Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	FSFIND
Citation Text:	124 F.Supp.2d 877
Lines:	511
Documents:	1
Images:	0

H

United States District Court,
D. New Jersey.
Matthew KOHLMAYER
v.
NATIONAL RAILROAD PASSENGER CORPORATION

No. CIV. A. 99–5455 (NHP).
Dec. 20, 2000.

Attorney admitted to practice outside state sought pro hac vice admission to District Court. United States Magistrate Judge Hedges denied application, and attorney appealed. The Court, Politan , J., held that attorney's pattern of uncivilized behavior, including misconduct that had resulted in mistrials, warranted denial of admission despite good standing in foreign bar.

Application denied.

West Headnotes

[1] Attorney and Client 45 10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of Practitioners in Different Jurisdiction. Most Cited Cases

Federal courts have wide discretion in granting admission to practice pro hac vice, but discretion cannot be exercised arbitrarily.

[2] Attorney and Client 45 10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of Practitioners in Different Jurisdiction. Most Cited Cases

Practice of comity, as to granting admission to out-of-state attorneys to practice before federal district court, is not mandated by United States Constitution.

[3] Attorney and Client 45 10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of Practitioners in Different Jurisdiction. Most Cited Cases

Attorney's pattern of uncivilized behavior in past actions, including misconduct resulting in mistrials as well as belligerent conduct toward opposing counsel, warranted denial of attorney's application for pro hac vice admission to federal district court, even though no disciplinary proceedings against attorney had proceeded to conclusion and even though attorney was member in good standing of foreign state's bar. U.S.Dist.Ct.Rules D.N.J. Civil Rule 101.1(c)(1).

[4] Attorney and Client 45 10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of Practitioners in Different Jurisdiction. Most Cited Cases

Although mere fact of prior disbarment did not ipso facto disqualify attorney from admission pro hac vice under federal district's local rules, admission to bar of foreign state was not by itself sufficient for such admission. U.S.Dist.Ct.Rules D.N.J. Civil Rule 101.1(c)(1).

[5] Attorney and Client 45 10

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k10 k. Admission of Practitioners in Different Jurisdiction. Most Cited Cases

In determining whether attorney is suitable for admission pro hac vice at time of his or her application, federal district court has discretion to deny ap-

plication regardless of past or present disciplinary actions and regardless of present good standing in bar of his or her home state. U.S.Dist.Ct.Rules D.N.J. Civil Rule 101.1(c)(1).

[6] Attorney and Client 45 19

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k19 k. Disqualification in General. Most Cited Cases

While civil litigant's interest in having counsel of his choice is an important consideration, it does not rise to level of criminal defendant's constitutional right to have counsel of his choice. U.S.C.A. Const.Amend. 6.

[7] Constitutional Law 92 4273(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(2) k. Admission and Examination. Most Cited Cases
(Formerly 92k287.2(5))

Right to practice law in courts of jurisdictions in which an attorney is not admitted to bar is not protected by due process clause. U.S.C.A. Const.Amend. 14.

***877** Gregory L. Nester,Marvin I. Barish Law Offices, P.C., Camden, NJ, for Plaintiff.

John A. Bonventre, Landman, Corsi, Ballaine & Ford, Newark, NJ, for Defendants.

POLITAN, District Judge.

Dear Counsel:

This matter comes before the Court on appeal from Magistrate Judge Ronald J. Hedges Order' denying an application of Marvin I. Barish, Esquire ("Mr.Barish") ***878** for *pro hac vice* admission to this Court.[FN1] The Court heard oral argument on this matter on September 29, 2000. For the reasons articulated herein, Judge Hedges' Order of August 17, 2000 is **AFFIRMED**.

FN1. Where a magistrate judge decides a non-dispositive matter, meaning that the order does not dispose of a claim or defense of a party, upon appeal the district judge may modify or set aside such order only if it is "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a); 28 U.S.C. § 636. Thus, Judge Hedges' Order denying the *pro hac vice* admission of Mr. Barish will not be reversed unless the Court finds it clearly erroneous or contrary to law.

STATEMENT OF FACTS & PROCEDURAL HISTORY

Mr. Barish is seeking *pro hac vice* admission in this case as plaintiff's counsel. The plaintiff, Mr. Matthew Kohlmayer ("Mr.Kohlmayer") was allegedly injured in the scope of his employment at National Railroad Passenger Corporation, also known as Amtrak (hereinafter "Amtrak"). Mr. Kohlmayer brings this action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60, and the Railroad Safety Appliance Act, 45 U.S.C. § 1, *et seq.* *See* Compl. ¶¶ 1–8. Mr. Barish has represented plaintiffs in many cases instituted under these federal statutes, and in that regard is experienced in this area of the law.

Mr. Barish is a member in good standing of the Bar of the Supreme Court of Pennsylvania[FN2] and has previously been admitted *pro hac vice* in The United States District Court of New Jersey. But *pro hac vice* admission in this district has been denied to Mr. Barish at least once. In 1996 Judge John W. Bissell denied Mr. Barish's application to practice in this Court; such decision is discussed in greater detail below.

FN2. Mr. Barish is also admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Third, Fourth, and Ninth Circuits, the Eastern District of Pennsylvania, the Northern District of California, and the United States District Court of Maryland. *See* Nester Decl. ¶ 3.

Mr. Barish's conduct in the past few years, while practicing in this Court and in courts of other jurisdictions, has often been uncivilized, and at times unprofessional. Amtrak has filed disciplinary proceedings against Mr. Barish in Pennsylvania as a result of questionable trial tactics in a case involving claims similar to the present claims. As far as this Court is aware, those proceedings are currently pending. No other disciplinary actions are pending against Mr. Barish, and to the Court's knowledge he has never been disciplined by Pennsylvania or any other state's Bar Association.

Judge Hedges denied Mr. Barish's *pro hac vice* application on the basis of Mr. Barish's past record, finding that his conduct falls below the expectations of the Court. *See Kohlmayer v. Nat'l R.R. Passenger Corp.*, 2000 WL 1276599 (August 17, 2000) . Instances of the behavior in question are set forth in more detail throughout this opinion.

DISCUSSION

The question before the Court today is whether an attorney who is a member in good standing of the bar of one state must be admitted to practice *pro hac vice* in the United States District Court of New Jersey where his past behavior has been uncivilized and unprofessional and has resulted in reprimands, mistrials and wasted judicial time.

In answering this question, the Court is led to the crossroads of ethics and civility. While the line between unethical and uncivilized behavior is often blurred, there is nevertheless a meaningful distinction. Where an attorney violates ethical duties, the Rules of Professional Responsibility apply and formal disciplinary proceedings may result. *See* L.Civ.R. 103.1, 104.1; ***879***In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 160 (3d Cir.1984). General uncivilized or "unlawyerlylike" conduct may not constitute a technical violation of the ethical rules, but such conduct is a stain on the legal profession and often delays the judicial process.

Judge Bassler, in distinguishing civility and ethics, stated that "incivility" is "akin to pornography in that while it may be hard for us to define, we all know it when we see it." Bassler, J. *Lost Cause or Last Chance for Civility*, N.J. Law Journal, op. ed. at 23, July 10, 1995. Incivility has been defined by the Seventh Circuit Judicial Committee on Civility as "rudeness, hostility, abrasive conduct, and strident personal attacks on opponents." *See id.*

In recent years, instances of such uncivilized behavior have become commonplace, and most apparent in inter-attorney relations. Today, a kind word, a slap on the back of an adversary, or even the courtesy of a handshake has become so rare that it makes heads turn in courtrooms where this type of behavior occurs. It ought not be so.

Civility is basic and fundamental. It should not only govern one's everyday, personal life, it should govern one's professional life as well. Life is too short to be spent on making enemies. More importantly, our level of civility (or lack thereof) reflects upon ourselves. Civility is the measure of who we are—both to kings and to paupers. If we can accord to the pauper the same respect we might give a king, we have earned the title "civilian." Attorneys everywhere should strive to attain this coveted title.

The New Jersey Bar Association, in conjunction with the Deans of Rutgers School of Law - Newark, Rutgers School of Law–Camden, and Seton Hall Law School, created the Commission on Professionalism in the Law in response to the increase in uncivilized behavior among attorneys. *See* 51 Rutgers L.Rev. 889, 895 (1999). The primary goal of the commission is "to help improve the professional behavior and attitudes of lawyers and

judges." Baisden, Cheryl, "The New Jersey State Bar Association: the First 100 Years," N.J. Lawyer (October, 1999). This is an important goal for the legal profession, and one which may be furthered, at least in part, by this opinion.

A. The Standard for Admission *Pro Hac Vice*

There is no uniform standard for *pro hac vice* admission in United States District Courts. District courts therefore mainly rely on state bar admission in determining whether to admit an attorney *pro hac vice*. *See In re Dreier,* 258 F.2d 68 (3d Cir.1958); 33 A.L.R. 799 (1977).

In this district, the local rule regarding *pro hac vice* admission states, in pertinent part, that:

> [a]ny member in good standing of the bar of any court of the United States or of the highest court of any state, who is not under suspension or disbarment by any court ... may **in the discretion of the Court**, on motion, be permitted to appear and participate in a particular case.

L.Civ.R. 101.1(c)(1)(emphasis added). Clearly the rule contemplates that Courts may deny admission *pro hac vice,* even though the applicant is not currently suspended or disbarred from the practice of law. The scope of discretion has been left to interpretation by the Courts.

[1] It is well-settled that federal courts have wide discretion in granting admission to practice *pro hac vice*. *See Thoma v. A.H. Robins, Co.,* 100 F.R.D. 344, 348 (D.N.J.1983); *see also* 7 Am.Jur.2d, Attorney at Law, § 22 (1997). Such discretion cannot, however, be exercised arbitrarily. *See Thoma,* 100 F.R.D. at 348; *see also* Comment, The Local Rules of Civil Procedure in The Federal District Courts–A Survey, 1966 DUKE L.J. 1011, 1018.

The question here is whether it is proper for this Court to consider evidence of past inappropriate, uncivilized, and unprofessional***880** behavior by Mr. Barish in determining whether he should be permitted to practice before this Court.

[2] Typically, a liberal approach is taken by federal courts in all jurisdictions in allowing out-of-state attorneys to practice in federal courts of jurisdictions where they are not admitted to the bar. The trend of leniently granting *pro hac vice* admission stems from the Supreme Court case of *Selling v. Radford,* which held that even where an attorney was no longer a member of a state bar, he was not automatically barred from appearing before the Supreme Court. 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917). Liberal admission is also commonly done as a matter of comity between states. *See Leis v. Flynt,* 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717(1979); 33 A.L.R. 799 (1977). The practice of comity is not, however, mandated by the Constitution. *See id.*

Practices among the federal district courts in this country vary from state to state, but this district is not unlike most other districts in that motions for *pro hac vice* admission are granted almost as a matter of course.

B. The Conduct in Question

The record in this case is replete with instances of grossly inappropriate, uncivilized, and unprofessional behavior by an attorney who seeks admission to practice before this Court. Mr. Barish has in recent years left a trail of mistrials in his wake.

In 1992 Mr. Barish engaged in inappropriate behavior and "questionable ethics" at trial, resulting in the grant of a new trial by the United States District Court for the Eastern District of Pennsylvania. *See Patchell v. Nat'l R.R. Passenger Corp.,* 1992 WL 799399 (E.D.Pa. July 31, 1992). After the court issued its memorandum opinion detailing the bases for its decision, the parties settled the case, and the court vacated its opinion because of the settlement. The Third Circuit reversed the trial court's decision to vacate its opinion, and the opinion was reinstated. *See Patchell v. National R.R. Passenger Corp.,* 107 F.3d 7 (3d Cir.1997).

Mr. Barish argues here that Judge Hedges should not have relied on the district court's opinion, which details the inappropriate behavior of Mr. Barish at trial, since the opinion was reinstated because of a reversal based on a procedural fault of the district court. *See* Pl. Br. at 6. This Court disagrees. It was proper for Judge Hedges to rely on the opinion as it contained insight into Mr. Barish's prior behavior and character.

In an unpublished opinion, Judge Simandle of this Court granted a motion for a new trial by defendants, after the plaintiff won a jury verdict, on the basis of Mr. Barish's grossly uncivilized behavior at trial. *See* Bonventre Decl., Ex. C; *McEnrue v. N.J. Transit Rail Ops.*, Civil Action No. 90–4728, at 17–27 (Sept. 30, 1993). The trial court took into consideration verbal attacks wherein Mr. Barish admittedly cursed at his adversary on the record, but later apologized for those outbursts. The trial court took a "wait-and-see" attitude and continued the trial, which ultimately concluded without mistrial.

Judge Simandle found that the trial court made a mistake by so doing, noting that Mr. Barish repeatedly suggested to the jury in his closing argument that they return a "large" verdict and referred to "millions" of dollars. Judge Simandle felt that Mr. Barish overstepped his bounds with these references by implicitly suggesting to the jury a damages award. *McEnrue*, 90–4728 at 26. Judge Simandle concluded that the "facts of Mr. Barish's misconduct, and his utterly belligerent conduct toward opposing counsel, when added together, justified ending the case by mistrial." *See id.*

At oral argument before this Court, Mr. Barish stated that Judge Hedges mischaracterized these opinions, and that he "never knew saying something in a closing speech ... was worthy of [his] not being ***881** able to practice in this court." Tr. of Oral Argument, 9/29/00, p. 7, lines 15–18. It so happens that what Mr. Barish chose to say in that closing speech, as in others he has made, was highly improper, thereby making it "worthy" of a mistrial. If Mr. Barish chooses to act in an uncivilized, possibly unethical manner, he should expect negative repercussions such as this.

In 1995, a jury verdict in favor of Mr. Barish's client was *sua sponte* set aside and a new trial was granted because of Mr. Barish's conduct at trial. *See Spruill v. Nat'l R.R. Passenger Corp.*, 1995 WL 534273, *9 (E.D.Pa.1995). Judge Shapiro based her ruling, in part, on Mr. Barish's improper opening statement, his egregious leading of a witness, his attempt to coach the plaintiff during cross-examination by the defendants, and his troubling demeanor, including attempts to address the jury while in sidebar. Judge Shapiro concluded as follows:

> We have noted in reviewing the caselaw that this is not the first time the improper conduct of plaintiff's counsel has been the subject of judicial criticism, sufficient to set aside a verdict in favor of his client. Here, approximately two years after the complaint was filed, this case unfortunately remains unresolved. This is unfair to both parties who should have a resolution of the underlying issues; it may be especially unfair to plaintiff who has been injured and may have a meritorious claim against Amtrak. We are in a situation because of the conduct of plaintiff's counsel; not only do both parties suffer, but the administration of justice suffers when judicial resources are caused to be wasted.

Id. at *9.

Mr. Barish argues that Judge Hedges' reliance on *Spruill* was misplaced. He contends that none of the fourteen reasons explicitly listed by Judge Shapiro for setting aside the verdict rose to the level of a debarable offense, and therefore the grant of a new trial was erroneous. He further argues that Judge Hedges should not have relied on the case in denying *pro hac vice* admission. All fourteen bases listed by Judge Shapiro related to Mr. Barish's conduct at trial. This opinion provided further insight to Judge Hedges, as it does to this Court, of Mr. Barish's character, professional habits, and lack of

civility. As such, it was properly considered by Judge Hedges.

Mr. Barish contends that Judge Hedges also erroneously relied on a prior denial of *pro hac vice* by Judge Bissell of this Court, conclusively stating that Judge Bissell's ruling was clearly erroneous. *See Natusch v. Consolidated Rail Corp.*, Civil Action No. 94–2635 (D.N.J.1996). In *Natusch*, Judge Bissell, relying in part on Judge Simandle's 1993 ruling, recognized that there was "peril on the seas in front of [the Court] based upon the past conduct of [Mr. Barish]," and found that it was thus proper to deny admission. Judge Bissell further commented that Mr. Barish should consider the denial of *pro hac vice* admission a warning, that he should improve his behavior or risk not practicing in this Court in the future.

Mr. Barish further contends that he chose not to appeal the ruling because "it was a one time matter and the case was settled." *Id.* at 9. This Court is not persuaded by the argument that Judge Bissell's ruling was clearly erroneous just because Mr. Barish claims it to be so.

It appears to the Court that Mr. Barish's antics have not subsided. Recently, Mr. Barish was involved in yet another case resulting in a mistrial. *See Comuso v. Nat'l R.R. Passenger Corp. a/k/a Amtrak*, No. 97–7891, 2000 WL 502707 (E.D.Pa. April, 26, 2000). In this case, the mistrial was granted because Mr. Barish threatened to "kill" opposing counsel. *See id.* at *1. Mr. Barish later admitted calling his adversary a "fat pig" "[f]our times" in that same outburst. *See* Defendant's Letter to the Court dated October 2, 2000, Ex. E. This conduct epitomizes the declined state of civility in inter-attorney relations.

***882** Mr. Barish admits that his conduct in trying the *Cumuso* case was "volatile" at times, but he blames opposing counsel for taunting him, forcing him to behave in an ill manner. *See* Pl. Br. at 8. The Defendant in *Cumuso*, also the defendant in the present case, instituted disciplinary proceedings against Mr. Barish as a result of his behavior. *See* Pl. Reply Br., Ex. A. A letter from the Pennsylvania Disciplinary Board to the Clerk of the Eastern District of Pennsylvania was submitted as an exhibit to this Court. The letter did not describe the nature of the proceedings against Mr. Barish, but instead instructed all parties involved to keep any information regarding the disciplinary proceeding strictly confidential. As far as this Court is aware, those proceedings are still pending.

Mr. Barish argues that this Court has no ability to deny *pro hac vice* admission if the attorney is a member in good standing of the bar of the Supreme Court of a state. *See* Pl. Br. at 1. Mr. Barish cites an Eleventh Circuit case which states that admission to a state bar creates a presumption of good moral character that cannot be overcome by the "whims of the district court." *Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553, 1559 (11th Cir.1997).[FN3] The Court does not disagree with this premise, however, the record in this matter is more than sufficient to overcome (in a far from whimsical manner) the presumption of Mr. Barish's good moral character.

> FN3. *Schlumberger* relied on an older Fifth Circuit case called *In re Evans*, 524 F.2d 1004 (5th Cir.1975), in opining that *pro hac vice* admission should not be denied "absent a showing of unethical conduct rising to a level that would justify disbarment." *Id.* at 1561. This Court disagrees with that standard. This Court can, and must, consider the character of an applicant and his or her record of civility when determining whether to grant *pro hac vice* status. *See* L.Civ.R. 101.1(c)(1).

[3] The question here is whether the hands of this Court are tied, such that it must admit Mr. Barish *pro hac vice* and then hold its breath for the duration of trial in hopes that a mistrial will not result. In answering this *pro hac vice* question, this Court retains broad discretion. *See In re Dreier*, 258 F.2d at 70; *Mruz v. Caring*, 107 F.Supp.2d 596

(D.N.J.2000); *Thoma*, 100 F.R.D. at 348; *accord In re G.L.S.*, 745 F.2d 856 (4th Cir.1984)(denying *pro hac vice* admission of an attorney because the Court was not satisfied with the "private or professional character" of the attorney).

In *Thoma*, an out-of-state attorney "continually thwarted the progress of litigation," and denial of *pro hac vice* status on that basis was proper. Although *Thoma* involved an attorney's behavior in the actual case at bar, unlike here (where Mr. Barish's conduct has thwarted the progress of numerous other litigations), the concept is applicable. When forewarned with a substantial amount of evidence that an attorney is likely to hinder the litigation process, a court should not and cannot be forced to grant a *pro hac vice* application of that attorney.

In *In re Dreier*, the attorney seeking *pro hac vice* admission had been disbarred after he was convicted on criminal charges, but was reinstated to the bar of Pennsylvania at the time of his *pro hac vice* application. 258 F.2d 68–69. The Court nevertheless instructed the district court to grant Mr. Dreier's application, stating:

> Certainly an erring lawyer who has been disciplined and who having paid the penalty has given satisfactory evidence of repentance and has been rehabilitated and restored to his place at the bar by the court which knows him best ought not to have entered against him by a federal court solely on the basis of an earlier criminal record and without regard to his subsequent rehabilitation and present good character.

Id. at 69–70 (*citing Schware v. Board of Bar Examiners*, 353 U.S. 232, 246–47, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957)).

***883** [4][5] *In re Dreier* stands for the proposition that the mere fact of prior disbarment does not *ipso facto* disqualify an attorney from admission *pro hac vice* in courts of this district. It does not stand for the proposition that admission to the bar is sufficient for admission *pro hac vice*. In fact, the Third Circuit emphasized that a *pro hac vice* applicant who is a member in good standing of an out-of-state bar should not be admitted if the court finds that "the [applicant] is **not presently of good moral or professional character."** *Id.* at 70 (emphasis added). Thus, in determining whether an attorney is suitable for admission *pro hac vice* at the time of his or her application, a court has discretion to deny an application regardless of past or present disciplinary actions and regardless of present "good standing" status in the bar of his or her home state.

This Court does not desire or propose a broad standard whereby hearings, for example, on *pro hac vice* applications might often be necessitated. There must, however, be some point, some line at which an attorney's repeated, documented, instances of uncivilized behavior, whether or not rising to the level of a disbarable offense, strips him of the privilege of *pro hac vice* admission.

The Court finds that Mr. Barish's conduct, as detailed in this opinion, has reached that point. Mr. Barish has been warned by numerous judges that if he continues his uncivilized behavior, he will no longer be permitted to practice in this Court. Because Mr. Barish has blatantly failed to heed these warnings, he will not be permitted to appear *pro hac vice* in this case.

In his 1995 article, Judge Bassler stressed that uncivil behavior by attorneys yields social costs. *See* Bassler, J., *supra*, at 23. Time spent dealing with peripheral matters as a result of uncivilized behavior is time simply wasted by courts. *See id.* The Northern District of Texas has addressed this matter as well:

> With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction.

Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D.Tex.1988). Judge Bassler posed the question: "what can we do about it," and answered "not much." This Court finds today that there are some instances in which courts can do something about it. Courts can use their discretion to deny the privilege of *pro hac vice* admission to attorneys who consistently act in an uncivilized manner, regardless of whether formal ethical complaints have been made against the *pro hac vice* applicant.[FN4]

FN4. The Court renders no opinion on the quantity of uncivilized conduct required before an attorney is said to have a pattern of unacceptable behavior. Instead, this determination should be made by courts on a case-by-case basis. *See Leis*, 439 U.S. at 443, 99 S.Ct. 698.

Where a court is made aware of a pattern of uncivilized behavior by an attorney, bordering on the unethical, which has resulted in the waste of judicial time in the past, it must have discretion to deny the otherwise leniently granted *pro hac vice* applications in the interest of judicial economy.

[6] There are two further issues to be addressed by this Court. First, the plaintiff's interest in having Mr. Barish represent him in this matter has not been overlooked. While this is an important consideration, it does not rise to the level of a criminal defendant's constitutional right to have the counsel of his choice. *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir.1966); *but see Leis v. Flynt*, 439 U.S. 438, 441–42, n. 4, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979).[FN5] ***884** *Spanos* has been criticized, perhaps even rejected, by the Supreme Court insofar as it found that a client had a "constitutional right" under the privileges and immunities clause to the counsel of his choice. *See Leis*, 439 U.S. at 441–42, n. 4, 99 S.Ct. 698 (*citing Norfolk & Western R. Co. v. Beatty*, 423 U.S. 1009, 96 S.Ct. 439, 46 L.Ed.2d 381 (1975)).

FN5. Notably, *Spanos v. Skouras* is not a case about *pro hac vice* admission per se. An out-of-state attorney was never admitted *pro hac vice* because he never appeared before the Court where the case was tried, the Southern District of New York. After trial, the attorney brought suit against his client for fees. The client defended on the grounds that the attorney had engaged in the unauthorized practice of law because he was never admitted *pro hac vice.*

The Second Circuit stressed that the attorney would have been admitted *pro hac vice* had a proper motion been made, as the attorney was a member in good standing of the California bar and had never conducted himself in an "unlawyerlylike" fashion (unlike Mr. Barish). *Id.* at 168. The Second Circuit found that where the client had exercised his right to counsel of his choice, he could not then escape payment of compensation for services rendered.

Second, the Court is cognizant of Mr. Barish's interest in practicing his profession. *See In the Matter of Abrams*, 521 F.2d 1094, 1099 (3d Cir.1975)(*quoting Ex parte Burr*, 22 U.S. 529, 9 Wheat. 529, 6 L.Ed. 152 (1824)). Nearly two hundred years ago, the Supreme Court emphasized attorneys' interest in practicing their profession, but stressed that it is nevertheless "extremely desirable that the respectability of the bar should be maintained." *Ex parte Burr*, 22 U.S. at 529–30, 9 Wheat. 529. This desire has not ceased.

[7] The right to practice law in courts of jurisdictions in which an attorney is not admitted to the bar is not a right protected by the due process clause of the Fourteenth Amendment. *See Leis v. Flynt*, 439 U.S. 438, 441–42, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979). The *Leis* Court approved instead of a case-by-case determination of *pro hac vice* admission, where federal courts maintain discretion in admitting the attorneys who will practice before them. *See id.* at 443, 99 S.Ct. 698. The Court

stressed that while liberal admission may be proper, it is "not a right granted by statute or the Constitution." *Id.*

Having given due consideration to the interests of the plaintiff in having the counsel of his choice, and Mr. Barish's interest in practicing before this Court, the Court adheres to its finding that the interest in maintaining the "highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice" would be undermined if Mr. Barish were admitted to practice before this Court. *Howell,* 936 F.Supp. at 773.

Judge Hedges' Order denying the admission of Mr. Barish *pro hac vice* was not clearly erroneous or contrary to law, and accordingly is affirmed.

CONCLUSION

Based on the foregoing reasons, the Order of Judge Hedges on August 17, 2000 denying Mr. Barish's application for admission *pro hac vice* is hereby **AFFIRMED**.

D.N.J.,2000.
Kohlmayer v. National R.R. Passenger Corp.
124 F.Supp.2d 877

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	SC-CS
Citation Text:	496 S.E.2d 619
Lines:	328
Documents:	1
Images:	0

Supreme Court of South Carolina.
In the Matter of Harvey L. GOLDEN, Respondent.

No. 24747.
Heard July 8, 1997.
Decided Jan. 19, 1998.

Attorney grievance proceeding was instituted. The Supreme Court held that making gratuitously insulting, threatening, and demeaning comments in course of two depositions warranted public reprimand.

Public reprimand ordered.

West Headnotes

[1] Attorney and Client 45 59.8(1)

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

Making gratuitously insulting, threatening, and demeaning comments in course of two depositions warranted public reprimand. Appellate Court Rule 407, Rules of Prof.Conduct, Rules 4.4, 8.4; Appellate Court Rule 413, Rule on Disc.Proc., Par. 5.

[2] Attorney and Client 45 57

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

Ultimate authority to discipline attorneys and manner of discipline rests with Supreme Court.

****619 *335** J. Mark Taylor, of Kirkland, Wilson, Moore, Allen, Taylor & O'Day, P.A., West Columbia; David H. Wilkins, of Wilkins & Madden, P.A., Greenville; and John P. Freeman, Columbia, for Respondent.

Attorney General Charles Molony Condon and Senior Assistant Attorney General James G. Bogle, Jr., Columbia, for Complainant.

PER CURIAM

In this attorney grievance matter, the Respondent Harvey L. Golden ("Attorney") is alleged to have committed misconduct by making gratuitously insulting, threatening, and demeaning comments in the course of two depositions. It is alleged that Attorney's conduct violated Rules 4.4 and 8.4 of ***336** the Rules of Professional Conduct, Rule 407, SCACR, and section 5 of the Rule of Disciplinary Procedure, former Rule 413, SCACR. Attorney denies any misconduct. He contends his actions during the depositions were reasonable and necessary to obtain responses from hostile witnesses. Attorney further asserts his comments after one deposition were merely intended to be humorous.

Two members of the hearing Panel found misconduct as alleged and recommended attorney be privately reprimanded for misconduct; one Panel member recommended the matter be dismissed. The Interim Review Committee unanimously adopted the findings of fact and conclusions of law set forth in the majority's Panel Report. As to the sanction, all committee members participating [FN1] recommended some form of public sanction. Three voted that Attorney be suspended from the practice of law for thirty days; three voted that he be publicly reprimanded. After hearing arguments of counsel, reviewing the record, including the court reporter's tape recording of one of the depositions, and considering the applicable law, we find the appropriate sanction is a public reprimand.

