa Disciplinary Rule 7-106(C)(2) proscribes asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. *Iowa Disciplinary Rule 7-106(C)(5), providing that a lawyer shall not '[f]ail to comply with known local customs of courtesy or practice,' was too vague to be a rule of conduct enforceable as law.*" Proposed Iowa Rules of Prof. Conduct Drafting Comm., *Final Rpt. to S. Ct. of Iowa,* at 142 (May 2002).

B. The American Inns of Court

Members of the bench and bar have also addressed incivility by adopting an American version of the traditional English lawyer apprenticeship system.[37] The American Inns of Court developed in the late 1970s while the United States and England were participating in the Anglo-American exchange of lawyers and judges.[38] In 1980, a pilot Inn program was founded in Salt Lake City, Utah.[39] It was hoped that by bringing legal professionals together, civility and professionalism among local bar members would be reinforced, or created if it did not already exist. Now, the American Inns of Court Foundation consists of more than 324 Inns made up of approximately 71,000 members in 47 states and the District of Columbia.[40] To foster collegiality and enhance the learning experience, membership within an Inn comprises four categories: (1) Masters, who include judges, experienced lawyers, and law professors; (2) Barristers, who are lawyers with some experience, but who do not meet the requirements to be a Master; (3) Associates, comprising of lawyers who do not meet the minimum requirement for Barristers; and (4) Pupils, who are third-year law students.[41]

The membership is then further divided into groups consisting of members from all four classifications, these groups are called "pupilage teams."[42] The organization of the pupilage teams allows experienced members of the bench and bar to mentor younger attorneys and third-year law students, instilling in them high standards of professionalism, civility, ethics, and legal skills.[43]

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37 American Inns of Court, *http://www.innsofcourt.org*, select General Information (accessed August 29, 2005).

38 *Id.*, select General Information, History.

39 *Id.*

40 American Inns of Court, *Focus on the Future: 2001-2002 Annual Report*, 10-13 (West 2002).

41 *See generally supra* note 36 (describing the general formulation and goals of the Inns).

42 *Id.*

43 Hugh Maddox, *An Old Tradition with a New Mission The American Inns of Court*, 54 ALA. LAW. 381, 382 (1993).

Each pupilage team is required to perform a demonstration for the rest of the Inn at a meeting during the year.[44] The demonstrations range from mock trials to presentations concerning tactics and ethics.[45] Preparation meetings for the pupilage teams, demonstrations, and the full meetings of the Inn members, takes place at breakfast, lunch, or after work.[46] These meals and meetings encourage relationships to develop among the pupilage team members and foster already-existing relationships.[47]

C. Eating and Meeting With Others in the Legal Community

Most Inns serve dinner at their regular meetings. A few Inns serve only snacks or hors d'oeuvres, but have a special meal at the beginning or end of the year. Sitting down to break bread together on a regular basis, a tradition derived from the English Inns, contributes greatly to collegiality and mentoring opportunities.[48] The fostering of collegiality through eating is not a foreign concept in the United States. Universities and colleges have been doing it for years. Recently there has been a revival of the communal dining and living environments on college campuses.[49] The sense of community created by these residence halls leads to greater collegiality and civility within the community. This same concept can be carried over into the professional legal world.

In fact, one law firm in Maryland has incorporated potlucks in its efforts to increase employee morale. As part of a month-long celebration, the eight-person firm of Cumberland and Erly decided to sponsor a potluck.[50] Each took a turn providing lunch for all, and the firm provided the soft drinks and extras. They found that morale shot up, and has stayed high.[51]

The Polk County Women Attorneys and Iowa Organization of Women Attorneys have formalized the potluck tradition started by attorney Bess Osenbaugh at the Iowa Attorney General's Office, and carried forth to the U. S. Justice Department, through sponsorship of the Puckerbrush Potluck at the Iowa State Fair. Bess found that having a "moveable feast," where members of each department had to visit other departments to complete their lunch, was a way to increase communication between divisions of various offices.[52] Other business literature shows that potlucks are a way to improve motivation, reduce turnover, and increase profitability.[53]

The tradition of communal dining via potluck has been recorded throughout history, with one derivation of the name coming from Old English in the late 1500's, and meaning whatever food happens to be available, particularly for a guest.[54] In the United States, it may also be related to the Native American

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44 *See supra* note *36 http://www.innsofcourt.org* (discussing agenda of meetings).

