

# 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 ~~we~~ have preserved, protected and defended the Rule of Law in order to ensure justice for all; and

**WHEREAS**, preservation and promulgation of the ~~we~~ 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, ~~x~~ 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 ~~we~~ processes.

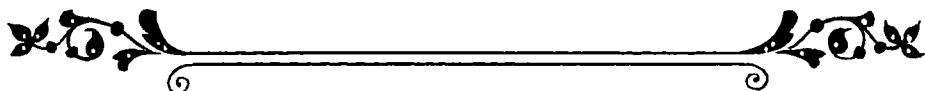
I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems, resolving disputes through negotiation whenever possible.

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

I will contribute time and resources to public service, ~~to~~ 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.<sup>1</sup>

## I. Civility and the Legal Profession

Civility is often confused with ethics and professionalism, yet these three terms are analytically distinct.<sup>2</sup> Civility is defined as “manners, respect, tolerance, concern for the public good<sup>3</sup> and ethics is defined as “moral action, conduct, motive or character.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### A. Civil Litigation

Lawyers face conflicting ideas about what it means to be a zealous advocate within our adversarial system of justice.<sup>8</sup> 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.<sup>9</sup> Lawyers can be further confused by informal bar norms that conflict with formal

<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> *Id.* at 1212

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> *Id.* at 915-917.

<sup>8</sup> 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).

<sup>9</sup> *Id.*

bar rules and may not think their actions to be morally deficient where the conflicting informal norms are followed.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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."<sup>13</sup>

## 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

## 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.<sup>17</sup> The uncivil litigator uses this rhetoric as one of the guns in his arsenal.<sup>18</sup>

"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.'"<sup>19</sup> Lawyers have begun to use the adversarial

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<sup>10</sup> Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 Hous. L. Rev. 309, 360-61 (2004).

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

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

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

<sup>14</sup> 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).

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

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

<sup>17</sup> 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).

<sup>18</sup> 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).

<sup>19</sup> 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.<sup>20</sup> This overreaching strains relationships between all members of the legal community.<sup>21</sup>

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.<sup>22</sup>

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).”<sup>23</sup> 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.”<sup>24</sup> 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.”<sup>25</sup> Use of the footnote was not “permissible advocacy,” because it went beyond an argument of misapplied facts or law.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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 15<sup>th</sup> Judicial District Court).”<sup>29</sup> 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.”<sup>30</sup> The supreme court found evidence of professional misconduct and suspended the attorney from

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<sup>20</sup> *Id.*

<sup>21</sup> 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).

<sup>22</sup> 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).

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

<sup>24</sup> *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).

<sup>25</sup> *Wilkins*, 782 N.E.2d at 986.

<sup>26</sup> 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).

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *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.<sup>31</sup>

### 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.<sup>32</sup> 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."<sup>33</sup> The Committee concluded its report by making some recommendations that included proposed standards of professional conduct for lawyers practicing law within the Seventh Circuit.<sup>34</sup> Behavioral norms within the court system have been notoriously tricky to conceptualize.<sup>35</sup> These findings and recommendations marked the first time that judges and lawyers came to a common understanding of how they should treat each other.<sup>36</sup> 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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<sup>31</sup> *Id.* at 27.

<sup>32</sup> *See Interim Rpt.*, 143 F.R.D. at 374.

<sup>33</sup> *Id.* at 375.

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

<sup>35</sup> 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).

<sup>36</sup> 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 *civily 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 'fail 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.<sup>37</sup> 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.<sup>38</sup> In 1980, a pilot Inn program was founded in Salt Lake City, Utah.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

The membership is then further divided into groups consisting of members from all four classifications, these groups are called "pupilage teams."<sup>42</sup> 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.<sup>43</sup>

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

<sup>38</sup> *Id.*, select General Information, History.

<sup>39</sup> *Id.*

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

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

<sup>42</sup> *Id.*

<sup>43</sup> 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.<sup>44</sup> The demonstrations range from mock trials to presentations concerning tactics and ethics.<sup>45</sup> Preparation meetings for the pupilage teams, demonstrations, and the full meetings of the Inn members, takes place at breakfast, lunch, or after work.<sup>46</sup> These meals and meetings encourage relationships to develop among the pupilage team members and foster already-existing relationships.<sup>47</sup>

### 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> Other business literature shows that potlucks are a way to improve motivation, reduce turnover, and increase profitability.<sup>53</sup>

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.<sup>54</sup> In the United States, it may also be related to the Native American

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<sup>44</sup> See *supra* note 36 <http://www.innsforcourt.org> (discussing agenda of meetings).

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

<sup>48</sup> See *supra* note 36 (discussing meeting formats).

<sup>49</sup> 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).

<sup>50</sup> Laurence Cumberland, *February is the Cruellest Month*, 86 ABA J. 112, 112 (2000).

<sup>51</sup> *Id.*

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

<sup>53</sup> B. Nelson, *Return on People: Happiness Committee Brightens Workday*, [http://www.bizjournals.com/bizwomen/consultants/return\\_on\\_people/2003/07/14/column239.html](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](http://www.serbin.net/article_66ways.shtml) (last accessed August 30, 2005).

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



tradition of the “potluck” [Nootka Chinook jargon: *p’achitt*: giving], a ceremonial feast, marked by the host distributing gifts, which are reciprocated by the guests.<sup>55</sup>

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<sup>56</sup>, church suppers<sup>57</sup>, or informal neighborhood or family gatherings.<sup>58</sup> 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.”<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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).<sup>63</sup> Potlucks are one of the most traditional methods to foster this interaction, and food is always a catalyst for bringing people together.<sup>64</sup>

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

<sup>56</sup> Supra note 52.

<sup>57</sup> 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).

<sup>58</sup> Weber, 90 *CHRISTIAN SCIENCE MONITOR* at 12.

<sup>59</sup> 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).

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

<sup>61</sup> 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).

<sup>62</sup> 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>.

<sup>63</sup> *Id.*

<sup>64</sup> *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 damned). 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;



**BERNARD W. SMALLEY**, a shareholder with Anapol Schwartz Weiss Coban Feldman & Smalley, concentrates his practice in the areas of medical negligence, defamation, class actions and other major personal injury matters.

(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."

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 oppos-

ing 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.

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*

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

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## 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. •

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

## JCB

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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

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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

----- Footnotes -----

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.

----- End Footnotes----- **[\*\*60]**

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.

----- Footnotes -----

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).