FN1. One member of the Interim Review Committee did not participate in this matter.

FACTS

Smith Deposition

Attorney represented Mrs. Doe in a divorce action.[FN2] Pursuant to a temporary order, Mrs. Doe was receiving alimony. Attorney advised Mrs. Doe she could jeopardize her alimony if she had a boyfriend prior to her divorce. Mrs. Doe ended her relationship with Mr. Smith, apparently as a result of this advice. Thereafter, Mr. Smith contacted Mr. Doe's attorney and informed her he was having an adulterous relationship with Mrs. Doe. Based on this information, Mr. Doe filed a motion to terminate Mrs. Doe's alimony. Attorney noticed Mr. Smith's deposition.

FN2. Due to the sensitive nature of these matters, pseudonyms have been used.

In December 1994, Attorney deposed Mr. Smith. Smith was not represented by counsel at the deposition. He was a ***337** retired ****620** school teacher who had been hospitalized for emotional problems on six occasions within the previous fifteen years. He suffered from several disabilities including injuries to his lower back as the result of an automobile accident, debilitating migraine headaches, and bipolar affective disorder for which he was being treated with a series of psychotropic medications. The witness's physical and mental disabilities were fully known to Attorney who agreed that Smith was not mentally well.

We have reviewed both the written transcript and the audio recording of the deposition. The following are a few examples from the deposition transcript that illustrate Attorney's conduct at the deposition:

(1) [Attorney]: And who was your lawyer in your first divorce?

[Smith]: Me.

[Attorney]: Was that because you are cheap or you think you are smart enough to be your own lawyer? Is that what you think?

[Smith]: What kind of a question is that?

[Attorney]: Its a good question.

(2) [Attorney]: I don't need criticism from you. You ain't nearly as good as I am about answering questions or asking them. Just answer my questions, mister.

(3) [Attorney]: Don't get snide with me. Just answer my questions or you are going to be in severe difficulty, especially if you make me angry at you. I'm not going to try to get angry with you. Just answer my questions.

(4) [Attorney]: You are coming across as an absolutely ridiculous person. But that's okay, you will learn the hard way.

(5) [Attorney]: You are not smart enough to question my questions. You are not smart enough to even answer my questions. But do the best you can.

(6) [Attorney]: Do you understand English? I speak real clear English.

(7) [Attorney]: You-you must understand that this is not just a test of your telling the truth, this is also a test of ***338** your reasonableness. And whether you flunked or not is not going to be subject of my discussion here at this time.

(8) [Attorney]: And if you keep your mouth shut I might get on to [the] next question.

(9) [Attorney]: You are going to jail if you are an obstructionist in this State here, and especially if you are lying.

(10) [Attorney]: Well, I am not going to argue with you. You are not smart enough to argue with.

(11) [Attorney]: No, you don't tell me how to ask questions. We just take your answers down and we'll deal with you with the judge. See, and then we will see how smart you are.

(12) [Attorney]: You are just not smart enough to know what a restraining order is.

(13) [Attorney]: So you think it is your scintillating personality that caused him to want to play chess with you?

(14) [Attorney]: And when was that?

[Smith]: When was that? It was more than once. The first night was New Years Eve.

[Attorney]: What year?

[Smith]: It was, it was the New Years Eve we left the party.

[Attorney]: What year?

[Smith]: I would say it was January 1st 1994 was the first time we ever did it.

[Attorney]: 1994?

[Smith]: Uh-huh. (Indicating yes).

[Attorney]: That's not New Years Eve. January first is not New Years Eve.

[Smith]: I know but see the clock goes through 12:00. And when it goes past twelve then it is the next day, which makes it January 1st.

[Attorney]: And no longer New Years Eve, is it?

(15) [Attorney]: Did you fight them?

[Smith]: Huh?

[Attorney]: Did you fight them?

[Smith]: No, I didn't fight them.

***339** [Attorney]: Okay. So they didn't need five, they just needed one, right?

[Smith]: I bit one.

****621** [Attorney]: Why did you bite him?

[Smith]: ‘Cause I was hungry.

[Attorney]: Okay. Where did you bite him?

[Smith]: (sigh) He had his foot-

[Attorney]: Where did-

[Smith]: -in my-

[Attorney]: I didn't say why. I-

[Smith]: Okay.

[Attorney]: -Asked you where did you bite him?

[Smith]: Okay. Somewhere around his ankle. It was right on top of my face.

[Attorney]: Uh-huh. And was that because you were trying to fight them?

[Smith]: If you had been there I would probably bite you, too.

[Attorney]: No, I'd shoot you before you could bite me.

[Smith]: Oh.

[Attorney]: Guaranteed. Guaranteed.

(16) Attorney referred to Smith, who had been a patient at Charter Hospital, as an “inmate” of the hospital.

(17) Smith injured his back moving a box of books while preparing for the school year. Attorney asked Smith, who was a teacher, if he was the janitor:

[Attorney]: You are not a janitor, are you?

[Smith]: Huh?

[Attorney]: You are not the janitor, are you?

[Smith]: Gee, now what kind of question was that?

....

[Attorney]: ... When you said you get the desks in order, that's something for the janitor to do, get the desks in order?

Attorney testified the purpose of Mr. Smith's deposition was to destroy Mr. Smith's credibility. He denied he had any intent to embarrass, delay, or otherwise burden Mr. Smith, or ***340** to pollute the administration of justice. Attorney admitted he made some mistakes in the deposition. For instance, he stated he allowed Mr. Smith to "get to him" and admitted he should have set the tone for the deposition.

Jones Deposition

In May 1994, Attorney, who was representing Mr. Jones, deposed Mrs. Jones, the adverse party in a domestic proceeding. Mrs. Jones's attorney was present during the course of her deposition, although some of the alleged comments by Attorney took place off the record when her attorney was not present.

The grievance complaint alleged that after the deposition, Attorney stated to Mrs. Jones: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice. What I'd like, is to be locked in a room with you naked with a very sharp knife." Thereafter, it is alleged that Attorney said: "What we need for her [pointing to Mrs. Jones] is a big bag to put her in without the mouth cut out."

At the Panel hearing, Mrs. Jones testified as follows regarding Attorney's comments after the deposition:

... It was at the end, and the court reporter was beginning to put her things away. [Attorney] pushed all of his papers at me like that, and he leaned across the table, and he pointed his finger, and he said, "You are a meanspirited, vicious witch, and I don't like your face, and I don't like your voice, and what I want," and at that point he stood up, and he screamed, "What I want is to be locked in a room naked with you with a sharp knife," and I said, "Naked?" He said, "Yes, naked with a sharp-locked in a room naked," and I said "Uh," ... I then said to [Attorney], "What? Naked? What are you going to do? ..." And he said, "No, I will kill you with the thing." And at that point ..., the paralegal for [opposing counsel], came in ... and [Attorney] then pointed ... and he said to [the paralegal], "what we need for her is a big bag to put her in without the mouth cut out."

Opposing counsel's legal assistant testified that during a break in the deposition, she entered the conference room to give opposing counsel a note. She testified she heard Attorney***341** state that he would like to put a ****622** plastic bag without any air holes over Mrs. Jones.

In his answer, Attorney "adamantly denie[d]" making the "big bag" comment. However, during the Panel hearing, he admitted making the "big bag" comment, but stated Mrs. Jones took it out of context. Secondly, he contended that he had jokingly said that the only way the matter could be resolved would be to lock Mr. and Mrs. Jones naked in a room with a knife on the table and let the better participant emerge triumphant.

ANALYSIS

[1] With regard to the Smith matter, the Hearing Panel concluded that Attorney's actions demonstrated

his total disregard and failure to show any respect for the rights of a third party. The extent, the intensity, the sarcasm and maliciousness, the unnecessary combativeness, the gratuitous threatening and intimidation, and the unequivocal bad manners of [Attorney's] conduct could have been for

no purpose other than to embarrass or burden [Mr. Smith].

The Panel found Attorney's conduct in the Smith deposition violated Rule 4.4 of the Rules of Professional Conduct, Rule 407, SCACR. Rule 4.4 provides, in part: "In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person...." The Panel concluded Attorney had no legitimate purpose for his conduct. We concur with the Panel's analysis.

Attorney's words speak for themselves. Even if we assume that the deposition witness was uncooperative, Attorney would not be justified abusing this witness in the manner illustrated above. The record further shows that Attorney interrupted Smith on numerous occasions. Moreover, the audio recording reveals the volume of Attorney's voice was repeatedly loud, and his statements were sarcastic, rude, or otherwise inappropriate. He acted in a threatening and demeaning manner. His conduct was outrageous and completely departed from the standards of our profession, much less basic notions of human decency and civility.

***342** While attacking a witness's credibility is a legitimate and often necessary objective, Attorney's conduct at the Smith deposition went far beyond this purpose. We find Attorney's bullying of a mentally unstable witness in the Smith deposition an utterly inappropriate trial tactic. Although Mr. Smith was a hostile witness,[FN3] Attorney's behavior was unwarranted. If he truly thought Mr. Smith was intentionally being unresponsive and recalcitrant, Attorney could have recessed the deposition and moved the family court for an order requiring Mr. Smith to respond appropriately. We find, by clear and convincing evidence, that Attorney used means that had no purpose other than to embarrass, delay, or burden a third person. Thus, he has violated Rule 4.4 by his conduct at the Smith deposition.

FN3. The transcript and tape recording indicate Mr. Smith was suspicious and often difficult; at times, Mr. Smith yelled and once threatened to turn over the conference table. This outburst took place after Smith had been repeatedly ridiculed and bullied by Attorney. Attorney testified he deliberately attempted to provoke Smith into an outburst so as to damage Smith's credibility.

With regard to the Jones deposition, the Panel concluded Attorney had commented off the record that Mrs. Jones was "mean spirited," that someone should be "locked in a room naked" with her, and that he would like to put a bag over her without a hole for her mouth. They found that Attorney made these comments in an agitated tone of voice. The Panel did not believe these comments were an attempt at humor, but rather, the Panel found Attorney's comments were intended to be insulting and degrading. It concluded that Attorney's conduct tended to pollute the administration of justice and to bring the legal profession into disrepute. This conclusion was reached based on testimony of Mrs. Jones, of the legal assistant, and of opposing counsel who overheard Attorney saying "mean spirited" and "locked in a room naked." Moreover, Attorney's credibility was damaged by his selfcontradiction as to the "big bag" comment. Initially, he adamantly denied making the comment, but he later claimed at the Panel hearing that the comment was taken out of context. We fully agree with the Panel's conclusions. We ****623** find Attorney's comments after the Jones deposition could not possibly be interpreted as humorous, particularly in light of the serious nature ***343** of the issues and highly charged atmosphere of the deposition. Attorney's comments only served to insult an adverse party. Rule 8.4 of the Rules of Professional Conduct, Rule 407, SCACR, is violated when a lawyer engages in conduct prejudicial to the administration of justice. *See also* Rule 413, parag. 5.D, Rule on Disciplinary Procedure. We find, by clear and convincing evidence, that Attorney violated these rules by his misconduct at the Jones deposition.

We remind the Bar that although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting. Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition.

SANCTION

[2] The ultimate authority to discipline attorneys and the manner of discipline rests with this Court. *In re Dobson, III,* 310 S.C. 422, 427 S.E.2d 166 (1993). Analysis of the instant case reveals conduct much more egregious than a previous matter wherein we imposed a public reprimand for similar behavior. *In re Goude,* 296 S.C. 510, 374 S.E.2d 496 (1988) concerned a young attorney's misconduct at a sentencing hearing and outside a courtroom, where he made insulting remarks towards a child victim in a criminal matter. We publicly reprimanded the attorney, finding his conduct violated DR 7-106(C)(6), which prohibits a lawyer from engaging in undignified or discourteous conduct degrading to a tribunal, and DR 1-102(A)(5) and (6), which prohibit conduct prejudicial to the administration of justice and which adversely reflects on fitness to practice law.

Attorney's actions in the present case are much more reprehensible than that which we sanctioned in *Goude.* Here, we do not have a single incident, but two separate matters involving different parties and different depositions. Here, we do not have a momentary loss of cool, but rather, a repeated pattern of misconduct over the course of an entire deposition. Here, we do not have a few negative remarks, but rather, comment after comment-*seventeen* of which are set forth above in connection with the Smith deposition and *two* of ***344** which are delineated as to the Jones deposition-intending to intimidate and harass. Here we do not have an inexperienced attorney, but rather an attorney who has been practicing for over four decades.

The Panel, which had an opportunity to hear first-hand the testimony of the witnesses, summed up Attorney's actions in the following way:

> [Attorney's] conduct ... exemplifies the worst stereotype of an arrogant, rude, and overbearing attorney. It goes far beyond tactical aggressiveness to a level of gratuitous insult, intimidation, and degradation of the witness. It is behavior that brings the legal profession into disrepute.

We agree.

Attorney urges us to impose no sanction in this matter. Alternatively, Attorney argues that any sanction be mitigated by his experience and standing in the profession, his health problems for the past several years, and his lack of disciplinary history until recently. We approach attorney discipline matters with a heavy heart, especially in a case such as this one. Attorney has been a prominent and productive member of this state's bar for over four decades. He has been a leader nationally in the establishment of standards for the practice of domestic and family law. He has encouraged and mentored several generations of highly skilled and respected family law practitioners, including his two lead counsel in this matter who have so eloquently presented his case. We do take all of these factors into account. Nevertheless, we cannot utilize a different set of sanctions for misconduct committed by a lawyer of high standing and long experience, than that utilized when similar misconduct is found in a young and inexperienced practitioner.

We find that a public reprimand should be imposed for Attorney's violations of Rules 4.4 and 8.4 of the Rules of Professional Conduct, Rule 407, SCACR, and section 5 of the Rule of Disciplinary Procedure, former Rule 413, ****624** SCACR. Attorney's acts are veritably prejudicial to the administration of justice and undermine the very foundations of respect for the rule of law. Accordingly Harvey L. Golden is hereby publicly reprimanded.

PUBLIC REPRIMAND.

S.C.,1998.
Matter of Golden
329 S.C. 335, 496 S.E.2d 619

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	FEDFIND
Citation Text:	260 F.3d 228
Lines:	670
Documents:	1
Images:	0

260 F.3d 228, 57 Fed. R. Evid. Serv. 795
(Cite as: 260 F.3d 228)

United States Court of Appeals,
Third Circuit.
Marie SALDANA,
v.
KMART CORPORATION,
Marie Saldana, Appellant in No. 99-4055,
Lee J. Rohn, FN* Appellant in No. 00-3749.

FN* Pursuant to Rule 12(a), F.R.A.P. (Amended Per Court's Order of 3/16/01)

Nos. 99-4055, 00-3749.
Argued May 18, 2001.
Filed July 23, 2001.

Store patron brought "slip and fall" action against store. The District Court of the Virgin Islands, 84 F.Supp.2d 629,Thomas K. Moore, J., granted summary judgment in favor of store and imposed sanctions on patron's attorney for her out-of-court vulgar language in this and other cases. Patron and her lawyer appealed. The Court of Appeals, Barry, Circuit Judge, held that: (1) safety expert's conclusion that store violated worker safety requirements and her "pour tests" were inadmissible; (2) patron's testimony that a layer of dust had accumulated on puddle was insufficient to support finding that store had constructive notice of spill; and (3) attorney's use of profanity and her post-verdict letter describing expert witness as a "Nazi," did not warrant invocation of court's inherent powers to sanction attorney.

Affirmed in part, and reversed in part.

West Headnotes

[1] Federal Courts 170B 766

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk766 k. Summary judgment. Most Cited Cases

When reviewing an order granting summary judgment, the Court of Appeals exercises plenary review and applies the same test a district court applies. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 2546

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2546 k. Weight and sufficiency. Most Cited Cases

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party, in a motion for summary judgment, for a jury to return a verdict for that party; such affirmative evidence, regardless of whether it is direct or circumstantial, must amount to more than a scintilla, but may amount to less, in the evaluation of the court, than a preponderance. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 2543

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2543 k. Presumptions. Most Cited Cases

In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[4] Negligence 272 1104(6)

272 Negligence
272XVII Premises Liability
272XVII(D) Breach of Duty
272k1100 Buildings and Structures
272k1104 Floors
272k1104(6) k. Water and other substances. Most Cited Cases

Because patron, who allegedly slipped on puddle of liquid car wax on floor of discount department store, did not allege actual notice on the part of store, she was ultimately required to show that wax was on floor long enough to give store constructive notice of this potential unreasonable risk of harm.

[5] Negligence 272 ⚿1670

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)5 Weight and Sufficiency
272k1667 Premises Liability
272k1670 k. Buildings and other structures. Most Cited Cases

Negligence 272 ⚿1708

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1705 Premises Liability
272k1708 k. Buildings and other structures. Most Cited Cases

Circumstantial evidence that a substance was left on the floor for an inordinate period of time can be enough to constitute negligence in slip-and-fall case; where a plaintiff points to such evidence, it is a question of fact for the jury whether, under all the circumstances, the defective condition of the floor existed long enough so that it would have been discovered with the exercise of reasonable care.

[6] Evidence 157 ⚿512

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due care and proper conduct in general. Most Cited Cases

Safety expert's conclusion that store violated worker safety requirement by allowing liquid car wax to accumulate on floor for some time before patron slipped on it and fell was inadmissible in personal injury action; expert's conclusion would not assist fact finder to decide whether store unreasonably failed to detect wax spill that injured patron. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] Evidence 157 ⚿150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

"Pour tests" conducted by expert witness of store patron, who allegedly slipped and fell on puddle of car wax on store's floor, were irrelevant, and, therefore, inadmissible in patron's personal injury action; measurements did not account for disturbance caused by patron's fall which left her legs and skirt wet with car wax, and time it took to for wax bottle to empty did not, by itself, provide information when spill commenced or concluded, as nothing indicated at what point bottle was found to be completely empty. Fed.Rules Evid.Rules 402, 403, 702, 28 U.S.C.A.

[8] Negligence 272 ⚿1670

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)5 Weight and Sufficiency
272k1667 Premises Liability
272k1670 k. Buildings and other structures. Most Cited Cases

Patron's testimony that layer of dust had accumulated on puddle of liquid car wax on which she slipped in store was insufficient to support finding that store had constructive notice of spill; patron

offered no evidence of how much dust was there, how long it would have taken for any amount of dust to accumulate, or, whether it was dust from the air or dust picked up off floor by spreading of wax or force of patron's fall.

[9] Federal Courts 170B 813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

The Court of Appeals generally reviews a court's imposition of sanctions for abuse of discretion.

[10] Federal Courts 170B 754.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk754 Review Dependent on Whether Questions Are of Law or of Fact
170Bk754.1 k. In general. Most Cited Cases

When the procedure the district court uses in imposing sanctions raises due process issues of fair notice and the right to be heard, Court of Appeals' review is plenary. U.S.C.A. Const.Amend. 5.

[11] Constitutional Law 92 4426

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4426 k. Penalties, fines, and sanctions in general. Most Cited Cases
(Formerly 92k303)

Generally, the Due Process Clause of the Fifth Amendment requires a federal court to provide notice and an opportunity to be heard before sanctions are imposed on a litigant or attorney. U.S.C.A. Const.Amend. 5.

[12] Constitutional Law 92 4426

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4426 k. Penalties, fines, and sanctions in general. Most Cited Cases
(Formerly 92k303)

The Due Process Clause of the Fifth Amendment entitles a party, against whom sanctions are being considered, to notice of the legal rule on which the sanctions would be based, the reasons for the sanctions, and the form of the potential sanctions. U.S.C.A. Const.Amend. 5.

[13] Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of judge at chambers. Most Cited Cases

Attorney's use of profanity in two telephone conversations with attorneys and in two asides with attorneys during depositions, along with post-verdict letter in which attorney concurred with juror who described an expert witness as a “Nazi,” were not so egregious as to warrant invocation of court's inherent powers to sanction attorney; language complained of did not occur in presence of court, and there was no evidence that it affected either court's affairs or the orderly and expeditious disposition of any cases before it.

[14] 1951.6

170A Federal Civil Procedure
170AXV Trial

170AXV(A) In General
170Ak1951.3 Role and Obligations of Judge
170Ak1951.6 k. Order, decorum, and efficiency of proceedings. Most Cited Cases
(Formerly 170Ak1951)

Courts of justice are vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates; these powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

[15] Attorney and Client 45 3

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k3 k. Jurisdiction to admit. Most Cited Cases

Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of judge at chambers. Most Cited Cases

While the court's power to control admission to its bar and discipline attorneys who appear before it ought to be exercised with great caution, it is nevertheless incidental to all courts.

[16] Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of judge at chambers. Most Cited Cases

A court should normally look first to rule-based or statute-based powers and reserve inherent powers to sanction attorneys for those times when rule- or statute-based powers are not "up to the task."

[17] Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of judge at chambers. Most Cited Cases

Generally, a court's inherent power to sanction attorneys should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists.

***230** K. Glenda Cameron, (Argued), Lee J. Rohn, Law Office of Lee J. Rohn, St. Croix, USVI, Attorney for Appellants.

***231** Andrew C. Simpson, (Argued), St. Croix, USVI, Attorney for Appellee.

Before: McKEE, RENDELL and BARRY, Circuit Judges.

OPINION OF THE COURT

BARRY, Circuit Judge.

This case arises from a slip-and-fall suffered by Marie Saldana at a Kmart store on St. Croix. Ms. Saldana appeals the grant of summary judgment against her while her attorney, Lee Rohn, Esq., appeals the imposition of sanctions against her for her out-of-court vulgar language in a handful of cases, including this one. The tortuous procedural history that has led to the consolidation of a slip in a puddle of car wax with sanctions for vulgar language need not detain us. Suffice it to say that we have jurisdiction under 28 U.S.C. S 1291 and will affirm the District Court's December 20, 1999 decision with respect to Saldana, but will reverse with respect to Rohn.

I.

Marie Saldana alleged in her complaint that she slipped in a puddle of car wax in a Kmart aisle on April 20, 1995 and suffered injury. No one saw the wax before Saldana fell, no one else slipped in the puddle, and Saldana did not see tracks of wax near the puddle that might indicate someone else had stepped in the spill. Saldana stated that after she fell, she noticed that the puddle measured 24 inches across and was covered with a layer of light brown dust. A Kmart employee, Eugenie Williams, had walked down the same aisle less than three minutes prior to Saldana's fall and saw no wax on the floor at that time. After Saldana fell, Williams spotted an unbroken, completely empty bottle of wax on the floor with its top off.

Kmart brought a motion for summary judgment. In response, Saldana offered no evidence that any Kmart representative knew of the spill. Rather, she attempted to show constructive notice through the expert testimony of Rosie Mackay, proffered as a safety engineer, and her own testimony regarding the dust on the puddle. Saldana offered two reports by Mackay: an initial report dated January 1997, and a supplemental report dated April 1997. In the January report, Mackay concluded that "K-Mart was negligent in that there was a spill, and it was not cleaned up. Ms. Saldana was the unfortunate victim of this act of poor housekeeping...." App. at 361. Mackay based this conclusion in part on safety regulations promulgated pursuant to the Occupational Safety and Health Act ("OSHA"). Mackay's April report detailed the results of "pouring tests" she conducted to determine the length of time it would take for the same brand of wax to escape from an inverted bottle and form a 12-inch puddle on her kitchen floor. At her deposition, Mackay discussed additional experiments carried out in June 1997 involving open bottles lying on their sides. The District Court found Mackay's opinions and tests to be "irrelevant under Rule 402, ... confusing or misleading under Rule 403, and ... technically (scientifically) unreliable under Rule 702." *Saldana v. Kmart*, 84 F.Supp.2d 629, 636 (D.Vi.1999). The Court also found that any observation of dust on the puddle after Saldana's fall was not relevant to the state of the wax before the fall. *Id.* Thus, the Court granted Kmart's motion for summary judgment.

[1][2][3] When reviewing an order granting summary judgment, we exercise plenary review and apply the same test a district court applies. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994). "Under ***232**Federal Rule of Civil Procedure 56(c), that test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." *Id*. (quoting *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir.1992)). "In so deciding, a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Id.* A court should find for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of the ... pleading"; its response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. "Such affirmative evidence-regardless of whether it is direct or circumstantial-must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir.1989).

[4][5] Because Saldana does not allege actual notice on the part of Kmart, she would ultimately

be required to show that the wax was "on the floor long enough to give [Kmart] constructive notice of this potential 'unreasonable risk of harm.' " *David v. Pueblo Supermarket,* 740 F.2d 230, 234 (3d Cir.1984) (quoting Restatement (Second) of Torts S 343 (1965)). Although it is uncontested that the wax was on the floor at the time of the fall, "the mere presence of the foreign substance does not establish whether it had been there a few seconds, a few minutes, a few hours or even a few days before the accident." *Id.* Circumstantial evidence that a substance was left on the floor for an inordinate period of time can be enough to constitute negligence; where a plaintiff points to such evidence, it is a question of fact for the jury whether, under all the circumstances, the defective condition of the floor existed long enough so that it would have been discovered with the exercise of reasonable care. *Id.* at 236. Put another way, Saldana must point to evidence that would allow the jury to infer that the wax was on Kmart's floor for some minimum amount of time before the accident. Only then could a jury begin to consider whether under the circumstances the amount of time indicated by the evidence establishes constructive notice.

To show that the wax was on Kmart's floor an unreasonable length of time, Saldana relied chiefly on the information submitted by her expert, Rosie Mackay. As the District Court noted, Federal Rule of Evidence 702 imposes three major requirements as to expert opinions: (1) the witness must be an expert; (2) the procedures and methods used must be reliable; and (3) the testimony must "fit" the factual dispute at issue so that it will assist the jury. *See Kumho Tire v. Carmichael,* 526 U.S. 137, 149-50, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 590-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir.1985). Even if the evidence offered by the expert witness satisfies Rule 702, it may still be excluded if its "probative value ***233** is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. of Evid. 403 .

[6] We will assume *arguendo*, as did the District Court, that Mackay meets the requirements of an "expert." Even so, Mackay's reports and conclusions would not be admissible. In her January report, Mackay concluded that, although Kmart purports to follow safety procedures similar to certain OSHA regulations, "K-Mart was negligent in that there was a spill, and it was not cleaned up." App. at 361. Kmart "allowed" the wax to spill, Mackay wrote, and therefore "failed to use good, logical, prudent safety precautions." App. at 362. These conclusory statements essentially attempt to force upon Kmart a strict liability standard based on Mackay's reading of OSHA, a regulatory scheme far different from the applicable law described above. To be sure, in *Rolick v. Collins Pine Co.,* 975 F.2d 1009 (3d Cir.1992), this Court found admissible an expert's opinion that the defendant violated OSHA standards. *Id.* at 1014. That case, however, applied Pennsylvania law, and we noted that Pennsylvania courts had previously borrowed OSHA regulations for use as evidence of the standard of care owed to plaintiffs. *Id.*

This case is guided by the Restatement of Torts, which governs in the Virgin Islands in the absence of a local statute. 1 V.I.C. S 4. Under the Restatement, "[t]he court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively ... to protect a class of persons other than the one whose interests are invaded." Restatement (Second) of Torts, § 288; see also Restatement (Second) of Torts § 286, Illust. 1 (safety statute for protection of employees does not define standard of care owed to business invitee). As we have stated, Kmart is liable in this negligence action only if it knew or should have known of the dangerous condition but failed to take reasonable steps to correct it. *David,* 740 F.2d at 234. Thus, Mackay's opinion that Kmart violated worker safety requirements would not assist the fact finder in de-

ciding whether Kmart unreasonably failed to detect a wax spill that injured a business invitee. Mackay's April report includes similar conclusory statements that the District Court properly found would not be admissible at trial.

[7] Mackay's April pour tests indicated that, depending on the technique used, a bottle of the wax at issue would take almost three minutes to empty and an additional five minutes to form a 12-inch puddle. For her June tests, Mackay altered the pour angle and found a 14- to 15-inch puddle would form in about eight minutes. The District Court believed that the primary concern with these tests was not their accuracy, but their relevancy. FN1 Saldana connects these tests to the size of the Kmart puddle *after* her fall and argues the time involved establishes constructive notice. Undisputed evidence shows, however, that Saldana's fall and her recovery ***234** from that fall left her legs and skirt wet with car wax. This disturbance undoubtedly altered the size of the puddle; measurements of how quickly wax spreads without such interference simply have no bearing on this case.