45 *Id.*

46 Joryn Jenkins, *An Open Palm Holds More Sand than a Closed Fist*, 28 STETSON L. REV. 327, 330 (1998).

47 *Id.*

48 *See supra* note 36 (discussing meeting formats).

49 *See e.g.* Robert Godshall, *Creating Communities*, 72 AMERICAN SCHOOL & UNIVERSITY 150 (2000) (stating that the modern residence hall should foster collegiality, and the way to accomplish that is through common areas and communal dining facilities).

50 Laurence Cumberland, *February is the Cruelest Month*, 86 ABA J. 112, 112 (2000).

51 *Id.*

52 Shirley Ragsdale, *Puckerbrush Potluck Continues, In Memory of Bess*, D.M. REGISTER 13A (July 25, 2001).

53 B. Nelson, *Return on People: Happiness Committee Brightens Workday, http://www.bizjournals.com/bizwomen/consultants/return_on_people/2003/07/14/column239.html* (accessed August 30, 2005); Baillee Serbin, *Sixty-Seven Ways to Retain Excellent Employees and Gain Commitment In This Wild and Crazy Nonprofit Job Market, available at http://www.serbin.net/article_66ways.shtml* (last accessed August 30, 2005).

54 Elizabeth Weber, *In Search of Potluck Perfections*, 90 CHRISTIAN SCIENCE MONITOR 12, 12 (1998).

tradition of the "potlach" [Nootka Chinook jargon: *p'achitl*: giving], a ceremonial feast, marked by the host distributing gifts, which are reciprocated by the guests.[55]

The potluck is part of the social fabric of the United States – from the first Thanksgiving, to present-day celebrations, whether formal, and institutionalized at work[56], church suppers[57], or informal neighborhood or family gatherings.[58] Anthropologist Mary Douglas notes that "the meaning of a meal is found in a system of repeated analogies," and that "food choices support political alignments and social opportunities."[59] Studies of food events, in settings such as potlucks, also demonstrate the role they provide in the social support of participants, which is important to stress reduction and good health.[60] Perception of the availability of social support has been found to be a stress buffer, regardless of stress levels experienced by the subject, or whether support was actually provided.[61] Thus, working in an office that sponsors potlucks provides needed social support for lawyers and their staff.

Research has shown that social interaction is a key ingredient in creating a positive learning environment.[62] Social interaction "assists in one's ability to focus towards production (enables accomplishment), innovation (encourages new ideas, explores relationships, and creates change), and maintenance (restores one's self concept or interpersonal relationships).[63] Potlucks are one of the most traditional methods to foster this interaction, and food is always a catalyst for bringing people together.[64]

Communal dining, or a potluck, among lawyers not only contributes to collegiality, mentoring and education, but it promotes civility by reducing stress and building a sense of community. And, to quote Martha Stewart, "that's a good thing."

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55 M. Hook, *Entertaining With Potlucks: How to Survive and Enjoy Them* (Mardelho Press 1990).

56 Supra note 52.

57 Tracey Poe, *Soul Food Potluck*, 13 WORLD & I 142, 142 (June 1998); Daniel Sack, *On Deciphering a Potluck: The Social Meaning of Church Socials, http://www.materialreligion.org/journal/potluck.html* (accessed August 29, 2005).

58 Weber, 90 CHRISTIAN SCIENCE MONITOR at 12.

59 Daniel Sack, *Material History of American Religion Project On Deciphering a Potluck: The Social Meaning of Church Socials, http://www.materialreligion.org/journal/potluck.html*, 1 (accessed August 30, 2005).

60 C.L. Cooper, P.J. Dewe & M.P. O'Driscoll, *Organizational Stress: A Review and Critique of Theory, Research, and Applications* (Sage 2001).

61 M. Lindorff, *Is it Better to Perceive than Receive? Social Support, Stress and Strain for Managers*, 5 PSYCHOLOGY, HEALTH AND MEDICINE, 271, 271-287 (2000); S. Cohen & T.A. Willis, *Stress, Social Support and the Buffering Hypothesis*, 98 PSYCHOLOGICAL BULLETIN 310, 310-357 (1985).