> FN1. We note in passing, however, that Mackay conducted her pour tests on what she called a "vinyl tile surface particularly similar to the one at K-Mart." App. at 366. As we have already mentioned, this "vinyl tile surface" turned out to be Mackay's own kitchen floor, which she testified was at least 17 years old. Mackay further stated that the Kmart floor appeared to be significantly newer than her own; she also did not know whether the two floors had been cleaned with the same type of substance or resembled each other in any way relevant to her tests. We are, therefore, not persuaded that the accuracy of these tests was not also a concern.

Similarly, the time necessary for a wax bottle to empty does not, by itself, provide information regarding when the spill commenced or concluded. Nothing in the record indicates exactly when the bottle was found to be completely empty, leaving no way to deduce when the spill began. The spill may have started just as Saldana reached the aisle and continued as she fell, as she was being helped up, or even afterward. The District Court, therefore, properly rejected Mackay's reports. FN2

> FN2. Because we find all of the pour tests irrelevant, we need not decide whether the District Court abused its discretion in excluding evidence of tests conducted after the deadline for producing expert reports. We also note that the June tests, which purport to measure the amount of time wax takes to pour out of bottles lying flat on the ground, involved emptying only half the wax out of the bottle. Saldana, however, claims that the bottle at the time of her fall was empty. Reply Br. at 19 (calling the evidence that the bottle was completely empty an "un-controverted fact, indeed an admission.").

[8] The only other evidence Saldana points to regarding the amount of time the wax was on Kmart's floor is her observation of dust on the puddle after she fell. We note, however, as did the District Court, that Saldana offered no evidence of how much dust was found, how long it would have taken for dust to accumulate, or whether the dust was picked up off the floor by the spreading wax or the force of Saldana's fall. Standing alone, the mere presence of dust on the wax *after* Saldana's fall does not inform any decision as to the amount of time the wax was on the floor before the fall.

We, therefore, find that Saldana's case rests solely on speculation that events unfolded in such a way as to render Kmart negligent. FN3 There was a complete absence of relevant evidence-from either side-on the critical question of how long the wax was on the floor, and the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way. *See Fedorczyk v. Caribbean Cruise Lines,* 82 F.3d 69, 75 (3d

Cir.1996) (applying New Jersey law); *Lanni v. Pennsylvania RR*, 371 Pa. 106, 111-12, 88 A.2d 887 (1952) (finding of constructive notice impossible where no evidence existed to show how long oily spot was on the floor); *Richardson v. Ames Ave. Corp.*, 247 Neb. 128, 525 N.W.2d 212, 217 (1995) (holding a store not liable for a customer's slip and fall on liquid soap where no evidence showed how long spill had existed). FN4 As the authors of ***235** the Restatement put it in one particularly pertinent illustration:

> A, a customer in B's store, slips on a banana peel near the door, and falls and is injured. The banana peel is fresh, and there is no evidence as to how long it has been on the floor. Since it is at least equally probable that it was dropped by a third person so short a time before that B had no reasonable opportunity to discover and remove it, it cannot be inferred that its presence was due to the negligence of B.

Restatement (Second) of Torts, S 328D, Illust. 7 (discussing res ipsa loquitur). We find the facts here indistinguishable from the Restatement example. While a plaintiff need not prove his or her case by a preponderance of the evidence to survive summary judgment, Saldana has not met even her modest burden of showing at least some relevant evidence that could support her claim. Accordingly, we will affirm the District Court's grant of summary judgment.

FN3. Saldana argues that a jury could find that either Williams or a second Kmart employee working behind a nearby counter negligently failed to keep a proper lookout. A jury might, indeed, find that constructive notice requires a shorter amount of time when a spill occurs in an area of the store near an employee rather than in some remote aisle far from workers' eyes. Because Saldana does not allege that Kmart had actual notice of the spill, however, the relevant question continues to be whether the wax was on the floor long enough that some Kmart representative should have known about it.

FN4. Saldana cites *Rhoades v. K-Mart*, 863 P.2d 626 (Wyo.1993) for the proposition that whether a slippery substance was on the floor and how long it had been there are questions for the jury to determine. *Rhoades*, 863 P.2d at 630. The *Rhoades* Court noted, however, that the soda cup lid and straw found at the scene were dry, which would permit an inference that the soda had been on the floor a sufficient length of time for constructive notice. *Id.* at 630. The Wyoming Court also based its decision on an "operating methods" doctrine that neither party has argued applies to the present case. *Id.* at 630-31 (evidence showed that soda was available in the store, that soda had been spilled before, and therefore that Kmart might expect soda to be spilled at any time).

II.

While discovery was taking place in the Saldana case, Andrew C. Simpson, Esq., then of the firm of Bryant, White & Barnes, P.C., attorneys for Kmart, moved before the District Court for sanctions against Saldana's attorney, Lee Rohn, because of her use of language that he contended, in somewhat of an overstatement, violated the "fundamental precepts of legal ethics." App. at 133. As the memorandum in support of the motion succinctly put it, "[t]he basis for this motion is Attorney Rohn's repeated use of vulgarity, in particular the word 'fuck,' towards other members of the bar." *Id.* The motion was prompted by Rohn telling Simpson, in the course of a disagreement on the telephone over scheduling depositions, "you know, Andy, go fuck yourself." *Id.* at 178. The memorandum complained that Rohn "routinely" used the word "fuck" upon disagreeing with opposing counsel. *Id.* at 134.

A few preliminary comments. First, we do not condone Rohn's concededly rather free-wheeling

use of the word "fuck," and nothing that follows should be taken as any indication that we do. Second, there is no contention that at any time Rohn used that word or any vulgar language before the District Court or in any document submitted to the Court. Third, there is a long and not particularly happy history between Rohn and at least one other member of the Bryant firm in addition to Simpson who, we note, rebuffed Rohn's immediate attempt to apologize after the telephone incident. This history is not only readily apparent from the rather scathing submissions made by both sides, but from the fact that the motion and memorandum, although filed a mere three days after the fateful telephone disagreement, included a host of exhibits documenting, among other things, numerous occasions on which Rohn used the word between October 1993 and February 1997. This litany of incidents prompted Rohn to conclude that the firm had been "accumulating ammo" against her, *id.* at 190; whether or not that be the case, the history here certainly permits the conclusion that the firm's attempt to portray itself as something akin to a knight in shining armor protecting the bar and the public from "such conduct" and preventing the "further degradation of the administration of justice and the reputation of the Virgin Island Bar," *id.* at 136-37, may well be overstating its case.

***236** Rohn opposed Kmart's motion, and the District Court held a hearing, which, by order of the Court, was to have been limited "solely to the issue of Attorney Rohn's behavior in this case." *Id.* at 367. After the hearing commenced, however, the Court stated that it had not intended by that order to limit the inquiry to this case but, rather, had intended to limit the inquiry to Rohn's behavior in District Court cases, and the scope of the hearing expanded accordingly. *Id.* at 494, 496.[FN5] Kmart essentially rested on its papers and only Rohn testified, apologizing in the course of her testimony and promising to refrain from use of the word in the future. The Court, seemingly satisfied that Rohn had seen the error of her ways, barely touched on the issue of sanctions but stated that an opinion should and would issue giving very clear advice to the bar as to how attorneys are supposed to conduct themselves in and out of court. *Id.* at 537. That opinion issued more than two years after the hearing when the Court invoked Local Rule 83.2 and, in very strong language, sanctioned Rohn by ordering her to attend a legal education seminar on civility in the legal profession, write numerous letters of apology to all whom "she demeaned and insulted by her vulgarity and abusive conduct," apologize to the court reporters present at any of those proceedings, and pay the attorneys' fees and costs associated with bringing the sanctions motion. *Saldana*, 84 F.Supp.2d at 641.[FN6]

FN5. We note, without comment, that when the motion was filed, Rohn sought a continuance so that witnesses to the conduct alleged in the motion could be available to testify on her behalf. The Court denied the motion and entered the above quoted order. Thus, when, without notice, the hearing expanded, only Rohn was there to testify.

FN6. Those fees and costs were later determined to be $4,542.00.

[9][10] We generally review a court's imposition of sanctions for abuse of discretion. *Chambers v. NASCO*, 501 U.S. 32, 55, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *In re: Tutu Wells Contamination Litigation*, 120 F.3d 368, 387 (3d Cir.1997). When the procedure the District Court uses in imposing sanctions raises due process issues of fair notice and the right to be heard, this Court's review is plenary. *Tutu Wells*, 120 F.3d at 387; *Martin v. Brown*, 63 F.3d 1252, 1262 (3d Cir.1995).

[11][12] Rohn argues with considerable force that the District Court violated her due process rights to fair notice by failing to specify in advance of the hearing that sanctions would or at least could be premised on Local Rule 83.2. Generally, "[t]he Due Process Clause of the Fifth Amendment requires a federal court to provide notice and an op-

portunity to be heard before sanctions are imposed on a litigant or attorney." *Martin,* 63 F.3d at 1262. In particular, "[t]he party against whom sanctions are being considered is entitled to notice of the legal rule on which the sanctions would be based, the reasons for the sanctions, and the form of the potential sanctions." *Tutu Wells,* 120 F.3d at 379 (citing *Simmerman v. Corino,* 27 F.3d at 58, 64 (3d Cir.1994)) (emphasis in the original). "[O]nly with this information can a party respond to the court's concerns in an intelligent manner." *Id.* In other words, a party cannot adequately defend himself or herself against the imposition of sanctions unless he or she is aware of the issues that must be addressed to avoid the sanctions. *Id.*

Local Rule 83.2, which was adopted by the District Court in furtherance of the Court's inherent power to supervise attorney conduct and essentially codifies certain aspects of that power, was first mentioned by the Court in its opinion imposing ***237** sanctions, when it purported to base its sanctioning authority on that rule. That notification simply came too late, however, because Rule 83.2 was never pressed by Kmart as the basis for sanctions, was never mentioned at the hearing,[FN7] and no one-not the Court, not Kmart, and not Rohn-ever even alluded to the procedures of Rule 83.2(b)(5), much less argued why they should, or should not, be followed.[FN8]

FN7. The passing reference in a footnote in Kmart's reply to Rohn's opposition to the sanctions motion to the fact that the Court could "also" use Rule 83.2 to investigate "all" Rohn's misconduct, App. at 300, is the only prior reference to Rule 83.2. Thus, the District Court's statement that Kmart "relied heavily" on that Rule, *id.* at 634, was erroneous.

FN8. Under Rule 83.2(b)(5), the Chief Judge, if he deems it appropriate, shall refer a complaint to counsel to investigate and prosecute a formal disciplinary proceeding or make some other appropriate recommendation. The order of reference to counsel, and all further proceedings until the issuance of an order initiating a formal disciplinary action, shall be under seal. A judge would hear the matter and thereafter submit findings of fact, conclusions of law, and any recommendation to the full Court for action.

[13][14][15] While Rohn clearly did not have notice that sanctions could be imposed under Rule 83.2, she just as clearly did know that a Court has the inherent authority to impose sanctions and knew that sanctions up to and including a suspension of her license to practice were a possibility, although given the Court's last minute apparent about-face as to the scope of the hearing, it is less than clear what conduct she had notice would be considered for purposes of sanctions. We need not, however, decide whether an imposition of sanctions can be affirmed even after the purported basis of those sanctions has been rejected or whether there was some failure of due process, because we find that the quality and quantity of the transgressions found by the District Court-four uses of the word "fuck," two in telephone conversations with attorneys and two in asides to attorneys during depositions, and a post-verdict letter in which Rohn concurred with a juror who described an expert witness as a "Nazi"-simply do not support the invocation of the Court's inherent powers. Stated differently, we agree with Rohn that her use of language, while certainly not pretty, did not rise to the level necessary to trigger sanctions, at least under the Court's inherent powers.[FN9]

FN9. Parenthetically, we note, in this connection, our dismay that Mr. Simpson, in the memorandum in support of this motion, attempted to portray Rohn's conduct as "far more egregious than that of the attorney in *In re Tutu Wells,"* App. at 136, a case in which, among other things, the attorney in question during a status conference before the court "made an obscene

> gesture, pantomiming masturbation" while a woman attorney was making a presentation on behalf of her client. *In re: Tutu Wells*, 31 V.I. 175, 177 (D.V.I.1994).

"Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect[ ] and decorum[ ] in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, [19 U.S. (6 Wheat.) 204, 227] (1821); *see also Ex parte Robinson*, [86 U.S. (19 Wall.) 505, 510] (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See *Ex* ***238** *parte Burr*, [22 U.S. (9 Wheat.) 529, 531] (1824). While this power "ought to be exercised with great caution," it is nevertheless "incidental to all Courts." *Ibid.*

Chambers, 501 U.S. at 43, 111 S.Ct. 2123. The Chambers Court also warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* at 44, 111 S.Ct. 2123 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). We have, on more than one occasion, repeated that admonition. *See, e.g.*, *Prosser v. Prosser*, 186 F.3d 403, 406 n. 4 (3d Cir.1999); *Martin*, 63 F.3d at 1265; *Fellheimer, Eichen & Braverman, P.C., v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224 (3d Cir.1995).

[16][17] The language complained of in this case did not occur in the presence of the Court and there is no evidence that it affected either the affairs of the Court or the "orderly and expeditious disposition" of any cases before it. Moreover, as the *Chambers* Court observed, a court should normally look first to rule-based or statute-based powers and reserve inherent powers for those times when rule- or statute-based powers are not "up to the task." *Chambers*, 501 U.S. at 50, 111 S.Ct. 2123. As we put it in *Martin*, "[g]enerally, a court's inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists," presumably why the Court, albeit belatedly, purported to base these sanctions on Rule 83.2. *Martin*, 63 F.3d at 1265.

In addition to the fact that were sanctions warranted, Rule 83.2 would have been "up to the task," nothing "egregious" is evident here. Indeed, the District Court described itself as a "kindergarten cop" refereeing a dispute between attorneys. *Saldana*, 84 F.Supp.2d at 640. The petty and long-simmering nature of the dispute is, perhaps, best seen in some of the icing put on the cake: In addition to using the word "fuck," Rohn allegedly "sucked her teeth" (whatever that means) at a witness during a deposition, App. at 136; on another occasion, she used the word "bullshit," *id.* at 301; she also "frequently raises her voice to an unacceptable level," *id.* at 293; and once, after getting an answer she did not like at a deposition, she "pantomimed a gagging gesture (placing her finger in her mouth as if triggering the vomiting reflex)," with her side of the story being that she was trying to remove a splinter from her finger. *Id.* Rohn, of course, fought back at the same high level. Within a few days of the filing of the sanctions motion, for example, she had canvassed other plaintiffs' counsel and confirmed that "they have had to hang up on Attorney Simpson due to his rudeness and also find him rude and obnoxious to deal with." *Id.* at 125. Shortly thereafter, Rohn's partner submitted an affidavit stating that he had "on over a dozen occasions, utilized the 'F' word in discussions with Attorney Simpson" as well as in "literally hundreds of phone calls with other lawyers" without receiving one complaint; he also stated that "Simpson has

similarly utilized the 'F' word." *Id.* at 199.

We thus return to where we began-a handful of uses of the word that supposedly so offended counsel for Kmart that he felt compelled to move for sanctions under the Court's inherent powers. Because the District Court abused its discretion in granting that motion, we will reverse.

III.

For the reasons set forth above, the judgment of December 20, 1999 will be affirmed in part and reversed in part.

C.A.3 (Virgin Islands),2001.
Saldana v. Kmart Corp.
260 F.3d 228, 57 Fed. R. Evid. Serv. 795

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	MS-CS
Citation Text:	912 So.2d 823
Lines:	315
Documents:	1
Images:	0

H

Supreme Court of Mississippi.
Edwin WELSH
v.
William M. MOUNGER, II, E.B. Martin, Jr., MSM, Inc. and Mercury Wireless Management, Inc.
In re Dana E. Kelly.

Nos. 2002-CA-01245-SCT, 2005-CS-00538-SCT.
March 17, 2005.

Background: Following Supreme Court's affirmance of judgment for defendant in underlying fraud action, 883 So.2d 46, plaintiff's counsel filed motion for recusal of two Supreme Court justices. Both justices denied motions for recusal. The Supreme Court denied plaintiff's subsequent motion for reconsideration, ordering counsel to show cause why he should not be sanctioned.

Holding: Following counsel's response, the Supreme Court, Smith, C.J., held that counsel's conduct in repeatedly making false claim to Supreme Court, even after Court admonished attorney that claim was false, warranted public reprimand and a $1,000 sanction.

Sanctions imposed.

West Headnotes

Attorney and Client 45 59.8(1)

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

Attorney and Client 45 59.11

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.11 k. Fine. Most Cited Cases
(Formerly 45k58)

A public reprimand and a $1,000 sanction were warranted for attorney's flagrantly disrespectful conduct before the Supreme Court, his false accusations and repeated false statements to the Court, even after Court admonished attorney that statements were false, and his untimely motion to recuse two Justices, in light of his inability to fully accept responsibility for his improper conduct.

***824** James R. Hubbard, Dana E. Kelly, Phillip J. Brookins, John Leonard Walker, Jackson, Grady F. Tollison, E. Farish Percy, Oxford, attorneys for appellant.

John L. Maxey, George R. Fair, Paul Stephenson, Jackson, Donna Ross Philip, attorneys for appellee.

EN BANC.

SMITH, Chief Justice, for the Court.

¶ 1. This case arises from statements made by Dana E. Kelly in his motion for reconsideration of this Court's denial of his motions for the recusal of two justices made after the Court's opinion in *Welsh v. Mounger*, 883 So.2d 46 (Miss.2004), was handed down. The primary focus of Kelly's motions for reconsideration was upon Justice Dickinson. Kelly was ordered to appear before this Court, sitting en banc, on January 13, 2005, at which time he was offered an opportunity to further address the Court. Kelly declined to make any statement to the Court. His counsel, Rob McDuff, did address the Court. Due to Kelly's untimely filed motion for recusal, his refusal to accept responsibility for making inappropriate statements to this Court concerning Mounger being the "highest bidder" in Justice Dickinson's election campaign, and further due to

his repeated false statements to this Court concerning Mounger being the "single largest individual major donor to Justice Dickinson's election campaign," even after being clearly informed by this Court that the statements were false, we find that sanctions in the amount of a $1,000 and a public reprimand are appropriate.

FACTS

¶ 2. This matter began in the Chancery Court of Hinds County where Edwin Welsh, represented by Kelly, sued various defendants, including William Mounger II. After hearing testimony of over twenty witnesses over eleven days of trial, the Chancellor entered a judgment in favor of the defendants, and against Welsh. Then, Welsh appealed to this Court, whereupon we handed down a decision in July, 2004, affirming the Chancellor. Only after this Court handed down its decision which was unfavorable to Welsh, did Kelly file a motion for the recusal of Chief Justice Smith and Justice Dickinson. In the motion, Kelly alleged that "defendant Mounger was the single largest individual major donor to Justice Dickinson's election campaign."

¶ 3. By separate orders, both Justices denied the motions for recusal. In Justice Dickinson's order denying recusal, he pointed out that, when the case was decided on the merits, he was unaware of Mounger's contribution. He also pointed out that Kelly improperly waited over five months, until after this Court handed down its decision, before filing the motion to recuse. The order denying recusal also informed Kelly in no uncertain terms that the Certified Public Accountant for Justice Dickinson's campaign investigated Kelly's allegation that "defendant Mounger was the single largest individual major donor to Justice Dickinson's election campaign," and found it to be false.

***825** ¶ 4. Welsh filed a motion for reconsideration which contained the following:

> As the *Clarion Ledger* has noted, '[o]ur judicial elections have become highest-bidder exercises. It has to stop or the public will lose all faith in the system.' As the Chief Justice recently noted, '[t]rue or not, most people believe that too much money corrupts ...'
>
> In this sense, one of the two Defendants in this case was the highest bidder in the election campaign of Justice Dickinson.

Our order denying the motion for reconsideration included the following language:

> attorney Dana E. Kelly is hereby ordered to show cause, within five days from the date of the Order, why he should not be sanctioned for including the language in the motion, and is further ordered to present to this Court all evidence known to him which supports his allegation that 'one of the two Defendants in this case was the highest bidder in the election campaign of Justice Dickinson.'

¶ 5. Kelly filed his response, as ordered. He presented no evidence which supported his prior statement that "one of the two Defendants in this case was the highest bidder in the election campaign of Justice Dickinson." Instead, he insisted that the language in question "was a fair reference to documented public opinion, ..." and further told this Court that the language "was not intended and cannot fairly be read as an accusation that a judge sold his vote." Kelly appears to feel that the matter was not even fairly debatable.

¶ 6. Kelly then characterized this Court's order as "an incomplete and thus inaccurate description of the language of the motion and omits any reference to the context in which the argument is presented." Accordingly, he urged this Court to look at the "context" and ignore the literal language ("was the highest bidder"), which was the same language in which he authored and filed with this Court.

¶ 7. Kelly told this Court that the "context" is provided by a speech given by the Chief Justice of the Court, and an editorial in the *Clarion-Ledger* newspaper. The quote from the *Clarion-Ledger* (which is cited as part of the "context") states that

"[o]ur judicial elections have become highest-bidder exercises. It has to stop or the public will lose faith in the system." It does not say "*appears* to have become highest-bidder exercises," but instead says, "*have* become highest-bidder exercises." (emphasis added).

¶ 8. Thus, Kelly insists that, not only must we ignore his literal language and read it in "context" with the *Clarion-Ledger*, but we must also accept that the *Clarion-Ledger* language does not really mean what it says and should also be read in context. Kelly's efforts are a weak, disingenuous attempt to explain (rather than a complete and unequivocal apology for) his inappropriate and unfounded accusation. There is also Kelly's repeated, false representation to this Court that "Mounger was the single largest individual contributor to Justice Dickinson's election campaign...."

¶ 9. This allegation was first made by Kelly in the motion for recusal. After Justice Dickinson's campaign treasurer informed us that the statement was not accurate, this Court informed Kelly, expecting him to check the records of the Secretary of State and withdraw his false assertion. However, without bothering to carefully recheck the records of the Secretary of State, Kelly ignored this Court's admonition, and he repeated the false statement *three times* in his motion for reconsideration. He even underlined it to afford it emphasis. He then repeated the false allegation for a third time in his ***826** response to our show cause order. Only after we ordered him to appear before this Court did he check the records and learn that indeed his statement was not accurate. Even then, he filed nothing with this Court to retract or apologize for these false statements. Making a false statement to this Court, repeatedly in the face of the truth, quickly approaches what many trial practitioners would maintain to be willful, wanton, and gross negligent behavior.

¶ 10. In his submission to this Court, Kelly implied that Justice Dickinson did not respond to the issue of whether appearance of impropriety might be raised, claiming such issue was "not addressed by the September 30 order." Kelly failed to mention, however, that the issue had already been fully addressed in this Court's August 23, 2004, order denying the motion for recusal.

¶ 11. Many other problems exist with Kelly's submission to this Court, all of which are outlined in our previous orders. Until Kelly was ordered to appear before us on January 13, 2005, Kelly's submissions to this Court in this matter were disrespectful, disingenuous, and totally unapologetic. Kelly accused this Court of being "incomplete" and "inaccurate." He repeatedly made the inaccurate claim that "Mounger was the single largest individual contributor to Justice Dickinson's election campaign," even after being warned in this Court's previous order that the statement was false.

¶ 12. Kelly attempted to mislead this Court, and anyone else reading his submission, by implying in his motion for reconsideration that the issue of "appearance of impropriety" had not been addressed when, in fact, it had been addressed by this Court. Kelly informed us that this Court could not fairly read his language to say what we fairly read it to say.

¶ 13. Finally, after all this, Kelly informs us that he drafted the motion for reconsideration "with care." Kelly also filed a supplemental response which this Court read and reviewed. Practitioners before this Court must appreciate and ensure that documents filed with this Court do not contain disrespectful, inappropriate language.

¶ 14. The purpose of the January 13, 2005, sanctions hearing was to allow Kelly to make a statement to this Court, followed by questions. However, Kelly declined to make any statement to the Court, although his counsel did address the Court. Having taken the matter under advisement, en banc, we render our decision as follows.

ANALYSIS

¶ 15. It is undisputed that this Court holds at-

torneys to the highest of standards. Furthermore, this is evidenced by the fact that the Board of Bar Commissioners of the Mississippi Bar has adopted the *Lawyer's Creed* which contains standards for lawyers' conduct in association with fellow professionals. A complete recitation of the applicable rules governing professional conduct would be redundant. However, we reiterate the importance of the first as well as foremost duty of attorneys which is to represent the interests of the client. Disturbingly, Kelly blatantly disregarded the standards of conduct enumerated in the *Lawyer's Creed* as well as the Mississippi Rules of Professional Conduct. Therefore, we must ask how, then, did Kelly's repeated, knowingly false comments serve first, the interests of his client to the best of Kelly's ability? We conclude they did not serve his client's interests.

¶ 16. We are further appalled by Kelly's selective, yet purposeful dismissal of the *four* previous statements we issued ***827** whereupon we specifically informed him that he had made false accusations in his pleadings. Attorneys are officers of the Court and as such, according to Rule 3.3 of the Mississippi Rules of Professional Conduct, are charged with displaying candor towards the tribunal. Kelly violated this mandate by *knowingly* continuing to make false statements of material fact to this Court.

¶ 17. Similarly, as an officer of the courts, attorneys are expected to engage in or refrain from certain actions or behaviors in order to maintain the integrity of this noble profession. Rule 8.2 of the Mississippi Rules of Professional Conduct expressly prohibits lawyers from "mak[ing] a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge ..." Again, Kelly repeated false accusations even after having been corrected by this Court.

¶ 18. Notably, the Mississippi Bar as well as Mississippi College School of Law and the University of Mississippi School of Law have taken additional measures in order to address Ethics and Professional Conduct among the Bar. Specifically, the Mississippi Bar has devoted several issues to Ethics and Professionalism in an attempt to "reign-in" behavior similar to Kelly's. More recently, both the Mississippi College School of Law and the University of Mississippi School of Law began conducting an annual Law School Professionalism Program that is presented to entering law students. Prior to the initiation of this program, courses on Ethics and Professionalism were not available until much later in the curriculum. While sponsored by the Mississippi Bar, many noted attorneys and judges participate in this program to inform entering law students of the high standards they will be held to, and also to deter them from engaging in unprofessional, unethical, and ill-advised behavior like that exhibited by Kelly.

¶ 19. Our response to Kelly's flagrantly disrespectful conduct occurring before this Court, shall serve as a warning to the members of the Mississippi Bar, and as such, shall conclusively clarify any misconceptions regarding the possibility of tolerance to improper conduct before this Court. While Kelly is not suspended or disbarred, we shall reference other jurisdictions that have suspended as well as disbarred attorneys that behaved similarly to Kelly.

¶ 20. In *United States District Court for Eastern District of Washington v. Sandlin*, 12 F.3d 861 (9th Cir.1993), an attorney was suspended from the practice of law for six months for allegedly making false statements about a trial judge, in reckless disregard for their truth. Moreover, in *Comm. on Legal Ethics of West Virginia v. Farber*, 185 W.Va. 522, 408 S.E.2d 274 (1991), a lawyer was given a three-month suspension for three separate counts of misconduct and indefinite suspension (pending proof of emotional and psychological stability) because he had a "pattern and practice" of lashing at judges with reckless accusations. The attorney misrepresented facts in a motion to disqualify a circuit judge and made allegations against that judge to a special

prosecutor and again falsely accused the circuit judge of criminal acts. *Id.* Also, in *Bar Ass'n of Greater Cleveland v. Carlin,* 67 Ohio St.2d 311, 423 N.E.2d 477 (1981), an attorney was suspended from the practice of law for one (1) year for persistently responding to court rulings with statements of disbelief, profanity, obscenity, disparagement of the judge and other manifestations of disrespect and discourtesy.

***828** ¶ 21. The following cases are exemplary of a nation-wide judiciary that refuses to condone or even entertain conduct by attorneys that is unprofessional or unethical. In the case of *In re Evans,* 801 F.2d 703 (4th Cir.1986), a lawyer was disbarred from the practice of law for reasserting charges against a judge, without investigating. The Court stated that the "failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law." *Id.* at 706. Also, in the case of *In re Palmisano,* 70 F.3d 483 (7th Cir.1995), which was a reciprocal discipline case where Palmisano was disbarred in Illinois for making blameless accusations of crime and lesser wrongs against judges, the federal judiciary asserted that they "are no more willing to tolerate repeated, false, malicious accusations of judicial dishonesty than are state courts."

¶ 22. Likewise, in *People ex. rel. Chicago Bar Ass'n v. Metzen,* 291 Ill. 55, 125 N.E. 734 (1919), the court disbarred an attorney who brought suit against a trial judge for damages on account of his ruling and prepared newspaper articles gaining publicity for his suit. When a lawyer repeatedly made grossly disrespectful allegations against a judge, he was subsequently disbarred from the practice of law. *In re Whiteside,* 386 F.2d 805 (2d Cir.1967). Finally, in *State ex rel. Nebraska State Bar Ass'n v. Michaelis,* 210 Neb. 545, 316 N.W.2d 46 (1982), an attorney was disbarred when, while at a hearing on charges of making unfounded allegations against judges, continued his attacks, and also attacked the deciding court just prior to its decision. In the case at bar, Kelly should have timely filed his motion *before* Justice Dickinson voted on the merits of the case, he should have supported his motion with evidence in the record, and he should have presented us with legal authority, rather than a newspaper editorial and a speech given by the Chief Justice. All attorneys are required to comply with these restrictions and requirements. So must Kelly.

CONCLUSION

¶ 23. For the aforementioned reasons, this Court concludes that Kelly's behavior is unacceptable and sanctionable. This is not an issue of free speech as attorneys are required to abide by higher ethical standards of conduct and give up what normally would be considered free speech to the public at large while appearing in Court or filing documents with the Court. Zealous advocacy does not include blatant disregard or outright disrespect to the judiciary and, accordingly, will not be tolerated. Our judicial system can not properly function when lawyers demonstrate a pervasive lack of respect for judges, justices and the courts. Lawyers are thus required to show respect for the position of judge and for the institution. Due to Kelly's inability to fully accept responsibility for making false and disrespectful accusations, his repeated false statements to the Court, and his untimely motion to recuse we find that sanctions in the amount of a $1,000, and a public reprimand are appropriate.

¶ 24. **DANA E. KELLY SHALL APPEAR BEFORE THIS COURT, IN OPEN COURT, ON MAY 10, 2005, AT 9:30 A.M. TO RECEIVE A PUBLIC REPRIMAND AND SHALL PAY SANCTIONS IN THE SUM OF $1,000 TO THE CLERK OF THIS COURT WITHIN THIRTY (30) DAYS OF THE DATE OF THIS OPINION.**

COBB, P.J., EASLEY, CARLSON, AND DICKINSON, JJ., CONCUR. ***829** WALLER, P.J., DIAZ, GRAVES AND RANDOLPH, JJ., NOT PARTICIPATING.

Miss.,2005.
Welsh v. Mounger

912 So.2d 823
(Cite as: 912 So.2d 823)

912 So.2d 823

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	FEDFIND
Citation Text:	476 F.3d 462
Lines:	577
Documents:	1
Images:	0

476 F.3d 462, 67 Fed.R.Serv.3d 457
(Cite as: 476 F.3d 462)

H

United States Court of Appeals,
Seventh Circuit.
Erik REDWOOD and Jude Redwood, Plaintiffs-Appellants, Cross-Appellees,
v.
Elizabeth DOBSON and Harvey Cato Welch, Defendants-Appellees,
and
Marvin Ira Gerstein, Defendant-Appellee, Cross-Appellant.

Nos. 05-4324, 06-1165.
Argued Jan. 8, 2007.
Decided Feb. 7, 2007.

Background: The accused in a state criminal proceeding brought action under § 1983 and the civil rights conspiracy statute against the Assistant State's Attorney, the complainant, complainant's attorney in related civil litigation, and other defendants, claiming that defendants violated the First Amendment by discriminating against the accused's religion and that defendants conspired to maintain a malicious prosecution. The United States District Court for the Central District of Illinois, Michael P. McCuskey, Chief Judge, granted summary judgment in favor of defendants, denied the accused's motion for sanctions in discovery, and denied motion for attorney fees filed by complainant's attorney. Accused appealed, and complainant's attorney cross-appealed.

Holdings: The Court of Appeals, Easterbrook, Chief Judge, held that:
(1) Assistant State's Attorney was entitled to absolute immunity;
(2) Assistant State's Attorney's ordinary contact with complainant during the state criminal prosecution could not be viewed as a conspiracy;
(3) conduct of complainant's attorney in offering to seek dismissal of criminal charges against accused in exchange for settlement of civil matter did not provide basis for civil rights claim against complainant's attorney;
(4) three attorneys would be censured, and one attorney would be admonished, for conduct unbecoming a member of the bar, which occurred during deposition taken in the case; and
(5) district court acted within its discretion in denying the motion for attorney fees.

Affirmed; three attorneys censured; one attorney admonished.

West Headnotes

[1] Civil Rights 78 ⚿1376(9)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(9) k. Attorney General and prosecuting attorneys. Most Cited Cases

Conspiracy 91 ⚿13

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k12 Persons Liable
91k13 k. In general. Most Cited Cases

Assistant State's Attorney who decided to commence criminal prosecution against the accused, and who decided to put police officer before the grand jury as a summary witness rather than to call the complainant, was entitled to absolute immunity, in civil rights action brought by the accused alleging a conspiracy to maintain a malicious prosecution and discrimination against his religion in violation of the First Amendment. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1983, 1985.

[2] Civil Rights 78 ⚿1037

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1037 k. Malicious prosecution and false imprisonment; mental health commitments. Most Cited Cases

Civil Rights 78 ⚿1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and detention. Most Cited Cases

Malicious prosecution is not a constitutional tort independent of complaints about wrongful arrest and detention.

[3] Civil Rights 78 ⚿1375

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1375 k. Attorneys, jurors, and witnesses; public defenders. Most Cited Cases

Conspiracy 91 ⚿13

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k12 Persons Liable
91k13 k. In general. Most Cited Cases

Complainant in state criminal prosecution lacked absolute immunity, in civil rights action brought by the accused alleging a conspiracy to maintain a malicious prosecution and discrimination against his religion in violation of the First Amendment. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1983, 1985.

[4] Conspiracy 91 ⚿7.5(2)

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k7.5 Conspiracy to Interfere with Civil Rights
91k7.5(2) k. Rights or privileges involved. Most Cited Cases

Assistant State's Attorney's ordinary contact with the complaining witness in state criminal prosecution could not be viewed as a conspiracy under civil rights conspiracy statute, for purposes of civil rights suit brought by the accused, absent any indication that the prosecutor and complainant had a joint objective and pursued it through unlawful acts. 42 U.S.C.A. § 1985.

[5] Conspiracy 91 ⚿7.5(1)

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k7.5 Conspiracy to Interfere with Civil Rights
91k7.5(1) k. In general. Most Cited Cases

The minimum ingredient of a conspiracy, for purposes of civil rights conspiracy statute, is an agreement to commit some future unlawful act in pursuit of a joint objective. 42 U.S.C.A. § 1985.

[6] Civil Rights 78 ⚿1088(5)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(5) k. Criminal prosecutions. Most Cited Cases

Civil Rights 78 ⚿1326(10)

78 Civil Rights

78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(10) k. Attorneys and witnesses. Most Cited Cases

Attorney's conduct in offering to contact Assistant State's Attorney and ask her to dismiss a criminal charge against the accused, as part of settlement in civil case between the accused and the attorney's client, did not violate any rule of federal law and, thus, did not provide basis for accused to sue the attorney under civil rights statutes, even though the accused called the attorney's offer "extortion"; so far as § 1983 and the Constitution were concerned, criminal charges could be dismissed in order to facilitate civil settlement. 42 U.S.C.A. §§ 1983, 1985.

[7] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)3 Examination in General
170Ak1381 k. In general. Most Cited Cases

When deposing attorney asked witness questions that appeared to have the purpose of harassment, the appropriate response, as set out in rule of civil procedure, was for witness's attorney to halt the deposition and apply for a protective order, and the rule did not permit witness's attorney to simply instruct the witness to remain silent. Fed.Rules Civ.Proc.Rule 30(d), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In general. Most Cited Cases

Deposing attorney, the attorney-witness being deposed, and the witness's attorney would each be censured, as discovery sanction, for conduct unbecoming a member of the bar, which occurred during deposition taken in civil rights lawsuit; deposing attorney asked questions with no apparent relevance, such as whether the witness had ever engaged in homosexual conduct and whether witness had been ordered to obtain psychiatric counseling as part of state bar disciplinary proceedings, witness's attorney violated procedural rule in repeatedly instructing witness not to answer, witness feigned an inability to remember and purported ignorance of ordinary words, and mutual enmity did not excuse the breakdown of decorum that occurred at the deposition. Fed.Rules Civ.Proc.Rules 30(d), 37(a)(4), (b)(2), 28 U.S.C.A.

[9] Federal Civil Procedure 170A 1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In general. Most Cited Cases

Attorney representing one of defendants in civil rights case would be admonished, as a discovery sanction, for conduct unbecoming a member of the bar, which occurred during deposition taken by plaintiff's attorney of one of the other defendants in the suit; the admonished attorney had improperly joined objections by the witness's attorney instructing the witness not to answer, which violated procedural rule, and the admonished attorney inaccurately stated to deposing attorney that the questions asked at the deposition had to meet the standard of the rules of evidence. Fed.Rules Civ.Proc.Rules 30(d), 37(a)(4), (b)(2), 28 U.S.C.A.

[10] Federal Civil Procedure 170A 2840

170A Federal Civil Procedure
170AXX Sanctions

170AXX(F) On Appeal
170Ak2837 Grounds
170Ak2840 k. Frivolousness; particular cases. Most Cited Cases

While plaintiffs' principal arguments on the merits of their claims were frivolous, on appeal from summary judgment granted in favor of defendants in civil rights case, sanctions for frivolous appeal were not warranted, where plaintiffs' appeal was successful with respect to the issue of discovery sanctions, and fault was widely distributed in the case. F.R.A.P.Rule 38, 28 U.S.C.A.

[11] Civil Rights 78 ⚿1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to defendants; frivolous, vexatious, or meritless claims. Most Cited Cases

District court acted within its discretion, in § 1983 action brought by an accused for alleged violation of his constitutional rights in connection with state criminal prosecution, in refusing to award attorney fees to one of the defendants, where the state-law claims presented by accused and his wife were not as fatuous as those arising under federal law. 42 U.S.C.A. §§ 1983, 1988.

[12] Civil Rights 78 ⚿1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of litigation; prevailing parties. Most Cited Cases

Civil Rights 78 ⚿1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to defendants; frivolous, vexatious, or meritless claims. Most Cited Cases

The legal rule created by civil rights statute allowing prevailing party to recover attorney fees is asymmetric in plaintiffs' favor. 42 U.S.C.A. § 1988.

[13] Federal Courts 170B ⚿830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, attorney fees and other allowances. Most Cited Cases

Appellate review of the district court's decision on whether to award attorney fees in civil rights case is deferential. 42 U.S.C.A. § 1988.

[14] Federal Civil Procedure 170A ⚿2847

170A Federal Civil Procedure
170AXX Sanctions
170AXX(F) On Appeal
170Ak2847 k. Type and amount of sanction. Most Cited Cases

Appellants' and appellee's conduct in filing frivolous motions to strike portions of the opposing side's appellate briefs was not appropriate grounds for monetary sanctions, where the motions were filed before issuance of Court of Appeals' decision holding that motions to strike portions of brief were pointless and warranted sanction.

[15] Federal Courts 170B ⚿713

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk713 k. Statement of case or facts; appendix. Most Cited Cases

Federal Courts 170B ⚿715

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk715 k. Defects, objections and amendments; striking briefs. Most Cited Cases

A brief, or reply brief, is the appropriate means

to contest the accuracy of the other side's statement of facts in their briefs on appeal, rather than filing a motion to strike portions of brief.

***465** Judith M. Redwood (argued), Redwood Law Office, St. Joseph, IL, Charles L. Danner, Peoria, IL, for Plaintiff-Appellee.

Jude Redwood, pro se.

James C. Kearns, Keith B. Hill (argued), Heyl, Royster, Voelker & Allen, Urbana, IL, Roger B. Webber (argued), Beckett & Webber, Urbana, IL, David N. Rumley, Urbana, IL, for Defendant-Appellant.

Before EASTERBROOK, Chief Judge, and ROVNER and WOOD, Circuit Judges.

EASTERBROOK, Chief Judge.

This is a grudge match. Harvey Cato Welch represented Erik Redwood in a criminal prosecution for battery. Redwood was convicted and maintains that Welch is at fault. Redwood wants Welch to sign an affidavit confessing that he supplied ineffective assistance; he believes that with such an affidavit he could have his criminal record expunged. Welch, who believes that his legal work met professional standards, has refused to fall on his sword for Redwood's benefit. Redwood has retaliated by insulting Welch in public, calling him, among other things, a "shoe-shine boy." Redwood is white and Welch black; Welch believes that this phrase, when spoken to an adult, is a racial slur.

During October 1998 a scuffle occurred after Redwood again called Welch a "shoe-shine boy." Redwood filed a battery suit in state court; Welch filed a defamation counterclaim and asked the State's Attorney to prosecute Redwood for inciting a breach of the peace. Erik Redwood was represented in that litigation by attorney Jude Redwood, his wife, who also is a plaintiff in the federal suit. Elizabeth Dobson, an Assistant State's Attorney, decided that Erik Redwood had committed a hate crime by using a demeaning term that led to a physical confrontation. Officer Troy Phillips of the Urbana Police Department presented the evidence to the grand jury, which returned an indictment. Attorney Marvin Gerstein, representing Welch in the civil litigation, later wrote to Jude Redwood suggesting that, if the litigation could be resolved amicably, he would try to persuade Dobson to dismiss the criminal charge. The Redwoods rejected that offer. The civil case went to trial; while the jury was deliberating, the parties reached a settlement. Meanwhile the criminal prosecution had been dismissed on the ground that the state's hate-crime law does not apply to speech that does not threaten immediate physical injury. See *People v. Redwood*, 335 Ill.App.3d 189, 269 Ill.Dec. 288, 780 N.E.2d 760 (4th Dist.2002).

While the prosecutor's appeal in the criminal prosecution was pending, the Redwoods filed this federal action against Dobson, Welch, Gerstein, Phillips, and the City of Urbana. The complaint, signed by Jude Redwood as counsel (she is also a plaintiff, alleging loss of consortium) accuses the five defendants of violating the first amendment by discriminating against Erik Redwood's religion (which, he maintains, leads him to "teach truth and righteousness to all persons, including defendant Harvey Welch", a curious euphemism for personal insults) and of conspiracy to ***466** maintain a malicious prosecution. These acts are alleged to violate 42 U.S.C. § 1983 and § 1985, though the Redwoods have never tried to explain why a state may not apply a rule that is neutral with respect to the speaker's religion. See *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); cf. *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). The complaint also presents several claims under state law.

Urbana settled the litigation for nuisance value. After extended discovery, the district court granted summary judgment for the four other defendants. Phillips prevailed as a result of the absolute immunity that applies to witnesses in criminal pro-

ceedings. See *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). The Redwoods have abandoned their claims against him but appeal with respect to the remaining three defendants. The Redwoods also appeal from the denial of their motion for sanctions in discovery, Gerstein has filed a cross-appeal to protest the district court's denial of his motion for attorneys' fees, and both sides ask us to award sanctions for what they call frivolous arguments in this court.

[1][2] Dobson, Welch, and Gerstein are right to label most of the Redwoods' appellate arguments as frivolous. "Malicious prosecution" is not a constitutional tort independent of complaints about wrongful arrest and detention, and Erik Redwood was never placed in custody. See *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.2001). Dobson's decision to commence a criminal prosecution is covered by absolute immunity. See *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Although the plaintiffs insist that Dobson is being sued for administrative rather than prosecutorial duties, the only "administrative" act about which they complain is her decision to put Phillips before the grand jury as a summary witness, rather than to call Welch. That's precisely the kind of prosecutorial decision that immunity protects. Unlike activity of the sort at issue in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)-such as a prosecutor's personal conduct of an interrogation, or a pre-litigation search or seizure-the choice of witnesses to present is part of the prosecutorial function and cannot independently violate anyone's rights (as a search or seizure might do).

[3][4][5] As the complainant in the criminal prosecution, Welch lacks absolute immunity, see *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), but he's not a state actor and so can't be liable under § 1983 in the first place. That is why the Redwoods invoke 42 U.S.C. § 1985(3), which covers conspiracies between public and private actors. But where's the conspiracy? Plaintiffs treat all contact between prosecutors and complaining witnesses as "conspiracy." The minimum ingredient of a conspiracy, however, is an agreement to commit some future unlawful act in pursuit of a joint objective. See *United States v. Lechuga*, 994 F.2d 346 (7th Cir.1993) (en banc). The record in this case would not permit reasonable jurors to conclude that Welch and Dobson had a joint objective, let alone that they agreed to pursue it through unlawful acts. Welch complained to the prosecutor, seeking an end to what he deemed racist harassment; Dobson acted as she conceived the public interest to require. Dobson had no reason to do any favors for Welch and received nothing (except this lawsuit) in return for her official actions. No prosecutor handles a case in an isolation tank. Discussions with victims, witnesses, and police are common. If these ***467** ordinary acts amount to "conspiracy" to violate the Constitution, then immunities will be worthless and both witnesses and prosecutors would be induced to remain passive rather than enforce the criminal law vigorously.

[6] Then there is Gerstein, whose only role was to represent Welch in the tort litigation, and neither § 1983 nor § 1985(3) applies to that private activity. The Redwoods believe that Gerstein acted unethically by offering to contact Dobson and ask her to dismiss the criminal charge as part of a settlement. Whether or not that step was appropriate as a matter of legal ethics in Illinois, it does not violate any rule of federal law-for so far as § 1983 and the Constitution are concerned, criminal charges may be dismissed in order to facilitate civil settlement. See *Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). Calling the offer "extortion," as the plaintiffs do, does not make it so, as *Newton* demonstrates. See also *Dye v. Wargo*, 253 F.3d 296 (7th Cir.2001). If Gerstein acted wrongfully in suggesting a global resolution, the Redwoods' remedy lay in the state court handling the civil litigation (to which they never complained), or the Attorney Registration and Discip-

linary Commission of Illinois (to which they did), rather than in a federal lawsuit.

The only reason why the Redwoods' appeal is not wholly frivolous is that the district court dismissed the state-law claims on the merits rather than relinquishing supplemental jurisdiction. A court that resolves all federal claims before trial normally should dismiss supplemental claims without prejudice. 28 U.S.C. § 1367(c)(3). That both sides have allowed animosity to get the better of legal judgment, however, implies the wisdom of bringing the contretemps to a conclusion in a single forum. The state-law claims were not complex. On appeal, the Redwoods treat them as replays of the federal claims, and their principal argument is that a jury could find a conspiracy among the defendants. As we have rejected that argument with respect to the federal theories, it fails for state-law theories as well.

A profusion of motions and cross-motions for sanctions-and the conduct underlying some of these motions-demonstrates the extent to which counsel have allowed personal distaste to displace dispassionate legal analysis. Most depositions are taken without judicial supervision. Witnesses often want to avoid giving answers, and questioning may probe sensitive or emotionally fraught subjects, so unless counsel maintain professional detachment decorum can break down. That happened here; the results were ugly.

Gerstein's deposition was taken by Charles L. Danner on behalf of both Redwoods, though Jude Redwood attended and sometimes acted as counsel in addition to her role as a plaintiff. Gerstein's counsel was Roger Webber, though Gerstein himself peppered the transcript with legal arguments. The deposition began badly when Danner spent the first 30 pages or so of the transcript exploring Gerstein's criminal record-mostly vehicular violations. Danner made no effort to explain how these questions could lead to admissible evidence, and they got under Gerstein's skin. After Gerstein spontaneously refused to answer some of the questions (remarking "That's none of your business"), Webber began instructing Gerstein not to answer.

[7] Webber gave no reason beyond his declaration that the questions were designed to harass rather than obtain information-which may well have been their point, but Fed.R.Civ.P. 30(d) specifies how harassment is to be handled. Counsel for the witness may halt the deposition and apply for a protective order, see ***468**Rule 30(d)(4), but must not instruct the witness to remain silent. "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed.R.Civ.P. 30(d)(1). Webber violated this rule repeatedly by telling Gerstein not to answer yet never presenting a motion for a protective order. The provocation was clear, but so was Webber's violation.

Danner then turned to Gerstein's troubles with the state bar, another topic whose relevance (or ability to lead to relevant evidence) has never been explained. Gerstein was censured for misconduct in 1991 and suspended for a month in 2002. Although the reasons are matters of public record, Danner demanded that Gerstein confess them in the deposition; Gerstein professed inability to remember, and when Danner inquired whether Gerstein had been ordered to obtain psychiatric counseling or anger-management therapy, Webber again told him not to answer. Richard Klaus, representing Dobson, opined that Danner had committed a misdemeanor under Illinois law by asking questions about Gerstein's mental health.

What happened next must be set out in full to be believed:

> Q [by Danner]. Mr. Gerstein, have you ever engaged in homosexual conduct?
>
> MR. WEBBER: Objection, relevance.

MR. KLAUS: I join.

MR. WEBBER: I believe it violates Rule 30, and I'm instructing him not to answer the question.

A. I'm not answering the question.

MR. KLAUS: I join the objection.

Q. Mr. Gerstein, are you involved in any type of homosexual clique with any other defendants in this action?

MR. WEBBER: Same objection. Same instruction.

MR. KLAUS: I join the objection.

Gerstein would have been entitled to stalk out of the room. Webber justifiably could have called off the deposition and applied for a protective order (plus sanctions). Fed.R.Civ.P. 26(c), 30(d)(3), (4). Instead he told Gerstein not to answer, which was untenable as no claim of privilege had been advanced.

After a brief recess, Gerstein acquired "amnesia" and started playing word games.

Q. During the last recess that we had that we just reconvened from, did you consult with your attorney concerning this deposition?

Instead of asserting the attorney-client privilege, a genuine reason not to answer (though perhaps consultation would have violated an order that the deposition be conducted without such conferences), Gerstein played dumb.

A. I don't understand the question.

Q. We just had a recess.

A. I understand that.

Q. Do you understand that? During that recess period, did you take that time to consult with your attorney regarding this deposition?

A. I don't know what you mean by the word consult.

Q. Did you speak with your attorney regarding this deposition?

A. I don't think so. I don't know.

Q. Do you know how-did you write anything to your attorney during that recess?

A. Write anything?

Q. Correct.

***469** A. No.

Q. Did you speak with your attorney during that recess?

A. I had words with my attorney. We exchanged a conversation.

Q. Were those conversations-or strike that. Did any of the comments in that conversation or those conversations refer to any aspect of this deposition?

A. I can't recall.

The deposition fills a further 98 pages of transcript, unedifying to the end. At one point Danner asked whether the secretary who had typed the letter in which Gerstein offered to ask Dobson to dismiss the criminal prosecution was married; Webber instructed Gerstein not to answer. Danner asked whether the secretary had children; before Webber could leap in, Gerstein replied that she did. What this-indeed, what most of Danner's questions-had to do with the legal proceeding against Gerstein is unfathomable. Plaintiffs say that Gerstein once gave Danner "the finger," and though the transcript does not reflect that gesture the proceedings were heated enough that this could well have happened. (Gerstein does not deny this accusation; a video tape of the deposition was made, but we have not consulted it.)

[8][9] Danner's conduct of this deposition was shameful-not as bad as the insult-riddled performance by Joe Jamail that incensed the Supreme Court of Delaware, see *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 52-57 (Del.1994), but far below the standards to which lawyers must adhere. Gerstein, Webber, and Klaus were goaded, but their responses-feigned inability to remember, purported ignorance of ordinary words (the "consult" episode was not the only one), and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order-were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.

At one point, after Jude Redwood said that, because this was a deposition rather than a trial, Danner was entitled to fish for evidence whether or not the answers would be admissible, Klaus replied: "[T]his is not a discovery deposition. There's no such distinction or dichotomy under the federal rules. Everything that is asked here must meet the standard of the federal rules of evidence." Klaus either did not know, or did not care, that discovery may be used to elicit information that will lead to relevant evidence; each question and answer need not be one that could be one that would itself be proper at trial. But Danner's questions had ventured so far beyond the pale that overstatement on the other side was inevitable.

When the Redwoods sought sanctions in the district court, the judge declared that everyone had behaved badly and that, because Danner was the greater offender, no sanctions would be appropriate. The district judge remarked that it was "ludicrous" for the Redwoods to argue that lawyers may not instruct witnesses not to answer. Given Rule 30(d)(1), however, the Redwoods had (and have) a meritorious position on this issue.

Mutual enmity does not excuse the breakdown of decorum that occurred at Gerstein's deposition. Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to ***470** professional standards is vital, for the judge has no direct means of control.

Sanctions are in order, but they need not be monetary. See Fed.R.Civ.P. 30(d)(3), 37(a)(4), (b)(2). Because the arguments pro and con have been fully ventilated in this court, and none of the attorneys has asked for a hearing under Fed. R.App. P. 46(c), we see no need to drag out this controversy with a remand. Attorneys Danner, Gerstein, and Webber are censured for conduct unbecoming a member of the bar; attorney Klaus is admonished. (We differentiate in this way because a censure is the more opprobrious label, see *In re Charges of Judicial Misconduct*, 404 F.3d 688, 695-96 (2d Cir.2005), and Klaus's misconduct is substantially less serious than that of the other lawyers.) Any repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment.

[10] We are not done with motions and cross-motions for sanctions and other relief. Gerstein has asked us to penalize the Redwoods under Fed. R.App. P. 38 for taking a frivolous appeal. As we have explained, the Redwoods' principal arguments on the merits were frivolous, but their appeal with respect to discovery sanctions has been successful. Although we have the discretion to award Rule 38 sanctions issue-by-issue as well as appeal-by-appeal, we elect not to do so because fault is widely distributed. It should be plain to the Redwoods from what we have said, however, that any effort to resume this spite contest under another legal theory would not be in their financial interest (and would jeopardize Jude Redwood's future ability to practice law in federal court).

[11] In addition to asking for sanctions in re-

sponse to the Redwoods' appeal, Gerstein filed a cross-appeal to contest the district court's order denying his motion in that forum for attorneys' fees under 42 U.S.C. § 1988. Such awards in a defendant's favor are proper only if the suit is frivolous or vexatious. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The Redwoods responded with a Rule 38 motion of their own, asking us to award attorneys' fees in their favor on the theory that Gerstein's cross-appeal is frivolous. In a small concession, Gerstein has not asked for fees under Rule 38 on the theory that the Redwoods' Rule 38 motion is frivolous; perhaps he fears infinite regress.

[12][13] Any defendant who seeks fees under § 1988 for the cost of defense in the district court has a tough row to hoe, for two reasons-the legal rule that § 1988 creates is asymmetric in plaintiffs' favor, see *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980), and appellate review of the district court's decision is deferential. See *Webb v. Board of Education*, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). The district judge did not abuse his discretion. As we've mentioned, the state-law claims presented under the supplemental jurisdiction were not as fatuous as those arising under federal law. Although we would have been inclined to award sanctions were the decision ours to make, it is not; discretion includes the freedom to take decisions other than the appellate tribunal's first preference.

Finally, we have multiple motions to strike portions of the opposing side's briefs. The Redwoods asked this court to strike parts, if not all, of the statement of facts in Dobson's brief; Gerstein asked us to strike parts, if not all, of the statement of facts in the Redwoods' brief. Each motion-which was deferred by a motions panel to the hearing on the merits-asserts that statements in the other side's ***471** brief misrepresent the record. And each motion was met, first, with a defense of the brief's accuracy and, second, with a motion under Rule 38 for sanctions for filing a frivolous motion to strike.