62 Cheryl Burkhart-Kriesel and Brenda Caine, *From Potluck Suppers to On-line Seminars: The Evolving "Face" of Social Interaction*, 42 JOURNAL OF EXTENSION 4, _ 6 (2004), http://www.joe.org/joe/2004august/comm2.shtml.

63 *Id.*

64 *Id.* at _2.

LITIGATION

How to Take the Pretrial High Road When Opponents Choose the Low One

BY BERNARD W. SMALLEY
Special to the Legal

Increasingly, civil litigation, removed from the eyes and ears of the court, has become hand-to-hand combat at unprecedented levels.

Discovery disputes with or without an ethical component, which less than a decade ago were settled with a phone call and a confirming letter and, sometimes, a handshake, are now seemingly resolved with a flash of e-mails followed by a motion to compel, fully responded to with exhibits (the death of trees be dammed). Nowhere is this more evident than in the pretrial discovery process.

How did we, in the Philadelphia region, get to this point? Does it matter? Of course it does! More importantly, how can we better our collective lot?

KEEPING YOURSELF AND YOUR CLIENT ABOVE THE FRAY

In a perfect world, your opposing counsel would be committed to preserving the integrity of the adjudicative process and offer you his or her full cooperation in ensuring that this occurred. In reality, who among us has not been met with the following litany?

"Plaintiff [or defendant] objects to the requests to the extent they (1) seek information or documents protected from discovery by work product doctrine, the attorney/client privilege, or any other privilege or protection; (2) assume, imply or require legal conclusions; (3) are premature at this stage of the action; (4) are vague, ambiguous, overly broad, unduly burdensome, oppressive or harassing, or they require an unreasonable investigation."

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Without regard to whether blanket general objections are even appropriate, said objections are promptly followed by specific objections that state in pertinent part:

"Plaintiff [or defendant] objects to the extent that the party provides information or agrees to produce documents in response to the request, the party does so subject to, and without waiving, its general and specific objections and all objections enumerated below within each response. Each of the foregoing objections and limitations is incorporated into the responses, regardless of whether the objection or limitation is repeated."

Although such recitations are meant to inflame rather than educate, if you wish to proceed ethically, you must be guided by the overarching principle that an attorney who represents his or her client has an ethical duty to preserve the integrity of the adjudicative process.

Sometimes, and this is increasingly true, counsel who wishes to proceed ethically must "walk the entire plank" before sanctions are imposed by the court. As part of this necessary evil, you must make sure that every verbal communication and certainly every written communication with opposing counsel to resolve discovery disputes is a statement or correspondence that could be addressed before the court. Anything less subjects you to the same below-standard conduct that you have previously attributed to your opponent. No matter what, you must remain above the fray.

As difficult as it seems, it is turning the other cheek that will win the day.

This same comment applies to depositions. From a plaintiffs or defense counsel's perspective, the ideal conclusion of your opponent's witnesses' depositions would be the following:

- The exposure of facts that support the allegations in your complaint (or for the defendant, the answer to the complaint).
- Statements that can be re-crafted as requests for admissions, which would thereafter be deemed admitted.
- Testimony that gathers basic information for impeachment at the time of trial.
- Deposition testimony that exposes vast gaps in theories of liability of plaintiff or defenses of the defendant.

However, this conclusion rarely, if ever, occurs. Any lawyer who sticks around long enough will encounter an opposing counsel who: is a bully; is miserable all of the time; wishes to abuse you and your client, not necessarily in that order; displays dual personalities; hates what he does and shows it; is unprepared; or merely shows up.

Any opposing counsel exhibiting one of the above, or any combination of them, can negatively impact your effort to effectively represent your client and cause you to lash out in retaliation. The temptation must be resisted.

In preparing your client for a deposition, either during the initial preparation or during the substantive second preparation session — because no deposition preparation of your client or deponent for your client can ever be effectively done in one session — you must let your client know which of the above listed

Litigation continues on **8**

Litigation

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characters will show up at the deposition.

Finally, you must advise your client that above all he or she must stay out of the fray. Your continuing job is to make a record and to be sure that all stated objections are on the record.

We can all remember the client who either verbally or physically wants to come to our defense during the course of a deposition — a heartwarming feeling, but it doesn't advance the ball. As difficult as it seems, it is turning the other cheek that will win the day. Your opponent will tire, if not at this deposition, then at the next, or the next, or the next, or the next interaction.