[14][15] Each of the motions to strike was indeed frivolous, for the reasons given in *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (2006) (Easterbrook, J., in chambers). The Federal Rules of Appellate Procedure provide a means to contest the accuracy of the other side's statement of facts: that means is a brief (or reply brief, if the contested statement appears in the appellee's brief), not a motion to strike. Motions to strike sentences or sections out of briefs waste everyone's time. They go to a motions panel, which does not know (and cannot efficiently learn) which statements are accurate depictions of the record and, if erroneous, whether the error is legally material. If the motions panel defers decision to the hearing on the merits, as was done here, then the motion does nothing except increase the amount of reading the merits panel must do, effectively giving each side argument on top of the word limit set by Fed. R.App. P. 32. Motions to strike words, sentences, or sections out of briefs serve no purpose except to aggravate the opponent-and though that may have been the goal here, this goal is not one the judicial system will help any litigant achieve. Motions to strike disserve the interest of judicial economy. The aggravation comes at an unacceptable cost in judicial time.

These motions were filed before the opinion in *Custom Vehicles* issued, however, and therefore are not appropriate grounds of monetary sanctions. (It is too late to count the motion toward the allowable length of the brief, the sanction adopted in *Custom Vehicles.)* Future motions of this kind will not be so charitably received.

The judgment is affirmed. Attorneys Charles L. Danner, Marvin Ira Gerstein, and Roger B. Webber are censured for conduct unbecoming a member of the bar, and attorney Richard Klaus is admonished for conduct unbecoming a member of the bar.

C.A.7 (Ill.),2007.
Redwood v. Dobson
476 F.3d 462, 67 Fed.R.Serv.3d 457

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	CA-CS
Citation Text:	76 Cal.App.4th 232
Lines:	612
Documents:	1
Images:	0

76 Cal.App.4th 232, 90 Cal.Rptr.2d 198, 99 Cal. Daily Op. Serv. 9037, 1999 Daily Journal D.A.R. 11,531
(Cite as: 76 Cal.App.4th 232, 90 Cal.Rptr.2d 198)

H

Court of Appeal, Third District, California.
The PEOPLE, Plaintiff and Respondent,
v.
Paul O. CHONG, Defendant and Appellant.

No. C030332.
Nov. 15, 1999.
Certified for Partial Publication. FN*

FN* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the FACTS AND PROCEDURE and parts II through VI of the DISCUSSION.

Review Denied Feb. 23, 2000.

Defendant was convicted, in the Superior Court, Sacramento County, No. 96F07352,Richard H. Gilmour, J., of crimes relating to insurance fraud scheme involving vehicle exports. Defendant appealed. The Court of Appeal, Scotland, P.J., held that the trial court did not commit judicial misconduct by repeatedly admonishing defense counsel in front of the jury.

Affirmed.

West Headnotes

[1] Criminal Law 110 1035(8.1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(8) Remarks and Conduct of Judge
110k1035(8.1) k. In General. Most Cited Cases

Defendant waived his claim that the trial court committed judicial misconduct by repeatedly admonishing defense counsel in front of the jury, where defense counsel did not ask the court to advise the jurors that the judge's comments to defense counsel were not intended to imply any judgment by the court as to the merits of defendant's case.

[2] Attorney and Client 45 32(4)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(4) k. Attorney's Conduct and Position in General. Most Cited Cases

An attorney, however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice.

[3] Attorney and Client 45 32(8)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(8) k. Dignity, Decorum, and Courtesy; Criticism of Courts. Most Cited Cases

An attorney must not willfully disobey a court's order and must maintain a respectful attitude toward the court. West's Ann.Cal.Bus. & Prof.Code §§ 6068, 6103.

[4] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Con-

duct as to Argument and Conduct of Counsel. Most Cited Cases

When, during the course of trial, an attorney violates his or her obligations as an officer of the court, the judge may control the proceedings and protect the integrity of the court and the judicial process by reprimanding the attorney.

[5] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

Because events happen rapidly during the course of a trial, it is not always feasible to excuse the jury in order that counsel may be reprimanded, and when counsel defies the authority of the court in the presence of the jury, it is sometimes necessary to reprimand counsel in the presence of the jury.

[6] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority, and this type of attorney misconduct must be dealt with in the jury's presence, in order to dispel any misperception regarding the credence that jurors must give the court's instructions.

[7] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

When an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to repeatedly excuse the jury to admonish counsel.

[8] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

The court may act swiftly and strongly in the presence of the jury to admonish an attorney, if necessary to preserve the integrity of the judicial process.

[9] Criminal Law 110 655(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(1) k. In General. Most Cited Cases

The court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that the court is allying itself with the prosecution.

[10] Criminal Law 110 655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

Trial court did not commit judicial misconduct by repeatedly admonishing defense counsel in front of jury, where immediate admonishments were appropriate response to defense counsel's disparaging comments to the court, violation of court rulings, and repeated interruptions of the court and witnesses, and jury was instructed that the court had not intended by anything it had said or done to intimate or suggest what the jury should find to be the facts on any questions submitted. CALJIC 17.30.

****199 *234** John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Stan Cross and Michael J. Weinberger, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

SCOTLAND, P.J.

A jury convicted defendant Paul O. Chong of crimes relating to his participation in an insurance fraud scheme in which luxury cars were purchased in the United States, shipped to Hong Kong for sale in China, and then reported stolen here to collect insurance proceeds. Defendant was granted probation on the condition, among others, that he serve a period of confinement in the county jail. On appeal, he raises a variety of contentions.

In the published portion of this opinion, we reject defendant's assertion that the trial court committed prejudicial error by repeatedly admonishing defense counsel, Maureen Kallins, in the presence of the jury. Defendant does not try to justify Kallins's actions which led to the admonitions. Instead, he argues the "trial judge committed misconduct by rendering undiluted accusations and condemnations in the jury's presence" instead of ***235** "simply excusing the jury when [the court] felt the necessity of admonishing or citing [Kallins's] conduct...."

As we shall explain, due to the many instances of unprofessional conduct in which Kallins made disparaging comments to the court, violated court rulings, and repeatedly interrupted the court and witnesses, it was appropriate for the court to immediately admonish Kallins in public rather than continuously disrupt the trial by excusing the jurors and admonishing her outside their presence.

In the unpublished parts of this opinion, we find no merit in defendant's remaining contentions. Accordingly, we shall affirm the judgment.

****200** FACTS AND PROCEDURE[FN**]

FN** See footnote *, *ante*.

DISCUSSION

I

Citing 10 instances of allegedly "hostile comments" that the trial court made to defense counsel, Maureen Kallins, in the jury's presence, defendant claims the comments constituted judicial misconduct which interfered with his Sixth Amendment right to counsel.

Background

Our review of the record reveals the 10 incidents involved the court responding to Kallins's disrespectful attitude toward the judge or opposing counsel, her disobedience to court rulings, her inappropriate comments in front of the jury, and her repeated interruptions of the proceedings.

The record further shows these incidents were representative of Kallins's unprofessional conduct throughout the course of the trial.

For example, at one point outside the presence of the jury, Kallins accused the trial judge of being intellectually dishonest. This comment occurred during the following exchange after Kallins interrupted the court's explanation of the factual basis for its ruling permitting a copy of a business record to be introduced in evidence. "THE COURT: — you're interrupting. Don't do that, please. [¶] MS. KALLINS: You're just making up facts. There was no ***236** testimony. [¶] THE COURT: Ms. Kallins, Ms. Kallins, don't interrupt, please. That was the way I recall the testimony. [¶] Is that the way you recall the testimony, Mr. Hengel [the prosecutor]? [¶] [THE PROSECUTOR]: Yes, your Honor. [¶] MS. KALLINS: How convenient. [¶] THE COURT: Ms. Kallins, those types of comments are — are rude and uncalled for. And I really appreciate it if you would desist. I realize there's no jury here. But that type of — you must realize that that type of conduct is uncalled for. [¶] MS. KALLINS: And you must realize that intellectual dishonesty is appalling to me.... And to hear the Court paraphrasing the testimony in a way that is less than complete, and is a complete aberration of what was testified to.... [¶] THE COURT: All right. We're not — I'm just telling you please try and maintain some modicum of civility here. [¶] MS. KALLINS: Well, I would—[¶] THE COURT: I would appreciate it."

Although Kallins responded that she wanted to be civil, she again accused the judge of being dishonest. When Kallins explained why she thought the evidence did not support the judge's factual finding, the following exchange occurred: "THE COURT: All right. I appreciate ... the fact that you're trying to assist the Court. [¶] I would also ... appreciate [it] if you would just abide by the rules of decorum, ... without which [we] just can't function. [¶] The classic example is, as I explained to the jury from the first day ... is that the job of the court reporter is to try and write down everything that's said. And that's why we're not to interrupt. And you — yet you continue to do that in front of the jury, which has been very embarrassing to the Court. [¶] I [would] appreciate it if you would desist from that type of conduct in front of the jury. [¶] MS. KALLINS: Are you — are you done, your Honor, because I want to say something about that [whereupon Kallins complained that the prosecutor had interrupted her questioning of witnesses]." Then, when the court began ruling that a copy of the original document would be admitted into evidence, Kallins again interrupted, leading to the following exchange: "THE COURT: Ms. Kallins, please, I was making a ruling and you interrupted me again. [¶] MS. KALLINS: But you're wrong.... [¶] THE COURT: Ms. Kallins, Ms. Kallins, can you please just [abide] by my request — [¶] MS. KALLINS: Oh, absolutely. Absolutely. [¶] THE COURT: — ****201** and not interrupt? [¶] MS. KALLINS: Absolutely. I am sorry, your Honor. Excuse me. [¶] THE COURT: Somehow I do not detect that that apology is sincere, Ms. Kallins[,] [b]ased upon the tone of voice which you're using, which is very facetious and demeaning. [¶] MS. KALLINS: And I would — I would join that."

Kallins's derogatory comments during trial were directed at the prosecutor and witnesses as well. At one point in front of the jury, Kallins suggested, without basis, that the prosecutor had "tampered" with evidence. On another ***237** occasion, Kallins subjected a witness to a difficult and sometimes sarcastic cross-examination. After the witness, a records keeper for a shipping company, broke down and cried outside the jury's presence during a recess, Kallins accused the prosecutor of "parad[ing]" the crying witness down the hallway in front of jurors. In Kallins's words: "It was done intentionally, and it was clearly done with the intent to influence the jury that I was the big, bad lawyer who had impeached and made cry the sad, little keeper of the records...."

Near the end of trial, outside the presence of the jury, the court ultimately cited counsel for contempt for violating court orders not to argue with the court's rulings and not to make "snide remarks and asides ... that are obviously designed to influence the jury in response to the Court's rulings."

The court explained: "I've given you a chance to make any kind of ... apology. And you not only refuse, you don't think it's necessary. [¶] And you have absolutely no insight into the error of your ways as to what is appropriate conduct and what is inappropriate conduct. You've been boisterous and disrespectful and blatantly rude to the Court throughout this trial. [¶] And the main concern that I have is not my own dignity, so to speak, it's the dignity of the Court which is at stake. [¶] But it's my concern ... that [at] some point the People are not going to get a fair trial if you keep making these asides.... [¶] ... Forcing the opponent to continuously object to improper questions, it's unfair and unethical."

In response, Kallins stated, "Your Honor, listen, I'm 50 years old. I don't want to have my behavior decided like I'm an eight year old. [¶] You show respect for me as well." She then accused the court of being a "bald-face li[ar]," whereupon the court again held her in contempt.

The Incidents of Which Defendant Complains

Having illustrated the general nature of Kallins's attitude during trial, we turn to the 10 incidents of which defendant complains, in the order they occurred during trial.

1. The first was a rather innocuous exchange near the beginning of trial involving the automobile dealership's documents relating to defendant's purchase of a BMW. Because the original documents were in the possession of the United States District Court as evidence in a federal action against others involved in the insurance fraud scheme, the prosecutor sought to admit copies of the documents. When Kallins objected, the trial court held a hearing outside the jury's presence. The court concluded the copies would be admissible if a proper foundation were laid in accordance with ***238**Evidence Code section 1550. In the interest of judicial economy, the court allowed the prosecution to mark the documents for identification and to have the dealership's business manager testify that the exhibits were records of defendant's purchase of the BMW. To accommodate Kallins's request to examine the original documents, the prosecutor indicated that he had arranged for the United States Attorney's Office to obtain a federal court order permitting Kallins to see the originals.

When, on cross-examination of the business manager, Kallins asked what documents had been given to the investigator that "we so far have not been able to see," the court sustained the prosecutor's objection****202** that the question was "irrelevant and misleading" and ordered "the question be stricken." Despite the court's ruling, Kallins again asked the witness about an original document which "so far the jury hasn't been able to see" and noted that, "for whatever reason, that original is a carbon, isn't that right?" When the prosecutor objected, the court admonished Kallins that her statement "the jury has not been able to see [the original document] is gratuitous and irrelevant. And in my opinion, it tends to inject extraneous matters into these proceedings, which we've discussed extensively outside the presence of the jury. And as you know, the Court has been spending some time addressing that very issue. [¶] ... [I]t will be my decision to make as to whether ... [the jurors must] see the originals or whether ... the copies are [admissible] as a legal matter.... [¶] So that's the issue that's pending outside their knowledge ... [¶] ... [and] why you shouldn't be bringing it up."

The following colloquy then occurred: "MS. KALLINS: Look, Judge, this witness testified he gave the originals to [the investigator]. [¶] THE COURT: I don't want to argue—[¶] MS. KALLINS: That's all I'm saying. [¶] THE COURT:—Ms. Kallins. [¶] MS. KALLINS: I'm not arguing. [¶] THE COURT: Yes, you are. I just sustained the [objection]. [¶] Ask your next question. [¶] MS. KALLINS: Okay. That's fine. That's absolutely fine. That's correct."

2. When Kallins later disregarded the court's direction to "not argue with the Court in front of the jury" and demanded that the court explain a ruling, the following exchange occurred: "THE COURT:

... Ms. Kallins, it's not your position to interrogate me in front of the jury. [¶] MS. KALLINS: Well, I don't mean to interrogate you, your Honor. [¶] THE COURT: Well, don't do it. [¶] MS. KALLINS: Well — [¶] THE COURT: Listen to me, I'm making a ruling. You do not argue with the Court in front of the jury. You know that."

3. Kallins objected to the prosecutor's attempt to use an overhead projector to show to the jury a document which had been marked for ***239** identification but not yet received in evidence. Overruling the objection, the court explained that, based upon its earlier discussion with counsel, it was satisfied the document ultimately would be admitted and that, if the court was wrong, Kallins could move for a mistrial. Kallins stated: "So in other words, you can put anything you want on the [overhead projector] and later you ask to admit it, is that the ruling?" The court replied: "Now, Ms. Kallins, you're being factitious [we assume the court meant facetious or the court reporter misreported the comment]."

4. When the prosecutor objected to the lack of foundation for introduction of a defense exhibit, Kallins stated: "Maybe [the prosecutor] will stipulate that [the exhibit] was sent to me as 122 in discovery ... and this can be entered into evidence so the jury can take a look at it at this time." The prosecutor again objected, and the following exchange occurred: "THE COURT: Remember, Ms. Kallins, we [had an] agreement before court that we weren't supposed to ask each other about stipulations in front of the jury[.] [¶] Do you remember that? [¶] MS. KALLINS: Yes, your Honor, I remember a lot of what we talked about before the Court, but this was given to me in discovery. I don't see why the jury shouldn't be able to see it—wait a minute, your Honor. [¶] THE COURT: Wait. This is an agreement that you agreed to—[¶] MS. KALLINS: Right. [¶] THE COURT:—that neither side would ask for a stipulation in front of the jury. So let's try to abide by the agreement that we've made. [¶] ... Q (By Ms. Kallins) This is Defense B, without talking about what's on it, because we know it's not in evidence because it seems like my things can't come into evidence. [¶] ... [¶] THE COURT: Stop for just a second. Ms. ****203** Kallins, please do not make gratuitous comments such as you just did — [¶] MS. KALLINS: I'm not. [¶] THE COURT: — that some of my things can't come [in]. [¶] MS. KALLINS: None of my things. It's not some, it's none. [¶] THE COURT: Would you please listen to what I'm telling you? [¶] MS. KALLINS: Yes. [¶] THE COURT: When the Court admonishes you to do something, it is your job, as an officer of the Court, to follow that admonition. [¶] MS. KALLINS: Okay. Now — [¶] THE COURT: And not persist in defiance of the Court's ruling. [¶] MS. KALLINS: I am. [¶] THE COURT: So ask the next question. [¶] MS. KALLINS: I am. [¶] THE COURT: Abide by the rulings. When the jury leaves, you can put your objections more particularly on the record — [¶] MS. KALLINS: Thank you. [¶] THE COURT: — in as much detail as you [would] like."

5. Testimony was received from the export documentation supervisor for the shipping company which transported defendant's BMW to Hong Kong. She traveled from Southern California to appear as a prosecution witness. Although the witness had a return flight that evening, Kallins asked to continue cross-examination the following morning because she needed time ***240** to compare the original documents with the copies she had received from the prosecution. Noting "we were I suppose hoping that this witness could be allowed to go home," the court asked Kallins if it was "feasible" for her to review the documents and then cross-examine the witness before the court recessed for the evening. When Kallins replied, "No. I have to look through the documents. I'm sorry," the court told the witness the District Attorney's Office had a "victim witness unit" that would assist her in making new flight arrangements.

During cross-examination the following day, Kallins asked the witness whether, if the United States Customs had validated a shipping document,

the company was required to keep a copy of the validation. When the witness answered, "Not necessarily, no," Kallins retorted, "So Customs is sort of irrelevant to you?" The court sustained an objection the question was argumentative, but Kallins persisted by asking: "Well, is Customs irrelevant to the process?" Again, the prosecutor objected. As the court began to comment on the objection, Kallins repeatedly interrupted. After asking Kallins to "[p]lease eliminate the asides when the Court makes a ruling," the judge asked Kallins to explain the relevance of the question. The following exchange then occurred. "MS. KALLINS: Well, I'll pass. [¶] THE COURT: I don't appreciate the [facetious] remark on your part. [¶] MS. KALLINS: Well, I didn't appreciate the Court's comments on my questioning."

6. The agent from whom defendant purchased an insurance policy for the BMW and the company's claims representative who authorized payment after defendant reported the car stolen both acknowledged they had not seen the BMW before payment on the claim was made. During cross-examination of the claims representative, Kallins asked, "under what circumstances [does an insurer pay a claim without having seen the car]?" The prosecutor objected that the question was irrelevant.

When the court asked Kallins to explain the relevance, the following occurred: "MS. KALLINS: Well, your Honor, this witness is from the insurance company. You're gonna tell me you're going to put my client in prison for insurance fraud, you're not going to have the insurance company explain how they paid a claim on something they never saw? [¶] THE COURT: Ms. Kallins — Ms. Kallins — [¶] [THE PROSECUTOR]: Your Honor, I have to object. [¶] At this point, there's been no contention that her client is going to prison ... [¶] or anything of that nature. [¶] THE COURT: Miss Kallins, that is really a — [¶] MS. KALLINS: Oh, but — [¶] THE COURT: — a situation —will you let me finish, please, of gross misconduct on your part. [¶] MS. KALLINS:****204** But saying that my client's not going to prison is not gross misconduct on [the prosecutor's] part? [¶] THE COURT: Will you quit interrupting, ***241** please? [¶] MS. KALLINS: Excuse me. [¶] THE COURT: I am going to cite you for misconduct for that comment. [¶] I explained to the [j]ury when they took their oath not to consider penalty or punishment, each one of them. And you're attempting to interject that and have them violate the very oath that they took. [¶] Now, Ladies and Gentlemen, at this time I do want to admonish you once again that statements of [counsel] are not evidence, and they are not to be considered by you as evidence. [¶] And I again want to remind you of the law, which I've already read to you. The question of penalty or punishment [is] solely for the Court to decide, and [is] not relevant to your areas of inquiry in this matter.... [¶] I am going to have that stricken from the record, [Ms. Kallins's] comment about prison and — as well as [the prosecutor's] comment and reply. [¶] MS. KALLINS: Thank you. [¶] THE COURT: Please stick to the issues, Ms. Kallins. [¶] MS. KALLINS ... I sincerely think I am sticking to the issues. [¶] THE COURT: Not when you interject that type of gross prejudice into the — [¶] MS. KALLINS: Well, I think it's very difficult to — to — to work in an atmosphere where everything is considered not an issue by the Court. [¶] So I'm — I'm really trying to stick to the issues, if I could. Only I'm just trying — having trouble seeing what they are."

7. Later, during the prosecutor's redirect examination of the claims representative, Kallins interjected a comment suggesting the prosecutor had "tampered with the evidence[.]" The court responded: "Well now, Ms. Kallins, that is [an] absolutely improper comment to make, and I'm going to cite you for misconduct again."

8. During cross-examination of a participant in the insurance fraud scheme who testified against defendant, Kallins apparently stood close to the witness. The following exchange occurred: "[THE PROSECUTOR]: I request that Counsel distance

herself from the witness, please. [¶] MS. KALLINS: Gladly. [¶] THE COURT: ... Ms. Kallins your comment will be stricken from the record. You're admonished to cease and desist from these aside comments. [¶] Normally speaking, although I haven't been enforcing it, the attorneys ask permission to approach the witness. And with this particular witness, I suggest that's the best way to proceed."

9. During examination of the Department of Insurance investigator, Kallins persisted in asking irrelevant and argumentative questions to which objections were sustained. After its fifth ruling on the objections, the following exchange occurred: "THE COURT: ... The objection's sustained to — the question you asked is irrelevant. Move on. [¶] MS. KALLINS: Oh, okay. All right. I'm moving on. All right. Don't get upset or annoyed. [¶] THE COURT: All right. Miss Kallins — [¶] MS. KALLINS: Yes, your Honor. [¶] ***242** THE COURT: — no further asides like that. Don't tell the Court what attitudes to take. You be more concerned about your own behavior in this case. [¶] MS. KALLINS: Yes, your Honor. [¶] THE COURT: Do you understand what I'm saying? [¶] MS. KALLINS: Yes, your Honor. But you seem to be so upset about the ruling. [¶] THE COURT: I'm not upset. [¶] MS. KALLINS: Okay. [¶] THE COURT: I'm just telling you if you persist in this demeanor, I'm going to excuse the jury. [¶] MS. KALLINS: Well — [¶] THE COURT: So it's up to you. I've tried — [brief interruption by Kallins] — to be as patient as I can. [¶] MS. KALLINS: Yes, your Honor. [¶] THE COURT: But you are trying the Court's patience. [¶] MS. KALLINS: Yes, your Honor. [¶] THE COURT: Now, I ask you respectfully to abide by the Court's rulings. [¶] MS. KALLINS: Yes. [¶] THE COURT: And not argue with me when I make a ruling. [¶] MS. KALLINS: Yes, your Honor."

****205** 10. Near the close of trial, during a discussion concerning whether Kallins was seeking to introduce defense exhibit O into evidence, the following exchange occurred: "MS. KALLINS: ... I only was offering it if 'N' could come in to show what a real PIERS Report looks like. [¶] Now that the real PIERS Report has been eliminated, the governmen[t] will have to remark [Exhibit O] and offer it themselves. [¶] Does the Court think that that's funny? [¶] THE COURT: Pardon me? [¶] MS. KALLINS: Does the Court think that's funny? I saw you laugh. [¶] THE COURT: Ms. Kallins, once again, pursuant to the previous order, I'm going to admonish you please desist from disrespectful comments to the Court. [¶] MS. KALLINS: I didn't mean disrespect, your Honor. [¶] THE COURT: Yes, you did. [¶] MS. KALLINS: No, that's my analysis. [¶] THE COURT: You've been around long enough to know what's proper [courtroom] behavior and what is improper."

Analysis

Defendant wisely does not attempt to defend Kallins's actions; in the words of his appellate attorney, defendant "does not excuse his trial counsel's conduct." He also concedes the trial court had a duty to control the proceedings. However, he believes the court committed misconduct by repeatedly admonishing Kallins in the jury's presence. According to defendant, the court could have avoided this problem by simply excusing the jury when it needed to admonish Kallins.

[1] Kallins never requested that, if the court intended to admonish her, it do so outside the jury's presence. Nor did she ask the court to advise the jurors that the judge's comments to Kallins were not intended to imply any judgment by the court as to the merits of defendant's case.

Perhaps Kallins did not make such requests because of her misguided trial tactics, which seemed to include alienating the witnesses, the prosecutor and ***243** the court, and baiting them to snap at her, thereby apparently attempting to create an impression that "the system" was against the defendant. In any event, because the trial court was not asked to so admonish the jury, defendant's claim of judicial misconduct is waived. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108, 31 Cal.Rptr.2d 321, 875 P.2d

36; *People v. Anderson* (1990) 52 Cal.3d 453, 467–468, 276 Cal.Rptr. 356, 801 P.2d 1107; *People v. Wright* (1990) 52 Cal.3d 367, 411, 276 Cal.Rptr. 731, 802 P.2d 221.)

Nevertheless, because defendant contends that Kallins's failure to object and seek curative jury admonitions constituted ineffective assistance of counsel (*Strickland v. Washington* (1984) 466 U.S. 668, 687–689, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693–694; *People v. Pope* (1979) 23 Cal.3d 412, 425, 152 Cal.Rptr. 732, 590 P.2d 859), we address the merits of his claim of error.

As we shall explain, in light of the nature and extent of Kallins's insolent and contemptuous conduct, the trial court's admonishments of Kallins in front of the jury were necessary and did not constitute misconduct.

Our legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law. And "ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." (John F. Dillon, *The Laws and Jurisprudence of England and America*, Lecture I (Boston: Little, Brown and Company, 1894), p. 17.)

In other words, it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney ****206** must be an example of lawfulness, not lawlessness.

[2][3] Accordingly, an attorney, "however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice...." (*Chula v. Superior Court* (1952) 109 Cal.App.2d 24, 39, 240 P.2d 398.) An attorney must not willfully disobey a court's order and must maintain a respectful attitude toward the court. (*Ibid.;* Bus. & Prof.Code, §§ 6068 , 6103.)

[4] When, during the course of trial, an attorney violates his or her obligations as an officer of the court, the judge may control the proceedings and protect the integrity of the court and the judicial process by reprimanding the ***244** attorney. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1108, 31 Cal.Rptr.2d 321, 875 P.2d 36; *DeGeorge v. Superior Court* (1974) 40 Cal.App.3d 305, 312, 114 Cal.Rptr. 860.)

[5] Because "events happen rapidly during the course of a trial ... it is not always feasible to excuse the jury in order that counsel may be reprimanded"; and, "when counsel defies the authority of the court in the presence of the jury, it is sometimes necessary to reprimand counsel in the presence of the jury." (*People v. Dickenson* (1962) 210 Cal.App.2d 127, 140, 26 Cal.Rptr. 601.)

In fact, to allow an attorney to engage in unprofessional conduct before the jury without a prompt and strong response from the court undermines the judicial process. If, without rebuke, an attorney does not show proper respect for the judge and the proceedings, how can a juror be expected to do so? If an attorney is permitted to flout a court's ruling, how can a juror be expected to adhere to the rule of law as instructed by the court?

[6][7] By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority. This type of attorney misconduct must be dealt with in the jury's presence in order to dispel any misperception regarding the credence that jurors must give the court's instructions. Furthermore, when an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to repeatedly excuse the jury to admonish counsel.

[8][9] For these reasons, the court may act swiftly and strongly in the presence of the jury to

admonish an attorney if necessary to preserve the integrity of the judicial process. The court commits misconduct only "if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression [that the court] is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, 63 Cal.Rptr.2d 1, 935 P.2d 708; *People v. Fudge, supra,* 7 Cal.4th at p. 1107, 31 Cal.Rptr.2d 321, 875 P.2d 36; *People v. Clark* (1992) 3 Cal.4th 41, 143–144, 10 Cal.Rptr.2d 554, 833 P.2d 561.)

[10] Viewed singularly or collectively, the judge's comments in this case did not constitute judicial misconduct because they were appropriate responses to Kallins's inappropriate actions and remarks (compare *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1170–1181, 211 Cal.Rptr. 288), and because the comments did not discredit the defense theory or create an impression that the court was allying itself with the prosecution. Moreover, the jury was instructed in accordance with CALJIC No. 17.30 that the court had not intended by anything it had said or done to intimate or suggest what the jury ***245** should find to be the facts on any questions submitted and, if the court had said or done anything that would seem to so indicate, the jury was instructed to disregard it and form its own opinion. We presume the jury followed these instructions and did not penalize defendant because of the court's response to Kallins's egregious misconduct. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 158, 253 Cal.Rptr. 390; *People v. Dickenson, supra,* 210 Cal.App.2d at pp. 138–139, 26 Cal.Rptr. 601.)

****207** Given the numerous occasions in which Kallins challenged the court's authority in the presence of the jury, made disparaging comments toward the court, opposing counsel and a witness, and violated court rulings, it would have been unreasonable for the court to continuously disrupt the trial and excuse the jury in order to admonish Kallins in private.

In a fit of diatribe after the court held Kallins in contempt outside the presence of the jury and directed her to stop disobeying court orders and acting in a rude and disrespectful manner, Kallins blurted out: "You show respect for me as well. I've shown unbelievable respect for this Court in the fashion of [the] most unfair trial I've ever experienced in 22 years of practicing law. [¶] This place is unbelievable. I've never seen anything like it."

Kallins is flatly wrong in her assessment of the fairness of the trial. Our review of the record reveals that the trial court did not commit any prejudicial error in its rulings and that it was remarkably courteous and restrained when dealing with Kallins's gross misconduct, which created what could be described as a "trial from hell."

Kallins also is flatly wrong in the self-assessment of her conduct. In our collective 97 years in the legal profession, we have seldom seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law.

The trial judge acted appropriately and commendably in attempting to restrain an attorney who was out of control.

II–VI FN***

FN*** See footnote *, *ante.*

***246** DISPOSITION

The judgment is affirmed.

BLEASE, J., and MORRISON, J., concur.

Cal.App. 3 Dist.,1999.
People v. Chong
76 Cal.App.4th 232, 90 Cal.Rptr.2d 198, 99 Cal. Daily Op. Serv. 9037, 1999 Daily Journal D.A.R. 11,531

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	CA-CS
Citation Text:	61 Cal.App.4th 1431
Lines:	323
Documents:	1
Images:	0

61 Cal.App.4th 1431, 72 Cal.Rptr.2d 333, 98 Cal. Daily Op. Serv. 1778, 98 Daily Journal D.A.R. 2419
(Cite as: 61 Cal.App.4th 1431, 72 Cal.Rptr.2d 333)

Court of Appeal, Second District, Division 6, California.
Maria Caroline TOWNSEND et al., Petitioners,
v.
The SUPERIOR COURT of the County of Santa Barbara, Respondent,
EMC MORTGAGE COMPANY et al., Real Parties in Interest.

No. B116602.
March 10, 1998.

Purchaser brought action seeking to compel sale of residence. After discovery dispute arose, mortgage company and real estate company brought motion to compel seeking sanctions and other parties joined. The Superior Court, Santa Barbara County, Frank J. Ochoa, J., No. 207853, granted motion and awarded sanctions. Purchaser sought writ of mandate. The Court of Appeal, Steven J. Stone, P.J., held that: (1) parties did not fulfill informal resolution requirement for bringing motion to compel merely by debating propriety of objection with purchaser's counsel immediately following objection, and (2) parties who were not discovery proponents, but simply join in motion seeking discovery sanctions, were not entitled to award of sanctions.

Writ issued.

West Headnotes

[1] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases

Provision of Discovery Act requiring that moving party declare that he or she has made serious attempt to obtain informal resolution of each issue prior to initiation of motion to compel is designed to encourage parties to work out their differences informally so as to avoid necessity for formal order. West's Ann.Cal.C.C.P. § 2025(*o*).

[2] Pretrial Procedure 307A 24

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak24 k. Discovery Methods and Procedure. Most Cited Cases

Under Discovery Act, parties must present to each other merits of their respective positions with same candor, specificity, and support during informal negotiations as during briefing of discovery motions, and only after all cards have been laid on table, and party has meaningfully assessed relative strengths and weaknesses of its position in light of all available information, can there be sincere effort to resolve matter. West's Ann.Cal.C.C.P. § 2025(*o*).

[3] Pretrial Procedure 307A 222

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)6 Failure to Appear or Testify; Sanctions
307Ak222 k. Order Compelling Answer. Most Cited Cases

In discovery dispute arising in deposition, proponent did not fulfill informal resolution requirement for bringing motion to compel merely by debating propriety of objection with deponent's counsel immediately following objection. West's Ann.Cal.C.C.P. § 2025(*o*).

[4] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions

307Ak44.1 k. In General. Most Cited Cases

Monetary sanctions are designed to recompense those who are victims of misuse of Discovery Act. West's Ann.Cal.C.C.P. § 2025(*o*).

[5] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases

Parties who are not discovery proponents, but simply join in motion seeking discovery sanctions, are not entitled to award of sanctions. West's Ann.Cal.C.C.P. § 2025(*o*).

[6] Pretrial Procedure 307A 222

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)6 Failure to Appear or Testify; Sanctions
307Ak222 k. Order Compelling Answer. Most Cited Cases

Reasonable and good-faith attempt at informal resolution of discovery dispute entails something more than bickering with deponent's counsel at deposition; rather, law requires that counsel attempt to talk matter over, compare their views, consult, and deliberate. West's Ann.Cal.C.C.P. § 2025(*o*).

****334 *1433** Joseph W. Fairfield, Gardena, for Petitioners.

No appearance for Respondent.

Shapiro & Miles and T. Robert Finlay, Santa Ana, for EMC Mortgage Company and Westfall & Company Realtors, Real Parties in Interest.

Myer, Paynter & Fock and Erich E. Fock, Santa Barbara, for John Moffett and Patricia Moffett, Real Parties In Interest.

Haws, Record, Williford & Magnusson, Santa Barbara, for Prudential California Realtors, Real Party In Interest.

Lori S. Carver and Mark E. Schiffman, Irvine, for Fidelity National Title Insurance Company, Real Party in Interest.

OPINION AND ORDER

STEVEN J. STONE, Presiding Justice.

Here we determine that the requirement of informal resolution, as set forth in section 2025, subdivision (*o*) of the Code of Civil Procedure, [FN1] is not fulfilled when the proponent, immediately following an objection, merely debates with the deponent's counsel the propriety of the objection. In addition, we conclude that parties who are not the discovery proponents, but simply join in a motion requesting discovery sanctions, are not entitled to be awarded sanctions.

FN1. Unless otherwise stated, all further statutory references are to the Code of Civil Procedure.

BACKGROUND

Maria Caroline Townsend, petitioner (hereinafter "Townsend"), filed a lawsuit seeking to compel the sale of a residence. On July 14, 1997, EMC ***1434** Mortgage Company and Westfall Realtors, two defendants in this action, took her deposition. During the course of the deposition, Townsend, acting upon the advice of her counsel, objected to and refused to answer certain questions. Counsel for EMC and Westfall, as well as counsel for the other parties present, attempted to convince Townsend to answer these questions. She steadfastly refused to do so. Suffice it to say, the discussion between counsel became at times heated and the discovery disputes were not resolved.

EMC and Westfall moved to compel further answers and for sanctions. As Jimmy Durante used to say, "Everybody wants to get inta de act," and it was only a matter of time before the other parties

(John Moffett, Patricia Moffett, Prudential California Realty, and Fidelity National Title Company) joined in the motion to compel and for sanctions.

EMC's motion to compel was accompanied by its counsel's declaration that, "At the time of the deposition, myself [*sic*] and counsel for Co–Defendant and Cross–Defendants made a reasonable good faith attempt to resolve informally each of the issues presented by this Motion to Compel...."

Townsend objected to the motion, in part, upon the ground that there was no evidence that counsel for the proponents had informally attempted to resolve this matter prior to bringing the motion. (See § 2025, subd. (*o*).)

Respondent court rejected this argument, reasoning that the informal resolution requirement was fully complied with by proponent by attempting to persuade the objector of the error of his ways at the deposition. It granted the motion and awarded sanctions. As an added fillip, the court awarded sanctions to the parties who had joined in the motion.

Townsend sought relief by way of a writ of mandate. Because the issue tendered by Townsend is one of general import to members of the bench and bar, we have issued an order to show cause. (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185–186, fn. 4, 23 Cal.Rptr. 375, 373 P.2d 439.)

****335** DISCUSSION

Informal Resolution

[1] It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. ***1435**(*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (*o*); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court, supra,* 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)

Federal discovery law also requires that, prior to the initiation of a motion to compel, the parties informally attempt to resolve discovery matters. (*Nevada Power Co. v. Monsanto Co.* (D.Nev.1993) 151 F.R.D. 118, 120; *Tarkett, Inc. v. Congoleum Corp.* (E.D.Pa.1992) 144 F.R.D. 282, 285–286; *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n.* (N.D.Tex.1988) 121 F.R.D. 284, 289 ["[t]he purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought"].) Some federal courts have lamented that, "in many instances the [informal] conference requirement seems to have evolved into a pro forma matter." (*Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, supra,* 121 F.R.D. at p. 289.)

[2] In *Nevada Power Co. v. Monsanto Co., supra,* 151 F.R.D. 118, 120, the court offered the following guidelines for the conduct of an informal negotiation conference: "[T]he parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can

there be a 'sincere effort' to resolve the matter."

These sensible guidelines apply, with equal force, California's Discovery Act. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 371, 15 Cal.Rptr. 90, 364 P.2d 266.)

Each of the statutes governing discovery contains a provision that requires that the parties, prior to invoking the assistance of the court, attempt ***1436** to informally resolve their discovery disputes. (§§ 2030, subd. (*l*) [interrogatories], 2031, subd. (*l*) [demand for inspection], 2032, subd. (c)(7) [demand for physical examination], 2033, subd. (*l*) [requests for admission].) Efforts at informal resolution for these proceedings will necessarily take place after the responses and objections to discovery have been reviewed by the proponent.

Depositions differ from other manner of discovery mechanisms in that counsel for both parties are present. The immediacy of counsel allows for the instantaneous discussion of an objection and attempts at informal resolution. This proposition has a certain facial appeal and the support of at least one commentator. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter 1997)[¶] 8:812, p. 8E–97.)

It is the collective experience of lawyers and judges that too often the ego and emotions of counsel and client are involved at depositions. (For some examples of heated exchanges that have taken place at depositions, see *Rosenthal v. State Bar of California* (1987) 43 Cal.3d 612, 629–630, 238 Cal.Rptr. 377, 738 P.2d 723 [petitioner was evasive and hostile at his deposition]; *Sabado v. Moraga* (1987) 189 Cal.App.3d 1, 4–7, 234 Cal.Rptr. 249 [counsel advised a witness, who he did not represent, to refuse to be sworn as a witness]; ****336** *Kibrej v. Fisher* (1983) 148 Cal.App.3d 1113, 1114, 196 Cal.Rptr. 454 [counsel for deponent repeatedly objected to the use of an interpreter].) Like Hotspur on the field of battle, counsel can become blinded by the combative nature of the proceeding and be rendered incapable of informally resolving a disagreement.[FN2] It is for this reason that a brief cooling-off period is sometimes necessary.

> FN2. Prior to his battle with Prince Hal, Henry Percy (Hotspur) spurns all efforts to peacefully resolve his differences with the King: "For I profess not talking; only this–/Let each man do his best: and here draw I/A sword, whose temper I intend to stain/With the best blood that I can meet withal/In the adventure of this perilous day." (Shakespeare: *Henry IV*, part I, act V, scene 2.)

[3] The following blow-by-blow account of the deposition illustrates the point: Joseph Fairfield, counsel for Townsend, fired the first salvo of objections when he let it be known, in no uncertain terms, that he considered to be irrelevant any questions not pertaining to a contract purportedly executed on April 20, 1995. After some debate over this objection, counsel for Fidelity National Trust, hoping to have the deposition end by 5 p.m., suggested that the objections of Townsend be made, but not debated: "... this is not the time to argue your cases. There's no judge...."

***1437** The attorneys, nonetheless, robustly sought to pick up the gauntlet thrown down by Fairfield. "Could we not argue the merits of it now?" suggested counsel for Prudential Realty. After specifying the grounds of the objection, T. Robert Finlay, counsel for proponent EMC, stated, "We will go to court and come back on that." At no point during this debate did counsel indicate that any of such discussion was intended as compliance with the requirement of informal resolution.

As in a prize fight, the deposition continued into the next round. As reflected at pages 76 through 88 and 103 through 114 of the transcript there occurred new outbreaks of skirmishing over the pugnacious Fairfield's successive objections of relevance. As the deposition moved into the afternoon, tempers flared. "Could you not raise your voice and calm down, please," said Finlay.

Once again there was argument and verbal sparring over the propriety of objections. This was followed by mockery and derision. "FINLAY: Would you like to stipulate to strike this portion of the Complaint in paragraph 17? [¶] FAIRFIELD: No. But I'll stipulate that you may enter a judgment against your client." Counsel for Fidelity National Trust, attempting to move the deposition along and cool things off, once again suggested that "[t]his isn't argument time."

The combatants stumbled into the final rounds. Fairfield, counterpunching, accused Finlay of asking an "insulting question." After a lull in the action, counsel for Moffett told Fairfield to stop shouting at him.

Finlay, seemingly caught flatfooted by Fairfield's fusillade of objections, was ill prepared to discuss the law governing relevance. His abbreviated discussions, as well as those remarks interposed by other counsel, were but insubstantial gestures to comply with the mandate of the Discovery Act.

Further protestations to the questions did not occur until later. Once again, there was argument and verbal sparring over the propriety of the objections. The deposition again resumed and, later, there was again argument. At no point did counsel for proponent indicate that these discussions were intended as compliance with the requirement of informal resolution.

Respondent court determined that real parties' efforts to convince counsel sufficed as attempts at informal resolution. Closer inspection of the record, however, reveals that the exchanges between counsel were plainly only argument and that there was made no effort at informal negotiation. Argument is not the same as informal negotiation. In short, debate over the ***1438** appropriateness of an objection, interspersed between rounds of further interrogation, does not, based upon the record before us, constitute an earnest attempt to resolve impasses in discovery.

Real parties contend that it would have been futile to meet and confer with Townsend. The Discovery Act makes no exception based upon one's speculation that the prospect of informal resolution may be bleak. Our history is replete with examples of traditional enemies working out their differences ****337** by way of peaceful negotiation and resolution.

We do not propose an absolute rule requiring that informal resolution must always await the conclusion of a deposition. Rather, we find that the statute requires that there be a serious effort at negotiation and informal resolution. We leave it to the parties to determine the proper time, manner, and place for such discussion.

Sanctions

[4][5] Monetary sanctions are designed to recompense those who are the victims of misuse of the Discovery Act. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262, 24 Cal.Rptr.2d 501; *Kohan v. Cohan* (1991) 229 Cal.App.3d 967, 971; , 280 Cal.Rptr. 474 2 Hogan & Weber, Cal. Civil Discovery (4th ed. 1997) § 15.4, p. 273.) Subdivision (*o*) of section 2025 provides that, "If a deponent fails to answer any question ... the *party seeking discovery may move* the court for an order compelling that answer...." (Italics added.) The provision allows for the imposition of sanctions against one who unsuccessfully opposes a motion to compel.

The deposition under review was noticed by EMC and Westfall. The motion to compel was brought by these parties. The remaining parties, neither having noticed the deposition nor initiated the motion to compel, were but incidental beneficiaries to both proceedings. As such, these outsiders were not entitled to be awarded sanctions.

CONCLUSION

Although we have not as yet reached the point where the participants at a deposition will be required to be licensed by the state boxing commission (e.g., see *Rudolph aka Babe McCoy v. Athletic*

Commission (1960) 177 Cal.App.2d 1, 1 Cal.Rptr. 898), we note with dismay the ever growing number of cases in which most of the trappings of civility between counsel are lacking. Some courts, such as the Superior Court for Orange County, are calling for professionalism at depositions. The Orange County Superior ***1439** Court has proposed that "[c]ounsel should not engage in any conduct during a deposition that would not be appropriate in the presence of a judicial officer." Counsel attending a deposition are admonished to refrain from engaging "in discourtesies or offensive conduct (e.g., disparaging the intelligence, ethics, morals, integrity or behavior of opposing parties or counsel)." (Proposed Orange County Superior Court Policy Regarding Professionalism in Depositions, ¶ C 1., *Conduct of All Counsel Attending a Deposition*, (Feb. 9, 1998) 98 Daily Journal D.A.R. 1337–1339.)

[6] A reasonable and good-faith attempt at informal resolution entails something more than bickering with deponent's counsel at a deposition. Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate. This was not done at the Townsend deposition.

The orders under review were made in excess of the trial court's jurisdiction. Let a writ of mandate issue directing respondent court to set aside its orders granting the motion to compel and imposing monetary sanctions, and to issue a new order denying the motion and sanctions.

GILBERT and COFFEE, JJ., concur.

Cal.App. 2 Dist.,1998.
Townsend v. Superior Court
61 Cal.App.4th 1431, 72 Cal.Rptr.2d 333, 98 Cal. Daily Op. Serv. 1778, 98 Daily Journal D.A.R. 2419

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	WI-CS
Citation Text:	754 N.W.2d 528
Lines:	225
Documents:	1
Images:	0

H

Court of Appeals of Wisconsin.
John BETTENDORF, Plaintiff-Appellant,
v.
ST. CROIX COUNTY, Defendant-Respondent.

No. 2007AP2329.
Submitted on Briefs April 29, 2008.
Opinion Filed May 20, 2008.

Background: Property owner filed action against county, seeking declaratory judgment that ordinance rezoning his parcel to commercial property only for his use was beyond county board's power. Parties filed cross-motions for summary judgment. The Circuit Court, St. Croix County, Scott R. Needham, J., granted owner's motion, struck portion of ordinance referring to owner, and stated that remainder of ordinance was valid. County appealed. The Court of Appeals, 296 Wis.2d 418, 722 N.W.2d 399, reversed. Upon remittitur, the Circuit Court entered a new judgment stating that ordinance had been invalid from date of enactment and that owner's special exception permit was thus invalid. Owner appealed.

Holding: The Court of Appeals, Hoover, P.J., held that circuit court's judgment entered following remittitur appropriately applied Court of Appeals' decision, such that no further proceedings were necessary to resolve legal issues.

Affirmed.

West Headnotes

Appeal and Error 30 1207(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1207 Rendition and Entry of Judgment or Order as Directed
30k1207(1) k. In General. Most Cited Cases

Circuit court's judgment entered following remittitur from Court of Appeals, stating that ordinance rezoning property owner's parcel to commercial property had been void from date of enactment and property owner's special exception permit was therefore invalid, appropriately applied Court of Appeals' decision, such that no further proceedings were necessary to resolve legal issues; Court of Appeals, in reversing trial court's decision severing portion of ordinance and declaring remainder of it valid, did not remand for further proceedings, only for correction of judgment, parties filed cross-motions for summary judgment on severability issue, which had effect of leaving only issues of law, Court of Appeals decided that ordinance was invalid as matter of law, and owner never asked Court of Appeals to reconsider its decision, nor did he ask trial court for further proceedings upon remittitur.

****529** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Matthew A. Biegert of Doar Drill, S.C. of New Richmond.

On behalf of the defendant-respondent, the cause was submitted on the brief of Gregory A. Timmerman, corporation counsel, of Hudson.

Before HOOVER, P.J., PETERSON and BRUNNER, JJ.

¶ 1 HOOVER, P.J.

***738** John Bettendorf appeals a circuit court judgment entered following remittitur from this court, arguing the circuit court erred in refusing to hear additional arguments after the case was returned. Because we conclude the court appropriately applied our decision, we affirm.

Background

¶ 2 Bettendorf owns a parcel of land in the Town of Kinnickinnic in St. Croix County. This parcel was initially zoned agricultural-residential.

In 1985, the county board enacted ST. CROIX COUNTY, WIS., ORDINANCE No. 108(85) (1985), which rezoned the parcel into commercial property. The ordinance read:

> NOW THEREFORE, BE IT ORDAINED, that the Comprehensive Planning, Zoning, and Parks Committee recommends approval for the rezonement to Commercial from Ag-Residential the following:
>
> > A parcel of land located in the NE 1/4 of the NE 1/4 of Section 19, T28N-R18W, Town of Kinnickinnic. ***739** *This [is] only for John D. Bettendorf's use and is not assignable.* (Emphasis added.)

In December 1990, Bettendorf applied for and received a special exception permit, which was granted without conditions on its transfer.[FN1] Bettendorf sought the permit so he could operate a business on the property.

> FN1. Throughout the proceedings, "special exception permit" has been used interchangeably with "conditional use permit." For consistency, we use only the term "special exception permit."

¶ 3 In 2004, Bettendorf, who wanted to sell the property and business, sought a declaratory judgment that the rezoning for one person's use was beyond the board's power. He also asserted the contingency that the rezoning "is not assignable" was severable and should be stricken, leaving the property zoned commercial but without the transfer limitation. Bettendorf further sought a declaration that his special exception permit was valid and transferable, and that the lack of transfer limitation superseded the restriction in the ordinance. In other words, Bettendorf believed the permit's lack of assignability limits meant he could sell the permit with the property, ****530** giving new owners the same permission he had to operate a business on the parcel.

¶ 4 The County admitted the rezoning had been beyond its power but affirmatively alleged that the ordinance was not severable, rendering the entire ordinance void from the date of enactment. Further, because a special exception permit must be consistent with the underlying zoning of a parcel, the County contended voiding the ordinance would invalidate the permit. The County also raised a handful of other affirmative defenses, including various estoppel theories, and brought a forfeiture counterclaim arguing ***740** Bettendorf was in violation of the zoning regulations since the date the invalid ordinance was enacted. Bettendorf responded to the counterclaim, raising several affirmative defenses, including an argument that his use was grandfathered in and that the County was estopped from challenging the ordinance.

¶ 5 Both sides moved for summary judgment. Bettendorf argued the court should strike the invalid part of the ordinance and give effect to the remainder and, further, should hold the special exception permit superseded the ordinance, making the permit transferrable with the property. The County argued the court should hold the ordinance was not severable. Bettendorf's response reiterated his initial arguments and sought dismissal of the County's counterclaim.

¶ 6 The court granted Bettendorf's motion and struck the portion of ORDINANCE 108(85) referring to Bettendorf and limiting assignment. The court stated the remainder of the ordinance was valid. The court partially based its determination on a separate zoning ordinance that supported severability whenever possible. The court also held that because the ordinance was valid as modified, the special exception permit was consistent with the zoning and therefore valid. Further, the court reasoned the permit should run with the property, not the owner, and was transferrable. The court also dismissed the counterclaim.

¶ 7 After the court entered judgment, the County sent a letter objecting, stating the court had not completely addressed all the issues, making the

judgment premature. However, the County withdrew all remaining claims so that the court's order could be considered final, and the County took its appeal as a matter of right.

***741** ¶ 8 We reversed. *See Bettendorf v. St. Croix County*, No. 2005AP1286, unpublished slip op., 2006 WL 2434091 (WI App Aug. 24, 2006). We concluded that, the severability ordinance notwithstanding, the county board had clearly intended to rezone Bettendorf's lot only for him and would never have enacted the rezoning otherwise. Therefore, we concluded the provision was not severable and ORDINANCE 108(85) was entirely void. *Bettendorf*, No.2005AP1286, unpublished slip op. ¶ 15.

¶ 9 We rejected Bettendorf's argument that even if the ordinance were deemed invalid, the special exception permit still permitted the business and could be transferred without limitation. We instead agreed with the County that because the ordinance was invalid, the zoning reverted to the agricultural-residential designation and a special exception permit allowing a business would be inconsistent with that zoning. Thus, Bettendorf's permit necessarily was invalid once the ordinance was voided. *Id.*, ¶ 16. Accordingly, we reversed the court's judgment and order.

¶ 10 Bettendorf petitioned the supreme court for review arguing, among other things, that we had exceeded the scope of our review by addressing the permit's validity. He contended the sole issue on appeal was severability. The supreme court declined to grant the petition for ****531** review. Upon remittitur, the circuit court entered a new judgment granting summary judgment to the County. The judgment stated that ORDINANCE 108(85) had been void from the date of enactment and the special exception permit was therefore invalid. Bettendorf appeals, arguing there are outstanding factual issues on his affirmative defenses.

***742 Discussion**

¶ 11 The procedural history before us is unique. Bettendorf is, in essence, challenging the fact that the court did not conduct further proceedings following remittitur. But we did not remand for further proceedings, only correction of the judgment.

¶ 12 While Bettendorf asserts factual issues remain, he ignores the procedural history. The County withdrew all claims other than the decided questions of severability and the permit's validity. The parties filed cross-motions for summary judgment on the severability issue. This has the effect of leaving only issues of law. *See Selzer v. Brunsell Bros.*, 2002 WI App 232, ¶ 11, 257 Wis.2d 809, 652 N.W.2d 806. Thus, we decided that the ordinance was invalid as a matter of law, not as a question of fact. The special exception permit necessarily came before us when Bettendorf invoked it as an alternate basis for affirmation.

¶ 13 Ultimately, Bettendorf is attempting to appeal his appeal, but he cites no authority permitting us to revisit that initial determination. The County took its appeal as a matter of right from a judgment determining that a portion of ORDINANCE 108(85) was severable and determining the special exception permit was valid and transferable. The parties addressed the severability issue and the permit's validity. We concluded the circuit court was in error and reversed. The court entered a new judgment in conformity with our decision. We were never asked to reconsider our decision, other than indirectly by the petition for review. Any perceived error in our prior reasoning could have been brought to our attention before now. Bettendorf also does not demonstrate that he asked the circuit court for further proceedings upon remittitur, or for reconsideration***743** of its new order in light of his belief there were issues yet to be addressed. The circuit court correctly entered a new judgment in conformity with our prior opinion: further proceedings were unnecessary to resolve the legal questions.

¶ 14 Although we resolve this issue in the County's favor, we take issue with its brief. We un-

derstand corporation counsel's obvious frustration over repeated litigation with Bettendorf, particularly in light of the fact situation in this case. But corporation counsel's brief contains a collection of attacks against Bettendorf's attorney[FN2] that are nothing more than unfounded, mean-spirited slurs. Given corporation counsel's grievances against Bettendorf's attorney, such hyperbole is, at the very least, ironic.

FN2. Corporation counsel actually refers to Bettendorf, not the attorney, in his brief, after noting that his "understanding of protocol" prevents him from referring directly to the attorney by name.

¶ 15 Contending that appellant's recitation of the facts is misleading is not an uncommon accusation from respondents. However, corporation counsel goes beyond noting this perceived misrepresentation and complains that opposing counsel's "desire to serve his self-interest is excessive. With apparent hubris, he mocks and insults this court and the appellate system with this approach and this appeal." Corporation counsel then comments: "Creating ****532** facts creates a false reality. Bettendorf['s attorney] needs a false reality to maintain this appeal."

¶ 16 To refute counsel's contention that this court exceeded its authority on review, corporation counsel notes that Bettendorf's attorney "goes beyond what I could conceive anyone doing. He doesn't push the envelope, he totally shreds it." Corporation counsel ***744** also asserts counsel's "rant is factually baseless.... The rest of his argument in this regard is the same ranting." Corporation counsel then cites *Alice in Wonderland* by Lewis Carroll, to less-than-persuasive effect, and summarizes this appeal as having a "farcical theme."

¶ 17 "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, *other lawyers* and public officials." (Emphasis added.) PREAMBLE, SCR ch. 20 (2005-06). "The advocate's function is to present evidence and argument so that the cause may be decided according to law.... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."[FN3] COMMENT, SCR 20:3.5 (2005-06). In the instant case, we view corporation counsel's belligerence to be unwarranted and inappropriate.

FN3. We thus appreciate Bettendorf's attorney's professionalism and restraint, demonstrated by his refusal to turn his reply brief into a similar set of attacks.

Judgment affirmed.

Wis.App.,2008.
Bettendorf v. St. Croix County
312 Wis.2d 737, 754 N.W.2d 528, 2008 WI App 97

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	DE-CS
Citation Text:	637 A.2d 34
Lines:	1763
Documents:	1
Images:	0

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

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

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

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

Affirmed and remanded.

West Headnotes

[1] Appeal and Error 30 1024.2

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

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

[2] Corporations and Business Organizations 101 2814

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

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

[3] Corporations and Business Organizations 101 2814

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

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

[4] Corporations and Business Organizations

101 ⚿2743

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

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

[5] Corporations and Business Organizations 101 ⚿2636

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

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

[6] Corporations and Business Organizations 101 ⚿1842

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

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

[7] Corporations and Business Organizations 101 ⚿1841

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

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

[8] Corporations and Business Organizations 101 ⚿2743

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

In sale or change of control transaction, en-

hanced judicial scrutiny is applied, and directors are obligated to seek best value reasonably available for stockholders, regardless of whether there is to be breakup of the corporation.