TAKING THE ETHICAL HIGH ROAD IN THE ADJUDICATIVE PROCESS

Being consistently forward-facing in your dealings with opposing counsel is the prescription for getting what you want from your opponent or, if not, getting what you want from the court after you have created the record and thereafter moved forward with the demand for sanction.

If every verbal communication (recorded or not) and every written communication is consistent with your plan of taking the ethical high road, eventually you will be successful.

It is said that the world is round: At some point in every major piece of litigation, the opponent who has been a melting pot of negativity will need an extension, will need to reschedule a deposition. Without hesitation I will grant such a request, unless there is a truly catastrophic condition that would be detrimental to my client.

There are reasons now more than ever to be respectful and ethical as you navigate the landmines of the pretrial discovery process.

First and foremost, the Rules of Professional Responsibility demand it.

Both counsel for plaintiff and defendant have the same duty to their clients; it is to advance the client's interest and not your own. In traditional fee arrangements where you are paid by the hour, you must work efficiently. And where you are paid pursuant to a contingent fee agreement, efficiency is again the watchword since without a successful conclusion, there is no fee. Consequently, when faced with a difficult adversary, your first reaction is to fight back, fight fire with fire. The better route is to take a deep breath and let pride take a back seat. At the end of the day, your client, you and your firm will be better off for it.

This ties into a second increasingly important reason to consistently look at pretrial as a process and not combat: In these economic times, where reduction in attorney and non-attorney staffing and sometimes outright law firm closures occur with alarming frequency, ethical conduct and efficiency go hand-in-hand. Neither the lawyer nor the client wants to look at a string of increasingly hostile and obstructive e-mails and correspondence that accomplished nothing besides wasting time, talent and paper.

Get the upper hand. Ask around. Does your opponent or the law firm have the reputation for being difficult in the world of e-mail? Try something: Pick up the phone and discuss the discovery plan with your opponent. Lay out common areas of agreement and thereafter confirm those areas in writing.

Of course, at the end of the day "it is about the business." In most circumstances, having initiated actions as well as defended them, I advise my opponent of the fact that I have the ability to see both sides. In those initial discussions, taking the high ground works. For more often than not, it stays that way until the end.

And in the end, with reduced stress levels on both sides, there often has been for me — and can be for you — future referral matters from that same purported hostile opponent, or potential opportunities to serve as an expert or co-counsel in future matters where appropriate.

ADDENDUM: ETHICS RESOURCES FOR PHILADELPHIA LAWYERS

When you find yourself facing ethical issues during the pretrial discovery process, you should know that, aside from your own innate sense of what is right and wrong, you have a number of helpful tools at your disposal.

For more than 25 years, the American Bar Association has maintained the Center for Professional Responsibility. Its sole purpose is to help lawyers who are faced with thorny ethical issues. Ethics Search is a part of the ABA's Web site available to members that, while not giving opinions, is in a position to provide research assistance on a variety of issues, including ethical issues that arise in the pretrial process.

Closer to home, the Pennsylvania Bar Association offers attorneys several avenues to obtain ethics advice. Confidential inquiries can be made and advice received as advisory only through the PBA's legal ethics and professional responsibility committee. (Be aware that the advisory opinions given are just that, and are not in any way binding on the Pennsylvania Supreme Court Disciplinary Board.)

The PBA also has in operation a Legal Ethics Hotline at 1-800-932-0311 ext. 2214 and requests for ethics direction can be addressed to Victoria White, the PBA's ethics counsel, at Victoria.White@pabar.org. On the print resource front, also available through the Pennsylvania Bar Institute is a "Pennsylvania Ethics Handbook" compiled by White and edited by Tom Wilkerson, past-chairman of the PBA legal ethics and responsibility committee.

Closer still, the Philadelphia Bar Association's committee on professional guidance, a committee that has existed for more than two decades, also takes specific ethics questions and gives guidance in the form of written opinions that are posted on the Philadelphia Bar Association's Web site, www.philabar.org. The committee consists of some 25 members of the association and lists all opinions on its Web site that have been published going back to 1987. Deputy Executive Director Paul Kazaras also gives guidance through the association's ethics hotline at 215-238-6328.