[9] Corporations and Business Organizations 101 1841

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

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

[10] Corporations and Business Organizations 101 1844

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

Corporations and Business Organizations 101 1847

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

Corporations and Business Organizations 101 1850

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

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

[11] Corporations and Business Organizations 101 2654

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

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

[12] Corporations and Business Organizations 101 2654

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

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

[13] Corporations and Business Organizations 101 ⚿2657

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2655 Agreements for Merger or Consolidation
101k2657 k. Requisites and validity. Most Cited Cases
(Formerly 101k582)

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

[14] Corporations and Business Organizations 101 ⚿1841

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

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

[15] Corporations and Business Organizations 101 ⚿2659

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

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

[16] Attorney and Client 45 ⚿10

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

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

Prof.Conduct, Rule 3.5(c), Del.C.Ann.

[17] Attorney and Client 45 ⚿10

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

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

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

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

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

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

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

VEASEY, Chief Justice.

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

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

nications Inc. v. QVC Network Inc., Del.Supr., Nos. 427 and 428, 1993, 637 A.2d 828, Veasey, C.J. (Dec. 9, 1993) (the "December 9 Order").[FN1]

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

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

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

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

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

I. FACTS

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

FN3. This Court's standard and scope of review as to facts on appeal from a prelim-

> inary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, Del.Supr., 535 A.2d 1334, 1342–41 (1987).

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

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

> FN4. Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, and director of Pfizer, Inc., Connecticut Mutual Life Insurance Company, and The Bear Stearns Companies, Inc.
>
> Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission, and an Adjunct Professor of Urban Planning at Columbia University
>
> Benjamin L. Hooks, Senior Vice President of the Chapman Company and director of Maxima Corporation
>
> J. Hugh Liedtke, Chairman of Pennzoil Company
>
> Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, and director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich
>
> James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, and director of the Toronto–Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary
>
> Lester Pollack, General Partner of Lazard Freres & Co., Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres, director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and Trustee of New York University
>
> Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc.

Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation

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

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

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

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

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

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

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

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

trolled by him.

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

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

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

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

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

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

Despite these attempts to discourage a competing bid, Diller sent a letter to Davis on September

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

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

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

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

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

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

transaction.

> FN6. Under the Amended Merger Agreement and the Paramount Board's resolutions approving it, no further action of the Paramount Board would be required in order for Paramount's Rights Agreement to be amended. As a result, the proper officers of the company were authorized to implement the amendment unless they were instructed otherwise by the Paramount Board.

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

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

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

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

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

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

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

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

II. APPLICABLE PRINCIPLES OF ESTABLISHED DELAWARE LAW

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

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

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

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

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

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

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

In the absence of devices protecting the minority stockholders, FN12 stockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger. ***43***Weinberger*, 457 A.2d at 703. Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot. The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.

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

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

Because of the intended sale of control, the Paramount–Viacom transaction has economic consequences of considerable significance to the Para-

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

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

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

> FN13. We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent. For example, where a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer. *See Pogostin*, 480 A.2d at 627; *Time–Warner*, 571 A.2d at 1152; *Bershad v. Curtiss–Wright Corp.*, Del.Supr., 535 A.2d 840, 845 (1987); *Macmillan*, 559 A.2d at 1285 n. 35. The decision of a board to resist such an acquisition, like all decisions of a properly-functioning board, must be informed, *Unocal*, 493 A.2d at 954–55, and the circumstances of each particular case will determine the steps that a board must take to inform itself, and what other action, if any, is required as a matter of fiduciary duty.

> It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. **This unremitting obligation extends equally to board conduct in a sale of corporate control.**
>
> ***44** 559 A.2d at 1280 (emphasis supplied) (citations omitted).

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

In pursuing this objective, the directors must be especially diligent. *See Citron v. Fairchild Camera and Instrument Corp.*, Del.Supr., 569 A.2d 53, 66 (1989) (discussing "a board's active and direct role

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

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

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

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

> [an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; ... the risk of non-consum[m]ation; ... the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.

Macmillan, 559 A.2d at 1282 n. 29. These considerations are important because the selection of one alternative may permanently foreclose other opportunities. While the assessment of these factors may be complex, ***45** the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders.

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

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

lan, this Court held:

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

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

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

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.
>
> *Id. See also Roberts v. General Instrument Corp.*, Del.Ch., C.A. No. 11639, 1990 WL 118356, Allen, C. (Aug. 13, 1990), reprinted at 16 Del.J.Corp.L. 1540, 1554 ("This enhanced test requires a judicial judgment of reasonableness in the circumstances.").

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

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

> FN17. It is to be remembered that, in cases where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and "will not substitute our views for those of the board if the latter's decision can be 'attributed to any rational business purpose.' " *Unocal*, 493 A.2d at 949 (*quoting Sinclair Oil Corp. v. Levien*, Del.Supr., 280 A.2d 717, 720 (1971)). *See Aronson*,

473 A.2d at 812.

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

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

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

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

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

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

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

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

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

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

> If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer

> of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as ***47** here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of [Nicholas J. Nicholas, Jr., president of Time], neither corporation could be said to be acquiring the other. **Control of both remained in a large, fluid, changeable and changing market.**
>
> The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. **But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated.** The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

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

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

> However, we premise our rejection of plaintiffs' *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon.*
>
> Under Delaware law there are, generally speaking and **without excluding other possibilities,** two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation **initiates an active bidding process seeking to sell itself** or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.

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

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

The Paramount defendants' position that **both** a

change of control **and** a break-up are **required** must be rejected. Such a holding would unduly restrict the application of *Revlon*, is inconsistent with this Court's decisions in *Barkan* and *Macmillan*, and has no basis in policy. There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental ***48** (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of **each** of these events that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.

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

III. BREACH OF FIDUCIARY DUTIES BY PARAMOUNT BOARD

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

A. The Specific Obligations of the Paramount Board

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

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

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

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

best value reasonably available under the circumstances.

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

Since the Paramount directors had already decided to sell control, they had an obligation ***49** to continue their search for the best value reasonably available to the stockholders. This continuing obligation included the responsibility, at the October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount–Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the Viacom tender offer or other aspects of the Paramount–Viacom transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

B. The Breaches of Fiduciary Duty by the Paramount Board

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

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

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

tion).

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

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

The Paramount directors had the opportunity in the October 23–24 time frame, when the Original Merger Agreement was renegotiated, to take appropriate action to modify the improper defensive measures as well as to improve the economic terms of the Paramount–Viacom transaction. Under the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No–Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders. Nevertheless, the Paramount Board made no effort to eliminate or modify these counterproductive devices, and instead continued to cling to its vision of a strategic alliance with Viacom. Moreover, based on advice from the Paramount management, the Paramount directors considered the QVC offer to be "conditional" and asserted that they were precluded by the No–Shop Provision from seeking more information from, or negotiating with, QVC.

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

When the Paramount directors met on November 15 to consider QVC's increased tender offer, they remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves. Yet, it was not "too late" to reconsider negotiating with QVC. The circumstances existing on November 15 made it clear that the defensive measures, taken as a whole, were problematic: (a) the No–Shop Provision could not define or limit their fiduciary duties; (b) the Stock Option Agreement had become "draconian"; and (c) the Termination Fee, in context with all the circumstances, was similarly deterring the realization of possibly higher bids. Never-

theless, the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was "illusory." This final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was thereby squandered.[FN21]

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

IV. VIACOM'S CLAIM OF VESTED CONTRACT RIGHTS

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

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

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

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

Viacom, a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features of the Stock Option Agreement. It cannot be now heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. As the Nebraska Supreme Court said in rejecting a similar argument in *ConAgra, Inc. v. Cargill, Inc.,* 222 Neb. 136, 382 N.W.2d 576, 587–88 (1986), "To so

hold, it would seem, would be to get the shareholders coming and going." Likewise, we reject Viacom's arguments and hold that its fate must rise or fall, and in this instance fall, with the determination that the actions of the Paramount Board were invalid.

V. CONCLUSION

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

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

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

ADDENDUM

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

The Court is constrained, however, to add this Addendum. Although this Addendum has no bearing on the outcome of the case, it relates to a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts. FN23

FN23. We raise this matter *sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings. *See In re Infotechnology, Inc. Shareholder Litig.*, Del.Supr., 582 A.2d 215 (1990); *In re Nenno*, Del.Supr., 472 A.2d 815, 819 (1983); *In re Green*, Del.Supr., 464 A.2d 881, 885 (1983); *Delaware Optometric Corp. v. Sherwood*, 36 Del.Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer*, 25 Del.Ch. 420, 22 A.2d 397 (1941). Normally our supervision relates to the con-

> duct of members of the Delaware Bar and those admitted *pro hac vice.* Our responsibility for supervision is not confined to lawyers who are members of the Delaware Bar and those admitted *pro hac vice,* however. *See In re Metviner,* Del.Supr., Misc. No. 256, 1989 WL 226135, Christie, C.J. (July 7, 1989 and Aug. 22, 1989) (ORDERS). Our concern, and our duty to insist on appropriate conduct in any Delaware proceeding, including out-of-state depositions taken in Delaware litigation, extends to all lawyers, litigants, witnesses, and others.

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

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

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

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

Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he was not admitted *pro hac vice.*[FN26] ***53** Under the rules of the Court of Chancery and this Court,[FN27] lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules,[FN28] and are required

to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles").[FN29] During the Liedtke deposition, Mr. Jamail abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter.

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

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

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

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

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

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

> The Delaware State Bar Association, for the Guidance of Delaware lawyers, **and those lawyers from other jurisdictions who may be associated with them,** adopted the following Statement of Principles of Lawyer Conduct on [November 15, 1991].... The purpose of adopting these Principles is to promote and foster the ideals of **professional courtesy, conduct and cooperation....** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession.... [A] lawyer ... **should treat**

> all persons, including **adverse lawyers** and parties, **fairly and equitably.... Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice....** Respect for the court requires ... emotional self-control; [and] the absence of scorn and superiority in words of demeanor.... A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial. **No pre-trial procedure should be used to harass an opponent or delay a case.... Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge....** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such investigation as is required to form an informed conviction that the lawyer to be admitted is ethical and competent, and should furnish the candidate for admission with a copy of this Statement.
>
> (Emphasis supplied.)

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

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

....

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

MR. JAMAIL: Don't answer that.

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

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe—

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

***54** MR. JOHNSTON: No. Joe, Joe—

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

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

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

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

MR. JAMAIL: Do it now.

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

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

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

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

MR. JOHNSTON: Are you finished?

MR. JAMAIL: Yeah, you—

MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have

no concept of what you're doing.

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

MR. JOHNSTON: Are you finished?

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

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

MR. THOMAS: Then just ask the next question.

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

A. No.

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

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

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

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

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

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

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

MR. JOHNSTON: I heard you fine.

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

(JA 6002–06).[FN30]

FN30. Joint Appendix of the parties on appeal.

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

FN31. We recognize the practicalities of litigation practice in our trial courts, particularly in expedited proceedings such as this preliminary injunction motion, where simultaneous depositions are often taken in far-flung locations, and counsel have only a few hours to question each witness. Understandably, counsel may be reluctant to take the time to stop a deposition and call the trial judge for relief. Trial courts are extremely busy and overburdened. Avoidance of this kind of misconduct is essential. If such misconduct should occur, the aggrieved party should recess the deposition and engage in a dialogue with the of-

> fending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified. *See* Ch.Ct.R. 37. It should also be noted that discovery abuse sometimes is the fault of the questioner, not the lawyer defending the deposition. These admonitions should be read as applying to both sides.

Nevertheless, the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions.[FN32] While the specter of disciplinary proceedings should not be used by the parties as a litigation tactic,[FN33] conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief under the trial court's rules, including Ch. Ct. R. 37. Under some circumstances, the use of the trial court's inherent summary contempt powers may be appropriate. *See In re Butler,* Del.Supr., 609 A.2d 1080, 1082 (1992).

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

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

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

> FN34. *See Hall v. Clifton Precision,* E.D.Pa., 150 F.R.D. 525 (1993) (ruling on "coaching," conferences between deposed witnesses and their lawyers, and obstructive tactics):
>
> > Depositions are the factual battleground where the vast majority of litigation actually takes place.... Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.
>
> 150 F.R.D. at 531.

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

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

Counsel attending the Liedtke deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of that proceeding. The record of the deposition as a whole (JA 5916–6054) demonstrates that, not only Mr. Jamail, but also Mr. Thomas (representing the Paramount defendants), continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers to questions,[FN36] and constantly pressed the questioner for time throughout the deposition.[FN37] As to Mr. Jamail's tactics quoted above, Mr. Thomas passively let matters proceed as they did, and at times even added his own voice to support the behavior of Mr. Jamail. A Delaware lawyer or a lawyer admitted *pro hac vice* would have been expected to put an end to the misconduct in the Liedtke deposition.

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

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

This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remed-

ies at this time in the context of this case. Nevertheless, consideration will be given to the following issues for the future: (a) whether or not it is appropriate and fair to take into account the behavior of Mr. Jamail in this case in the event application is made by him in the future to appear *pro hac vice* in any Delaware proceeding; FN38 and (b) what rules or standards should be adopted to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts.

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

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

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

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	FL-CS
Citation Text:	771 So.2d 1131
Lines:	249
Documents:	1
Images:	0

771 So.2d 1131
(Cite as: 771 So.2d 1131)

C

Supreme Court of Florida.
THE FLORIDA BAR, Complainant,
v.
Richard Lee BUCKLE, Respondent.

No. SC94027.
Oct. 12, 2000.

Attorney disciplinary proceeding was brought. The Supreme Court held that public reprimand was warranted against criminal defense attorney who sent victim of crime an objectively humiliating and intimidating letter designed to cause her to abandon her criminal complaint.

Public reprimand ordered.

Harding, J., dissented.

West Headnotes

[1] Attorney and Client 45 32(7)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(7) k. Miscellaneous Particular Acts or Omissions. Most Cited Cases

An attorney should carefully exercise his or her professional judgment and discretion with regard to the dissemination of religious materials enclosed with legal correspondence.

[2] Attorney and Client 45 59.8(1)

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

Public reprimand was warranted against criminal defense attorney who sent victim of crime an objectively humiliating and intimidating letter designed to cause her to abandon her criminal complaint. West's F.S.A. Bar Rules 4-4.4, 4-8.4(a, d).

[3] Attorney and Client 45 32(6)

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

Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while the Supreme Court supports and defends the role of counsel in proper advocacy.

[4] Attorney and Client 45 32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases

In corresponding with persons involved in legal proceedings, lawyers must be vigilant not to abuse the privilege afforded them as officers of the court.

[5] Attorney and Client 45 32(6)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Con-

duct, in General
45k32(6) k. Limitations on Duty to Client, in General. Most Cited Cases

A lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation.

[6] Attorney and Client 45 ⚿57

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

In contrast with a review of the referee's findings of fact in an attorney discipline matter, which should be upheld if supported by competent substantial evidence, the Supreme Court has a broader scope of review regarding discipline because it bears the ultimate responsibility of ordering the appropriate sanction.

***1132** John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, Tallahassee, Florida, and Brett Alan Geer, Assistant Staff Counsel, Tampa, Florida, for Complainant.

Richard Lee Buckle, pro se, Bradenton, Florida, and Layon F. Robinson, II, Bradenton, Florida, for Respondent.

PER CURIAM.

We have for review the complaint of The Florida Bar and the referee's report regarding alleged ethical breaches by Richard Lee Buckle. We have jurisdiction. *See* art. V, § 15, Fla. Const. For the reasons expressed below, we affirm the referee's findings of fact and conclusions of guilt, but we reject his recommendation regarding discipline and find that a public reprimand is the appropriate sanction for the misconduct at issue.

During his representation of Donald Spaulding, a criminal defendant who had been arrested for battery and false imprisonment, respondent Buckle contacted the alleged victim of the crimes, Lydia Gibas, both by telephone and by letter. During the first telephone contact, Gibas terminated the call after learning that Buckle represented the defendant. The second telephone contact ended similarly, with Gibas informing Buckle that she did not wish to speak to him. Immediately after the second phone call, Buckle transmitted a letter to Gibas and attached various religious materials to that letter. Receipt of this letter prompted Gibas to file a bar complaint against Buckle.

At the formal hearing in this matter, Gibas testified that the letter was humiliating and disparaged her character and that it caused her to consider abandoning the criminal complaint against Spaulding. The referee found that the letter was "objectively humiliating and intimidating to a reasonable person standing in Ms. Gibas' place" and that it had no substantial purpose other than to embarrass, intimidate, or otherwise burden Gibas. The referee also found that although Gibas was offended by the religious materials Buckle had attached to the letter, he had included those materials simply to fulfill his convictions as a religious person. The referee further stated his opinion that "the dissemination of religious materials, though not prohibited, should be carefully reviewed by all senders of such material, and professional discretion used concerning this type of dissemination."

[1] Based on the factual findings described above, the referee concluded that Buckle had violated Rule of Professional Conduct 4–4.4 (lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person); rule 4–8.4(a)(lawyer shall not violate Rules of Professional Conduct); and rule 4–8.4(d)(lawyer shall not engage in conduct prejudicial to administration of justice, including disparaging, humiliating, or discriminating against litigants, jurors, witnesses, and others on any basis). FN1 In aggravation, the referee considered Buckle's age of fifty-two, his two prior admonishments, his substantial experience in the practice of law, a pattern of misconduct, FN2 multiple offenses, and his

refusal to acknowledge the wrongful nature of his conduct. Additionally, the referee commented that throughout the proceedings, Buckle ***1133** attempted to portray the complaint against him as one of religious persecution and failed to see how his actions affected Gibas and the administration of justice. The referee recommended that Buckle be suspended for thirty days, be required to write letters of apology to Gibas and another woman to whom Buckle had sent a similar letter, and be placed on probation for two years during which he may not send religious materials in connection with his practice of law to any opposing litigant, witness, or attorney for same. Buckle now seeks review of the referee's report and recommendation.

> FN1. The referee did not expressly state whether it was the letter itself, the religious materials, or both that violated these rules. We find no violation with regard to the religious materials in and of themselves; however, we agree with the referee that an attorney should carefully exercise his or her professional judgment and discretion with regard to the dissemination of religious materials enclosed with legal correspondence.
>
> FN2. In aggravation only, the referee considered the testimony of Sheree Weisenberger, who had received a similar letter and calls from Buckle. Weisenberger was the alleged victim of another similar crime perpetrated by Buckle's client, Donald Spaulding.

[2] Buckle argues that his conduct did not violate any ethical rules and was, in fact, required by his duty to competently and zealously represent his client. He argues that contrary to the referee's finding, the letter he sent to Gibas had a substantial purpose other than to intimidate or disparage her. This purpose, he contends, was to gain additional information, to find out the position of the victim with respect to prosecution, and to discover whether or not the victim intended to pursue prosecution of the case. The referee expressly rejected this explanation as lacking credibility.

The referee's credibility determination in this regard is entitled to deference. *See Florida Bar v. Fredericks,* 731 So.2d 1249, 1251 (Fla.1999) (stating that "the referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect"). The referee found that Buckle's explanation was not credible "in that no reasonable attorney would ever expect such a letter to actually be answered by the purported victim of a crime." Indeed, just before Buckle transmitted the letter, Gibas had specifically informed him that she did not wish to have any contact with him. Thus, even more so under the circumstances of this case, it would be illogical for Buckle to have genuinely expected a voluntary response from Gibas after having been clearly advised that his contact was totally unwelcome.

The referee found that the letter on its face was objectively humiliating and intimidating to a reasonable person standing in Gibas' place. He found that the intent of the letter was obvious and that its intent was solely to "embarrass, intimidate, or otherwise burden Ms. Gibas," by "threatening to explore and exploit the most personal and important aspects and relationships in [her] life, to hold these aspects of her life up to public scrutiny, to expose her." The referee's finding in this regard is supported by competent substantial evidence.

Most importantly, the letter itself was introduced into evidence and its tone and content are both clear and direct. In it, Buckle poses numerous questions and includes many comments directed to Gibas' credibility, morality, and judgment and threatens to "leave no stone unturned" if she continues to press the charges. He essentially threatens to take her away from her job and her children and to expose her to ridicule, contempt, and hatred. He also threatens to expose and delve into the circumstances surrounding the murder of one of her family

members. As the referee found, the obvious intent of these threats, comments, and inquiries was to intimidate Gibas into abandoning her criminal complaint against Spaulding.

The heart of this matter revolves around the lines of propriety involved in the conflict between zealous advocacy and ethical conduct. We must never permit a cloak of purported zealous advocacy to conceal unethical behavior. At the same time, we must also guard against hollow claims of ethical impropriety precluding proper advocacy for a client. This Court has recognized that "ethical problems may arise from conflicts between a lawyer's responsibility to a client and the lawyer's special obligations to society and the legal system.... 'Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the ***1134** basic principles underlying the rules.' " *Florida Bar v. Machin,* 635 So.2d 938, 940 (Fla.1994) (quoting the Preamble to the Rules of Professional Conduct).

[3][4][5] Certainly, the principles underlying the rules include basic fairness, respect for others, human dignity, and upholding the quality of justice. Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in proper advocacy. In corresponding with persons involved in legal proceedings, lawyers must be vigilant not to abuse the privilege afforded them as officers of the court. A lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation.

In representing Spaulding, Buckle was certainly entitled and obligated to raise issues regarding Gibas' credibility and to attempt to discover the facts and circumstances surrounding the alleged crime; however, he was not entitled to use such inquiries as a ruse for threatening, disparaging, and humiliating Gibas into abandoning her complaint. Intimidating her for no other reason than to influence her to abandon the criminal charges and with no reasonable expectation of gaining any pertinent information is patently unfair and is clearly prejudicial to the administration of justice. Buckle's threats involving her employment, invasion of medical privacy, family, and security are simply beyond the bounds of proper advocacy. Accordingly, we uphold the referee's findings of fact and conclusions of guilt.

[6] We disagree, however, with the referee's recommendation regarding discipline. As noted above, the referee recommended that Buckle be suspended for thirty days, be required to write letters of apology, and be placed on probation for two years during which he would be restricted from sending religious materials in connection with his practice of law. In contrast with a review of the referee's findings of fact, which should be upheld if supported by competent substantial evidence, this Court has a broader scope of review regarding discipline because it bears the ultimate responsibility of ordering the appropriate sanction. *See Florida Bar v. Carricarte,* 733 So.2d 975, 978 (Fla.1999). In light of several cases involving similar conduct, we find that a public reprimand is the appropriate sanction for Buckle's misconduct in this case. *Florida Bar v. Sayler,* 721 So.2d 1152 (Fla.1998) (imposing a public reprimand where an attorney sent a frightening letter to opposing counsel in a workers' compensation matter which referenced the murder of a workers' compensation attorney and attached a copy of a newspaper article regarding the murder); *The Florida Bar v. Uhrig,* 666 So.2d 887 (Fla.1996) (imposing a public reprimand where an attorney sent a humiliating, embarrassing, and disparaging letter to his client's ex-husband); *Florida Bar v. Johnson,* 511 So.2d 295 (Fla.1987) (imposing a public reprimand where an attorney sent several letters to a client with whom he had a fee dispute stating that God told him that the client would be visited with a variety of biblical curses unless he paid the money he owed).

Richard Lee Buckle is hereby publicly reprim-

anded for his violation of the Rules Regulating The Florida Bar. Judgment for costs in the amount of $4,404.99 is entered against respondent and in favor of The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
HARDING, J., dissents as to discipline.

Fla.,2000.
The Florida Bar v. Buckle
771 So.2d 1131

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	SD-CS
Citation Text:	661 N.W.2d 354
Lines:	1104
Documents:	1
Images:	0

661 N.W.2d 354, 2003 SD 40
(Cite as: 661 N.W.2d 354)

C

Supreme Court of South Dakota.
In the Matter of the DISCIPLINE OF Benjamin J. EICHER, as an Attorney at Law.

No. 22523.
Argued March 26, 2003.
Decided April 16, 2003.

Attorney disciplinary proceeding was brought. The Supreme Court, Gilbertson, C.J., held that: (1) attorney engaged in professional misconduct by his written comments to a trial court disparaging the legal ability of opposing counsel, by attempting to bargain away a disciplinary complaint against himself by proposing he would not appeal a trial court's decision in underlying action if opposing counsel withdrew complaint, by intentionally misleading a trial court concerning availability of what he claimed was essential evidence, by threatening Rule 11 sanctions and a disciplinary complaint if opposing counsel did not take suggested actions, and by filing retaliatory and meritless disciplinary complaints in response to those filed against him; and (2) 100-day suspension was appropriate discipline in view of attorney's prior disciplinary history, his lack of respect for legal system, and his complete lack of remorse.

Suspension ordered.

West Headnotes

[1] Attorney and Client 45 ⚿57

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

State Supreme Court gives careful consideration in attorney disciplinary proceedings to findings of disciplinary board and referee, who have advantage of seeing and hearing witnesses.

[2] Attorney and Client 45 ⚿57

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

State Supreme Court gives no particular deference in attorney disciplinary proceeding to referee's recommended sanction.

[3] Attorney and Client 45 ⚿47.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k47.1 k. In General. Most Cited Cases

Attorney and Client 45 ⚿54

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k54 k. Trial or Hearing. Most Cited Cases

Confidentiality of disciplinary proceeding did not preclude attorney from telling his client about the proceedings concerning attorney's conduct and calling client as a witness; attorney could have waived that confidentiality by requesting that the matter be public. SDCL 16-19-99.

[4] Attorney and Client 45 ⚿57

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

Final determination for the appropriate discipline of a member of the State Bar rests firmly with the wisdom of state Supreme Court.

[5] Attorney and Client 45 ⚿57

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

In attorney disciplinary proceeding, state Supreme Court must thoroughly examine the merits of case, as well as the overall propriety of what Supreme Court's decision would mean to the State Bar and the public at large.

[6] Attorney and Client 45 ⚿49

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k49 k. Nature and Form in General. Most Cited Cases

Purpose of attorney disciplinary process is to protect the public, not to punish the lawyer.

[7] Attorney and Client 45 ⚿49

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k49 k. Nature and Form in General. Most Cited Cases

One purpose of attorney disciplinary process is the deterrence of like conduct by other attorneys.

[8] Attorney and Client 45 ⚿37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases

Written comments to trial court by attorney who represented a party in civil action, which characterized opposing party as having "despicable greed" and wanting to "make certain that her fangs [were] fully bared for all to see," suggested opposing counsel needed a long lecture in "good lawyering" and was "like a child who grows up undisciplined," and lectured court for giving "an extremely brief set of conclusory statements" in announcing ultimate result, went beyond fair and reasoned comment protected by First Amendment and constituted unprotected, unprofessional statements. U.S.C.A. Const.Amend. 1.

[9] Attorney and Client 45 ⚿42

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

Attorney who, upon receiving notice that opposing counsel in civil action had filed disciplinary complaint against him, proposed in letter to opposing counsel that he would not appeal decision in civil case if opposing counsel would agree to withdraw complaint, violated professional conduct rule imposing a duty to report disciplinary violations. SDCL 16-18 App., Rules of Prof.Conduct, Rule 8.3(a).

[10] Attorney and Client 45 ⚿42

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

Duty under rule of professional conduct to report disciplinary violations also embraces a responsibility not to frustrate the reporting by others or to dissuade others from cooperating in disciplinary investigations. SDCL 16-18 App., Rules of Prof.Conduct, Rule 8.3(a).

[11] Attorney and Client 45 ⚿42

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

Attorney who attempted to bargain away a disciplinary complaint filed against him by opposing counsel in civil action, by proposing that he would not appeal decision in that action if opposing counsel withdrew complaint, violated professional conduct rule prohibiting conduct prejudicial to the administration of justice. SDCL 16-18 App., Rules of Prof.Conduct, Rule 8.4(d).

[12] Attorney and Client 45 44(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k44 Misconduct as to Client
45k44(1) k. In General. Most Cited Cases

Attorney who, upon receiving notice that opposing counsel in civil action had filed disciplinary complaint against him, proposed in letter to opposing counsel that he would not appeal decision in civil case if opposing counsel would agree to withdraw complaint, violated duty to vigilantly prosecute and defend the rights of his own client.