Last but not least, you can always seek direction from seasoned trial lawyers whom you trust and respect. There are reasons why old guys like me are still around. •

JCB

continued from 1

would represent the best use of its limited resources. In the case of a referral, the board may continue to monitor the status of the external investigation to the extent practicable, and shall hold in abeyance its prosecutorial authority awaiting the outcome of the disposition by the law enforcement agency."

Likewise, the board will have to be given three days' notice of any public actions to be taken by the board.

According to the IOPs, it will also have to approve any member's or staff member's cooperation with an outside agency — whether it be testimony or the passing on of documents. And the board will have to vote on what action it will take when one of its members or staff is issued a subpoena.

The IOPs further require the board's chief counsel present board members with anonymous complaints. It previously fell to the investigation.

In September, *The Legal* reported an anonymous complaint was filed against former Luzerne County Judge Michael T. Conahan in September 2006, detailing allegations of case-fixing, mob ties and the improper placement of juveniles in a privately owned juvenile detention facility.

A copy of that complaint was also sent directly to the U.S. Attorney's Office for the Middle District of Pennsylvania in September 2006 and reviewed by federal authorities, sources previously told *The Legal*.

Klett, though, told the commission Massa never told the board about the complaint's existence until "August of '08," nearly two years after it was filed with the JCB. However, Cellucci told *The Legal* in December that Massa informed the board of a complaint filed against Conahan in the fall of the 2006 and that the board voted to table an investigation.

The Legal has also previously reported that as many as four complaints were lodged against Conahan. One of those referenced Massa, in testimony before the Interbranch Commission, was revealed to be a "gatekeeper" for all judicial conduct complaints.

Massa and his staff, according to his own testimony, review each complaint filed with the Judicial Conduct Board and forward a synopsis of those complaints and accompanying recommendations to the board members.

That will not change under the new IOPs.

The changes, Klett said in December, were prompted by the Luzerne County corruption scandal.

On Thursday, however, there was some sentiment among court watchers that the board's IOPs did little to ensure that the outcome would be different if something similar happened in the future.

Lynn Marks and Shira Goodman, the executive director and associate director, respectively, at Pennsylvanians for Modern Courts, wrote a letter to the board calling for it to amend the section dealing with referring cases.

Instead of passing on to law enforcement authorities any complaint alleging criminal

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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

Nos. 427, 1993 and 428, 1993 (Consolidated) C.A. No. 13117 (Consolidated)

SUPREME COURT OF DELAWARE

637 A.2d 34; 1994 Del. LEXIS 57; Fed. Sec. L. Rep. (CCH) P98,063

December 9, 1993, Submitted
February 4, 1994, Decided

OPINION:

[*36] 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 **[**3]** 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.

* * *

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, 637 A.2d 34, 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 **[**59]** issue of professionalism involving deposition practice in proceedings in Delaware trial courts.

n23

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n23 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*, Del. Supr., 36 Del. Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer*, Del. Supr., 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, 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.

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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. n24 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.

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n24 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).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**61]**

On November 10, 1993, an expedited deposition of Paramount, through one of its directors, J. Hugh Liedtke, n25 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.

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n25 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.

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Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he was not admitted *pro hac vice.* n26 **[*53]** Under the rules of the Court of Chancery and this Court, n27 lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules, n28 and are required to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles"). n29 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.

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n26 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. **[**63]**

n27 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. **[**64]**

n28 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."

n29 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.)

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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 **[**66]** 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, **[**67]** 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). n30

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n30 Joint Appendix of the parties on appeal.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

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 **[**68]** 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. n31

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n31 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.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**69]**

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. n32 While the specter of disciplinary proceedings should not be used by the parties as a litigation tactic, n33 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).

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n32 *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").

n33 *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.").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**70]**

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. n34 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.

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n34 *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.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**71]**

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. n35 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.

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n35 *See, e.g.,* Ch. Ct. R. 170(b), (d), and (h).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**72]**

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, n36 and constantly pressed the questioner for time throughout the deposition. n37 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.

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n36 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.,* 1981 Del. Ch. LEXIS 455, Del. Ch., C.A. No. 5899, Brown, V.C. (Jan. 15, 1981); *In re Asbestos Litig.,* Del. Super., 492 A.2d 256 (1985); *Deutschman v. Beneficial Corp.,* Del. 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. **[**73]**

n37 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.

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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 **[**74]** 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; n38 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.

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n38 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.

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As **[**75]** 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.*

YLD Update

"Roadhouse" Teaches Us To Be Nice

By Brian S. Chacker

As I was thinking about a topic for my final article as chair of the Young Lawyers Division, I received a phone call from opposing counsel in a case that recently had settled. Before getting down to business, we had a nice conversation about non-legal topics from family to a recent party that I had attended. Soon enough, we got to the case and worked out the final details of our settlement. As the case was officially over, I told her what a pleasure it had been to work with her during the course of the litigation. Because we had been courteous and cooperative with each other, we worked together well. That was when the topic for this article came to me. "Be nice."

"Roadhouse" is a 1989 movie starring the late Patrick Swayze as Dalton, a renowned barroom bouncer with a Zen view on life who is hired to clean up the nightly outbreaks of violence at Double Deuce, a roadhouse in Jasper, Mo. He also is charged to teach the rest of the Double Deuce's bouncers how to handle such violent situations. For you curious few who want to see this fine piece of cinema, it replays on TNT with extreme frequency.

On his first night, Dalton meets with the Double Deuce bouncers for their first lesson. He tells, them "All you have to do is follow three simple rules. One, never underestimate your opponent. Expect the unexpected. Two, take it outside. Never start anything inside the bar unless it's absolutely necessary. And three, be nice ... If somebody gets in your face and calls you a @#$%&, I want you to be nice. Ask him to walk. Be nice. If he won't walk, walk him. But be nice. If you can't walk him, one of the others will help you, and you'll both be nice. I want you to remember that it's a job. It's nothing personal."

As the legal profession becomes increasingly competitive and in many respects more adversarial, we all can take a lesson from Dalton. With younger attorneys being forced to go out on their own while still in the early stages of their careers and with layoffs continuing even today, it is important to remember that we are in the profession of Andrew Hamilton, the first Philadelphia lawyer. It is our responsibility to uphold the legacy of our profession. The need for zealous advocacy is burned into our brains from the first day of law school. What rarely is discussed is the idea of zealous advocacy.

It is important for our clients that we, as their attorneys, fight for them and use every tool available to successfully represent their needs. But in the course of our advocacy, we must remember that we are part of a community of attorneys who work together on a daily basis and will see each other not just in our present cases, but in future cases as well.

Consequently, we define the quality of our lives. The manner in which we choose to advocate for our clients and the manner in which we treat our opposing counsel are stepping-stones to the development of our professional reputations and will dictate how we are thought of in the future.

The easiest way to develop a positive reputation is to follow Dalton's advice and "be nice." If opposing counsel needs an extension for one reason or another and it will not prejudice your case or your position in a negotiation, then "be nice." Your generosity in that situation will speak volumes about who you are as a person and build good will for the future.

When I go into court to argue a motion or to try a case, I expect my opposing counsel to fight tooth and nail to prevent me from obtaining the relief I desire for my client. In the courtroom we are adversaries. But before we enter the courtroom or sit down at the negotiating table, and once we leave the courtroom or conference room, that adversarial interaction is over. We should be friendly and cordial – we should "be nice."

Unfortunately, there are many occasions when attorneys personalize their clients' cases and allow their advocacy to leak out of the courtroom or the conference room and into their personal relationships with opposing counsel. Suddenly, what should have been a nice relationship becomes a constant, uncomfortable and/or hostile interaction.

It is important to remember that while we may, and should, empathize with our clients' situations, opposing counsel will do the same with their clients. We as attorneys may not agree with our adversary's theories and arguments, but opposing counsel did not injure or damage us or our clients. Boorish, rude and obnoxious behavior does not serve anyone. It does not impress judges, juries or opposing counsel. It does not make us stronger or more zealous advocates and it

continued on page 9

BlogLink

Visit philawdelphia.wordpress.com for the latest from members of the Young Lawyers Division.

Harvest for the Homeless

Volunteers gather clothing donated for distribution to needy Philadelphians at the Young Lawyers Division's Harvest for the Homeless on Nov. 14. More than 15 people helped with the project at Ballard Spahr LLP.

Board OKs Budget for 2010

By Brian K. Sims

The Board of Governors has approved a $4.31 million budget for 2010, an increase of just 1 percent over this year's budget, while also passing a unanimous resolution to suspend automatic annual dues increases.

Chancellor-Elect Scott Cooper presented the budget to the Board at the Oct. 29 meeting following several months of meetings and discussion with the Association's professional staff and elected leadership.

"What you are looking at is the careful work of very professional people, and I am confident that this budget will serve this Association well," Cooper said. "Many people have had the opportunity to participate in this process, and the final result shows how strong this Association is."

Association Executive Director Kenneth Shear was also optimistic about the final budget, following its passage by the Board. "This budget holds challenges," said Shear, "and it attempts to maintain and expand the ongoing programs of this Association in difficult economic times."

In fact, the budget reflects no planned reductions in any services for members and shows a continued commitment to the Association's affiliate programs such as Philadelphia VIP and the Delivery of Legal Services Committee.

In an attempt to better control the expanding professional costs for all its members, the Board unanimously passed a resolution to suspend automatic dues increases that had been taking place since 1999. "This Association can look elsewhere for expanded revenue opportunities and cost-saving measures," Cooper said.

The resolution ends the former system that implemented an annual dues increase of 5 percent after March 31 of each year and maintained that level until the following year. In place, the Association will maintain its current membership dues rates and simply implement a late fee for dues payments made after March 31 of each year.

2010 Philadelphia Bar Association Budget

Sources of Funds

Membership Dues	$2,492,934
Lawyer Referral Service	390,000
Committee Programs	18,000
Publications	290,000
Interest and Dividends	70,000
Royalties	594,333
Management Fee	40,000
Special Events	231,703
YLD Program	15,000
Law Practice Management	2,000
Outside Groups	57,500
Other Income (including catering and reproduction costs)	109,500
Total Revenue	$4,310,970

Application of Funds

Lawyer Referral	75,713
Committee Activities	33,000
Meeting Services and Special Events	437,137
Communications	16,500
Affiliate Programs (VIP and DLSC)	144,034
Legal Services	7,300
Law Practice Management	2,500
Publications	9,407
Member Services	88,683
Executive	245,325
Finance and Administration	219,399
YLD Program	55,000
Overhead	260,806
Rent	143,900
Total Program Services	**1,738,704**

Support Services

Employee Salaries	1,516,093
LRIS Salaries	224,221
Employee Benefits	706,601
LRIS Benefits	81,389
Stationery, Postage and Office Expense	43,920
Total Support Services	**2,572,224**

Total Expenses	**4,310,928**
Change in Net Assets	**$42**

Panel: New Zoning Rules Nearly Ready

By Edward P. Kelly

It is a project almost 50 years in the making, but Philadelphia's new zoning code will soon be ready for the light of day.

That was the message delivered by panelists at an Oct. 30 joint meeting of the Real Property Section and the Zoning, Land Use and Code Enforcement Committee. Cheryl Gaston of the City Law Department moderated a panel that consisted of City Council members Bill Green and Brian O'Neill, as well as Richard DeMarco, Eva Gladstein, Peter Kelsen and Stella Tsai.

The Zoning Code Commission was created in 2007 "to develop a new zoning code that is easy to understand, improves the city's planning process, promotes positive development, and preserves the character of Philadelphia's neighborhoods." Councilman O'Neill noted that Philadelphia has changed dramatically since the last rewrite, and the code is irrelevant in some areas of the city. The ZCC is trying to make the code more relevant to today's Philadelphia. To that end, the code is shorter, there are fewer chapters and categories, and more illustrations in order to make the provisions "readable."

Gladstein explained that there are three phases to the ZCC's project: developing recommendations (now complete),

continued on page 12

YLD Update

continued from page 8

does not serve our clients. It only makes us difficult to work with and puts us in a poor light. No matter the arguments presented or negotiation stance taken, as Dalton says, "I want you to remember that it's a job. It's nothing personal." We all are doing the same thing for our clients – advocating.

If we listen to Dalton and we are able to separate our advocacy for our clients from our interactions with fellow attorneys, we will build positive reputations for ourselves and will have a more productive and less stress-filled practice and profession. We can continue to hold our heads high as we develop our careers and our reputations as attorneys.

On a personal note, I would like to thank the YLD Executive Committee for all of their hard work in making this a successful year and all of our members for their continued support.

Brian S. Chacker, an associate with Gay Chacker & Mittin, P.C., is chair of the Young Lawyers Division Executive Committee. He can be reached at (215) 567-7955, or by e-mail at bchacker@gaychackermittin.net.