[13] Attorney and Client 45 44(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k44 Misconduct as to Client
45k44(1) k. In General. Most Cited Cases

Attorney is in effect a special agent limited in duty to vigilantly prosecute and defend the rights of the client and not to bargain or contract them away.

[14] Attorney and Client 45 63

45 Attorney and Client
45II Retainer and Authority
45k63 k. The Relation in General. Most Cited Cases

Foundation of an attorney's relationship with clients and the legal system is trust.

[15] Attorney and Client 45 42

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

Attorney who moved to dismiss theft charge against his client on basis that state no longer possessed videotapes that purportedly showed client stealing money, but did not tell court that he, the attorney, had a copy of videotapes until confronted with that fact, engaged in improper and unprofessional conduct by intentionally misleading court concerning availability of what he claimed was essential evidence, and that conduct was not excused by attorney's professional obligation to represent his client. SDCL 16-18-19; SDCL 16-18 App., Rules of Prof.Conduct, Rule 3.3.

[16] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Professional conduct rule concerning candor towards tribunal goes beyond simply telling a portion of the truth; it requires every attorney to be fully honest and forthright. SDCL 16-18 App., Rules of Prof.Conduct, Rule 3.3.

[17] Attorney and Client 45 42

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

A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means, or any other rationalization that would excuse less than complete honesty in the practice of the profession.

[18] Attorney and Client 45 42

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

Selective omission by an attorney of relevant information exceeds the bounds of zealous advocacy and is wholly inappropriate.

[19] Costs 102 2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases

Motions for Rule 11 sanctions must never be used as a mere tactic to bolster a response, whether meritorious or not, to a motion or pleading. SDCL 15-6-11.

[20] Attorney and Client 45 42

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

Attorney who wrote 14 letters to opposing counsel, warning that attorney would seek Rule 11 sanctions, allege barratry, and file complaint with bar association's disciplinary board if opposing counsel did not take suggested actions, violated professional conduct rules dealing with fairness to opposing counsel, reporting of professional misconduct, and conduct prejudicial to administration of justice. SDCL 15-6-11; SDCL 16-18 App., Rules of Prof.Conduct, Rules 3.4, 8.3, 8.4.

[21] Attorney and Client 45 37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases

Professional conduct rule requiring a lawyer to inform appropriate authorities if lawyer has knowledge another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to other lawyer's fitness to practice puts a burden on reporting lawyer to make a preliminary determination whether a violation rises to that level. SDCL 16-18 App., Rules of Prof.Conduct, Rule 8.3(a).

[22] Attorney and Client 45 37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases

Statute that makes complaints submitted to disciplinary board of State Bar absolutely privileged and prohibits institution of a civil action predicated on such complaints does not immunize an attorney who files a complaint ultimately rejected by the board from a disciplinary proceeding in connection with filing unwarranted complaint. SDCL 16-19-30

.

[23] Attorney and Client 45 37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases

Attorney and Client 45 42

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

Attorney's filing of retaliatory and meritless disciplinary complaints against lawyers who had filed disciplinary complaints against him violated professional conduct rules concerning frivolous claims, candor toward the tribunal, fairness to opposing parties and counsel, truthfulness in statements to others, respect for rights of third persons, conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice. SDCL 16-18 App., Rules of Prof.Conduct, Rules 3.1, 3.3, 3.4, 4.1, 4.4, 8.3, 8.4.

[24] Attorney and Client 45 59.5(6)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.5 Factors Considered
45k59.5(6) k. Other Factors. Most Cited Cases
(Formerly 45k58)

Appropriate discipline in a particular attorney disciplinary case is determined by considering the seriousness of the misconduct and the likelihood that it or similar misconduct will be repeated.

[25] Attorney and Client 45 59.5(4)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.5 Factors Considered
45k59.5(4) k. Factors in Aggravation. Most Cited Cases
(Formerly 45k58)

State Supreme Court considers the prior record of the attorney in determining appropriate discipline in attorney disciplinary proceeding.

[26] Attorney and Client 45 52

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k52 k. Charges and Answers Thereto. Most Cited Cases

Fact that disciplinary complaints against attorney were not generated by judges who presided over legal proceedings giving rise to the complaints, but by opposing counsel, did not absolve attorney of any finding of wrongdoing, despite canon of judicial conduct requiring judge having knowledge of a violation of professional conduct rule that raises substantial question as to an attorney's fitness as lawyer to inform appropriate authority. SDCL 16-2 App., Code of Jud.Conduct, Canon 3, subd. D(2).

[27] Attorney and Client 45 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of Judge at Chambers. Most Cited Cases
(Formerly 45k58)

A trial court has no more authority to disbar, suspend, or publicly censure an attorney for an ethical infraction committed before it in a legal pro-

ceeding than it does to absolve that attorney of a charge of an ethical violation in the same proceeding.

[28] Attorney and Client 45 ⚿59.5(6)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.5 Factors Considered
45k59.5(6) k. Other Factors. Most Cited Cases
(Formerly 45k58)

An argument in attorney disciplinary proceeding that attorney in question is no worse than the supposed bottom of the barrel that have been admitted to the bar fails to pass muster.

[29] Attorney and Client 45 ⚿59.13(3)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.13 Suspension
45k59.13(2) Definite Suspension
45k59.13(3) k. In General. Most Cited Cases
(Formerly 45k58)

Suspension of 100 days from practice of law was appropriate sanction for attorney who engaged in professional misconduct by filing memorandum disparaging legal ability of opposing counsel, threatening sanctions and disciplinary complaints against opposing counsel, attempting to bargain away a disciplinary complaint against himself by offering to give up his client's civil appeal rights, and filing retaliatory disciplinary complaints, in view of attorney's prior disciplinary history, his lack of respect for legal system, and his complete lack of remorse. SDCL 16-19-31, 16-19-35.

***357** Robert B. Frieberg, Beresford, South Dakota, for Disciplinary Board.

Ronald W. Banks of Banks, Johnson, Colbath & Kerr, Rapid City, for Eicher.

ORIGINAL PROCEEDING

GILBERTSON, Chief Justice.

[¶ 1.] This is a disciplinary proceeding against Benjamin J. Eicher, a member of the State Bar of South Dakota. The Disciplinary Board of the State Bar of South Dakota has recommended public censure. The Referee has recommended a public censure on some issues and a private reprimand on another. Eicher urges the Court to hold that he "committed no violations of the Rules of Professional conduct for which reprimand of any kind is appropriate."

GENERAL BACKGROUND

[¶ 2.] Eicher is not married and has no children. He sponsors a baseball team, writes for a Los Angeles music newsletter, and is on the community advisory board of an Indian radio station. Eicher has a strong interest in theology.

[¶ 3.] Eicher is a 1985 graduate of the University of Nebraska School of Law. After passing the bar examination he was admitted to practice law in South Dakota. He practiced law in Rapid City with Franklin J. Wallahan until Wallahan's death in 1994. Eicher has been a sole practitioner since that time. He specializes in litigation and insurance defense.

[¶ 4.] Eicher has been the subject of four previous disciplinary complaints. The first, in 1992, was dismissed. The second, in 1997, was dismissed with a caution. The third, in 1998, was dismissed and expunged. Eicher received an admonition for the fourth in 2001. An admonition is a finding that a lawyer violated one or more of the Rules of Professional Conduct, but did not warrant a private reprimand. Three additional complaints are pending in this disciplinary proceeding.

KOCH COMPLAINT

[¶ 5.] On April 16, 2002 Spearfish attorney

Dedrich R. Koch filed a complaint with the Disciplinary Board concerning Eicher's conduct in a civil action, *Thomas v. Thomas. See Thomas v. Thomas,* 2003 SD 39, 661 N.W.2d 1. In the course of the lawsuit, Koch, who represented Gail Thomas, and Eicher, who represented Shirley M. Thomas, filed various motions and pretrial briefs and memorandums for Circuit Judge Kern's consideration. Koch attached these to his complaint and told the Board:

> ***358** Although I personally find Mr. Eicher's repeated threats and claims for sanctions to be unsupported, meritless and unprofessional, it is the personal attacks and insults hurled by Mr. Eicher at my client and me that I can not ignore. Vigorously attacking the allegations or criticizing the tactics of an opponent does not necessitate or allow the use of such blatantly offensive comments and I hope the disciplinary board will take the necessary steps to inform Mr. Eicher of the same.

[¶ 6.] In a document titled "Shirley Thomas' Reply to Gail Thomas' Brief in Support of Motion for Waste and Property Taxes" Eicher wrote, in part:

> • Gail's attempt to avoid any burden at all from her great bounty (it is assumed that no one would even try to argue that receiving title to $100,000 in unencumbered property without paying the giver a penny for it constitutes a "great bounty"), is shockingly greedy, to put it bluntly.
>
> • Gail continues to not only want her pound of flesh from Shirley, but wants all of the blood associated with it.
>
> • Gail's greed is stunningly bold.
>
> • Then, to make certain that her fangs are fully bared for all to see, Gail hurls yet another dose of acidic bile at Shirley. Gail accuses Shirley of criminal misconduct ... Perhaps Gail plans to have Shirley arrested, and hauled from the courtroom on March 27 in shackles, too.
>
> • Gail's arguments on these matters are so utterly fallacious, groundless, and frivolous, that they constitute plain violations of Rule 11.
>
> • Gail's despicable greed should not be rewarded.
>
> • Gail's ... adamant persistence in trying to make Shirley accountable, belies an active, rancid animosity against Shirley which not only defies logic but apparently knows no bounds.

[¶ 7.] Following Judge Kern's oral bench decision which was adverse to Eicher's client, Eicher filed a "Memorandum of Law for Reconsideration." In it he chastised Judge Kern:

> The Court attempted to issue its oral bench decision on March 27 in the scant moments left on the Court's clock at that specific time. It is presumed that had the Court sufficient additional time available, a more fully described and reasonably in-depth discussion would have been made by the Court of its findings of fact and its conclusions of law. Instead, the parties were only given an extremely brief set of conclusory statements of the ultimate result. However, the "bottom line" approach presented by the Court offers little if any guidance as to the Court's (as opposed to Gail Thomas' counsel's when the Findings and Conclusions are drafted) reasoning behind the specific rulings found within the penumbra of that "bottom line." Moreover, the Court gave no reasons at all for denial of Shirley's request for sanctions under Rule 11 of the Rules of Civil Procedure, even though the statutory provisions mandate entry of specific findings and conclusions whether such sanctions are granted or denied.

In this document Eicher also lectured the trial court about his view of Koch's legal ability:

> Our present system is clogged with specious claims brought by novice lawyers. It is clogged with positions which have no basis in fact or law, as if "lawyering" means to disagree with whatever the other side says. The circuit court judges see enough of this. But, the Court should

be well aware that for ***359** every example played out before it in open court, are hundreds of instances "behind the scenes" which never see the inside of a court file or the courtroom.

Formerly, there was a greater amount of mentoring by older, experienced lawyers to guide novice attorneys. When the undersigned thinks of what his mentor, the late (and great) Franklin J. Wallahan would have said had the undersigned taken the positions adopted here in this case by Gail and her counsel, it is not an exaggeration to say that a long lecture in "good lawyering" would have occurred as a result. However, without mentoring and without an eye toward quality practicing, Gail and her counsel simply fire away with a blunderbuss as much buckshot as possible-even if it is improper, unmerited, groundless or just plain wrong-with the comfort of knowing that all the Court will do is reject the position. In other words, there is no real downside. But this is where Rule 11 especially was geared to not only protect the innocent opponent, but to punish the wrongdoers. Just like a child who grows up undisciplined because the parents failed to provide appropriately strict guidance, when lawyers dump their half-baked or completely uninvestigated contentions on the courtroom floor without any correction, then it's no wonder that they never learn to do things differently (i.e., correctly) next time.

[¶ 8.] On April 23, 2002 Eicher received notice of Koch's disciplinary complaint against him. Eicher immediately faxed a letter to Koch suggesting that he withdraw the disciplinary complaint against Eicher or face an appeal in the *Thomas* matter. The letter also implied that Eicher would file a disciplinary complaint against Koch. This letter stated, in part:

Dear Deach:

I am confirming the terms of our discussion on the Bar Association matter in this case. My suggestion is that instead of having your client face an appeal from the above action if we proceed with the Bar Association contentions (i.e., mutual complaints), which will occur if I have to obtain the transcript to defend myself against your contentions and to put the matter wholly in context, we jointly approach the Bar Association as follows.

I would think a letter signed by both you and me, to the Bar Association, saying something as follows would suffice:

This is a joint letter by Dedrich Koch and Benjamin Eicher regarding a disciplinary complaint submitted by Attorney Koch against Attorney Eicher. We jointly agree that the disciplinary complaint is hereby withdrawn. On April 22, 2002 a hearing was held before Judge Kern wherein she denied relief to Attorney Koch based upon similar allegations against Attorney Eicher as those in the disciplinary complaint, as well as denying Rule 11 sanctions against Attorney Koch. Attorney Koch and Attorney Eicher have resolved their differences, personal and professional, and do not wish to involve the disciplinary board further. It is assumed that this letter will suffice to close the matter, unless different instructions are given to us.

Koch refused to accept Eicher's proposal.

[¶ 9.] On April 23, 2002 Eicher also wrote letters to Judge Kern and court reporter Jean A. Kappedal regarding the *Thomas* case. His letter to Judge Kern begins, "Certain conduct by Mr. Koch has led to the necessity of an appeal in this action. It is unfortunate but it remains a reality." His letter to Ms. Kappedal begins, "Because Mr. Koch could not leave well enough alone, we are going to have an appeal from this case after the parties ***360** submit their respective Findings of Fact, Conclusions of Law, and Judgments[.]"

CLAYBORNE COMPLAINT

[¶ 10.] On April 22, 2002 Rapid City attorney Courtney R. Clayborne filed a complaint with the

Disciplinary Board concerning Eicher's conduct in a criminal court trial held February 8, 2002.

[¶ 11.] Eicher represented Shawna Martin who was accused of stealing money from her employer. Clayborne represented her employer and was the first witness called during Martin's criminal trial. Clayborne testified that he had spoken with Martin who admitted to him that she had taken money from her employer on two or three occasions. He also testified that he had watched two videotapes supplied by Martin's employer which showed Martin stealing money.

[¶ 12.] Eicher, in open court and "as an officer of the court" moved to dismiss the charges because the State no longer had the videotapes of Martin in its possession. Eicher told the trial court that he had watched the videotapes and they showed Martin "didn't take anything." He claimed that the videotapes were "Defendant's best evidence" "because of what it shows and what it doesn't show. It's our best evidence because the other testimony would be that people are in and out of that [money] bag all the time." He argued, "It's manifest that when the State loses evidence, that is significant it is grossly prejudicial to the defendant[.]" It deprived him of evidence necessary to cross examine witnesses.

[¶ 13.] Eicher did not tell the trial court that he possessed copies of the videotapes. He received them from one of the employer's attorneys seven months earlier in a civil proceeding Martin initiated. During a break in the criminal trial Clayborne confronted Eicher and told him that it was unethical and misleading to fail to tell the court that he had copies of the videotape. Following the recess, Eicher told the court of Clayborne's accusation. He admitted that he had copies of the videotapes but did not bring them. He told the court that "I haven't misled the court about anything. The official tapes that are in evidence are not here." He also told the court, "[b]ut for [Clayborne] to accuse me of unethical conduct is about how low we've got to this thing."

BOARD GENERATED COMPLAINT

[¶ 14.] On July 18, 2001 Eicher filed a complaint with the Disciplinary Board against Attorney M for his conduct in the Bernardo case. The Board dismissed the complaint with a caution. A dismissal with a caution is a determination that while there was no violation of the Rules of Professional Conduct there was an advisory to improve the respondent lawyer's office practice or relations with other lawyers or clients.

[¶ 15.] In the course of investigating Eicher's complaint against Attorney M the Board discovered a series of fourteen letters Eicher wrote to Attorney M and a member of his firm in the course of a year regarding the Bernardo case and the Bird Hat case. In each case, Eicher warned Attorney M that he would seek Rule 11 sanctions and allege barratry and a frivolous action counterclaim if Attorney M did not take the actions Eicher requested. He advised Attorney M that if he took the action Eicher suggested there would be "no need to report the problem to the bar association." If Attorney M did not take the action Eicher "will be filing a complaint with the Bar Association's disciplinary board. So be it."

EICHER GENERATED COMPLAINTS

[¶ 16.] On May 2, 2002 the Disciplinary Board hand delivered a letter to Eicher ***361** informing him of correspondence discovered in the course of investigating his July 18, 2001 complaint against Attorney M concerning the Bernardo case. Eicher responded that day by hand delivering a second Disciplinary Board complaint against Attorney M concerning the Bird Hat case. The Board investigated and dismissed the complaint with a caution.

[¶ 17.] On May 15, 2002 Eicher filed separate complaints against Koch and Clayborne. On May 15, 2002 and May 20, 2002 Eicher filed separate complaints against two members of Clayborne's law firm. The Board investigated the four complaints and then dismissed and expunged all of them.[FN1]

FN1. Under Rule VIII(A) of the Rules of

> Procedure of the Disciplinary Board may dismiss a complaint if frivolous or clearly unfounded in fact. It may expunge a frivolous or clearly unfounded complaint by a separate and unanimous vote. Rule VIII(D), SDCL 16-19, Appx.

[¶ 18.] The Secretary-Treasurer of the State Bar filed an affidavit advising that he examined all of the Disciplinary Board records since 1989. No person, lawyer or non-lawyer, has filed as many complaints against lawyers as has Eicher, who has filed seven. Three were dismissed with a caution, four were dismissed and expunged.[FN2]

> FN2. Other than extensive background regarding Eicher's complaints against Koch and Clayborne, the record before us does not contain the specifics of the remaining complaints filed by Eicher since they were expunged and dismissed by the Disciplinary Board. As there is no basis for our review of the contents of the others, we express no opinion on their propriety.

DISCIPLINARY BOARD

[¶ 19.] Following a hearing the Disciplinary Board entered findings of fact and conclusions of law. Included in its findings were:

> 20. [Eicher's] responses to the Disciplinary Board were not forthright and lacked candor. He refused to answer questions directly. [Eicher] claimed ignorance or misapprehension of the applicable rules. [Eicher] claimed that the Disciplinary Board had required him to assert the meritless complaints mentioned in findings 11 and 21, above, which claim was false.
>
> 21. [Eicher's] conduct demonstrates a persistent practice prejudicial to the administration of justice of directing exceptionally harsh, vindictive and insulting communication to opposing counsel that serve no purpose, but aim to harass opposing counsel and their clients and result in burdening the justice system with unnecessary expense and acrimony.

[¶ 20.] The Disciplinary Board concluded:

A. [Eicher] has violated S.D.C.L. 16-18-14 concerning respect for parties and witnesses.

B. [Eicher] has violated S.D.C.L. 16-18-16 concerning the commencement or continuance of an action or proceeding for any motive of passion or interest.

C. [Eicher] has violated S.D.C.L. 16-18-19 concerning an attorney's duty to use such means only as are consistent with the truth, and never seek to mislead the judges by any artifice or false statement of fact or law.

D. [Eicher] has violated the following Rules of Professional Conduct:

(1) Rule 3.1 concerning frivolous claims;

***362** (2) Rule 3.3 concerning candor toward the tribunal;

(3) Rule 3.4 concerning fairness to opposing parties and counsel;

(4) Rule 4.1 concerning truthfulness in statements to others;

(5) Rule 4.4 concerning respect for rights of third persons;

(6) Rule 8.3 concerning the obligation to report misconduct; and

(7) Rule 8.4(a)(c) & (d) concerning professional misconduct.

[¶ 21.] The Board recommended that Eicher be publicly censured for his violations of the Rules of Professional Conduct and that he pay the costs and expenses of this disciplinary proceeding.

REFEREE

[¶ 22.] The Honorable Eugene Martin, a retired

judge of the circuit court, was appointed by this Court to act as Referee in this matter. The Referee agreed that Eicher violated the statutes and Rules of Professional Conduct cited by the Disciplinary Board. The Referee did not believe, however, that Eicher's conduct toward Attorney M violated any rule of professional conduct. The Referee recommended that Eicher receive a private reprimand for his conduct in the Clayborne complaint and a public censure for the remaining violations of Rules of Professional Conduct. The Referee noted:

> [Eicher] is an intelligent and articulate attorney with a resume replete with accomplishments, civil, legal, and religious. All of this notwithstanding, it appears to me that [Eicher] does not know, or refuses to acknowledge, the distinction between retaliation and appropriate response; between offensive personality and fair and reasoned comment; between vigorous representation and professional conduct. It is his obligation to know and follow.

STANDARD OF REVIEW

[1][2][3][4] [¶ 23.] The Disciplinary Board and the Referee conducted detailed hearings in this matter. Each made findings, conclusions, and recommendations regarding the appropriate discipline in Eicher's case. This Court gives careful consideration to their findings because they had the advantage of seeing and hearing Eicher, the only witness in each hearing. FN3 *In re Discipline of Mattson,* 2002 SD 112, 651 N.W.2d 278. This Court, however, gives no particular deference to the Referee's recommended sanction. ***363***In re Discipline of Dorothy,* 2000 SD 23, 605 N.W.2d 493. "The final determination for the appropriate discipline of a member of the State Bar rests firmly with the wisdom of this Court." *Matter of Discipline of Wehde,* 517 N.W.2d 132, 133 (S.D.1994).

> FN3. At oral argument Eicher claimed that the Disciplinary Board denied his request to present witnesses on his behalf. We find no basis for this in the record. He was advised of the Board's rules which include the accused attorney's "right to be heard, to offer witnesses, to be represented by Counsel and to have a record kept[.]" *See* Rule IX(D), Rules of Procedure of the South Dakota Disciplinary Board of the State Bar of South Dakota, SDCL 16-19, Appx.
>
> Eicher also claimed that the confidentiality of disciplinary proceedings precluded him from telling his client about the proceedings concerning his conduct and calling her as a witness. Eicher, however, could have waived that confidentiality. SDCL 16-19-99 provides, in part
>
> All proceedings involving allegations of misconduct by or the disability of an attorney shall be kept confidential until a formal complaint asking for disciplinary action is filed with the Supreme Court by the board or the attorney general, *or the respondent-attorney requests that the matter be public,* or the investigation is predicated upon a conviction of the respondent-attorney for a crime or, in matters involving alleged disability, the Supreme Court enters an order transferring the respondent-attorney to disability inactive status pursuant to § 16-19-88 or 16-19-92.
>
> (emphasis added).

LEGAL ANALYSIS

[5][6][7] [¶ 24.] In this case, "[w]e must thoroughly examine the merits of this case, as well as the overall propriety of what our decision would mean to the South Dakota Bar and the public at large." *Dorothy,* 2000 SD 23 at ¶ 19, 605 N.W.2d at 498. "[W]e first reaffirm the purpose of the disciplinary process-to protect the public, not to punish the lawyer." *Petition of Pier,* 1997 SD 23, ¶ 8, 561 N.W.2d 297, 299. A further purpose of the disciplinary process is the deterrence of like conduct by other attorneys. *Matter of Discipline of Tidball,* 503

N.W.2d 850 (S.D.1993).

1. The Koch Complaint

A.

[¶ 25.] When Eicher became a member of the State Bar of South Dakota he took an oath to "abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged[.]" SDCL 16-16-18. "Note that this is a continual and ongoing obligation. Each day of an attorney's life demands that these requirements be met anew." *In re Ogilvie*, 2001 SD 29, ¶ 56, 623 N.W.2d 55, 67 (Gilbertson, J., dissenting). This constitutes a lawyer's duty, SDCL 16-18-14, and a lawyer's responsibility to "use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Preamble, South Dakota Rules of Professional Responsibility. SDCL 16-18 Appx.

[¶ 26.] "[T]he legal profession has seen an increasing number of attorneys engaging in conduct that is personally and professionally offensive. State-bar disciplinary action results because of findings that an attorney has engaged in flagrant disrespect toward a court, opposing counsel, an adverse party, or the attorney's own client[.]" Janelle A. McEachern, Annotation, *Engaging in Offensive Personality as Ground for Disciplinary Action Against Attorney*, 58 A.L.R.5th 429 (1998).

[¶ 27.] The Nebraska Supreme Court has observed:

> We explained in *In re Appeal of Lane*, 249 Neb. at 511, 544 N.W.2d at 375, that the "requisite restraint in dealing with others is *obligatory conduct for attorneys* because '[t]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel.... Such tactics seriously lower the public respect for ... the Bar.' " (emphasis supplied.) (Quoting *Application of Feingold*, 296 A.2d 492 (Me.1972)). Furthermore, " '[a]n attorney who exhibits [a] lack of civility, good manners and common courtesy ... tarnishes the ... image of ... the bar....' " *Id.* (Quoting *In re McAlevy*, 69 N.J. 349, 354 A.2d 289 (1976)).
>
> *In re Converse*, 258 Neb. 159, 602 N.W.2d 500, 508 (1999).

[¶ 28.] This Court quoted *Converse* in *Dorothy*, 2000 SD 23 at ¶ 48, 605 N.W.2d at 507-508 and expanded its analysis:

> The Nebraska Supreme Court has recently stated:
>
> > "Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because ***364** trial by combat long ago proved unsatisfactory.
> >
> > ...
> >
> > "The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if a judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into [a] verbal free-for-all.... [H]abitual unreasonable reaction to adverse rulings ... is conduct of a type not to be permitted of a lawyer when acting as a lawyer."
>
> *In re Converse*, 258 Neb. 159, 602 N.W.2d 500, 508 (1999) (citing *Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367, 376 (1996)). Distinguishing between reasoned comment protected by the First Amendment and unprotected, unprofessional statements goes back nearly to the establishment of an organized bar in this State.
>
> [T]here can be such an abuse of the freedom of

> speech and liberty of the press as to show that a party is not possessed "of good moral character," as required for admission to the bar of this state ... and therefore to require that such person be excluded from the bar of this state; and to our mind the evidence submitted here shows such an instance ... "Nor can the respondent be justified on the ground of guaranteed liberty of speech. When a man enters upon a campaign of villification [sic], he takes his fate into his own hands, and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution...."

In re Egan, 24 S.D. 301, 326-27, 123 N.W. 478, 488 (1909). *See also In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644, 648-49 (1956); *Converse*, 602 N.W.2d at 509.

[8] [¶ 29.] Eicher's written comments to the trial court in the *Thomas* matter concerning Koch, Koch's client, and the trial court, went far beyond fair and reasoned comment protected by the First Amendment. Instead they constitute unprotected, unprofessional statements. As we said in *Dorothy*, 2000 SD 23 at ¶ 47, 605 N.W.2d at 507:

> This clearly was not an isolated incident where emotions of the moment in the heat of litigation overcame better judgment. *In re Snyder*, 472 U.S. 634, 647, 105 S.Ct. 2874, 2882, 86 L.Ed.2d 504, 514 (1985). The worst of it was prepared or written out in advance with sufficient time to reflect on the inflammatory contents of the statements before they were delivered.

"Moreover, these acts were not an isolated 'foolish and negligent' incident, *id.*, they were intentional and numerous in number." *Mattson*, 2002 SD 112 at ¶ 55, 651 N.W.2d at 289.

B.

[9] [¶ 30.] When Eicher received notice of the disciplinary complaint that Koch filed against him, he promptly faxed Koch a letter. In it, Eicher proposed that he would not appeal the *Thomas* decision if Koch would agree to withdraw the disciplinary complaint.

[10][11] [¶ 31.] By doing so, Eicher attempted to utilize Koch's client's interest in avoiding an appeal to compromise Koch's obligations to report professional misconduct. Rule 8.3(a) provides:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises***365** a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects *shall* inform the appropriate professional authority. (emphasis supplied).

"Rule 8.3(a) is a mandatory rule of discipline." 2 Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 8.3:201 (2d ed. 1996). The duty to report disciplinary violations also embraces a responsibility not to frustrate the reporting by others or dissuading others from cooperating in disciplinary investigations. FN4 *See Sup. Ct. Bd. of Prof. Ethics v. Furlong*, 625 N.W.2d 711 (Iowa 2001). Attempting to bargain away a disciplinary complaint also constitutes "conduct that is prejudicial to the administration of justice[.]" Rule 8.4(d); *The Florida Bar v. Frederick*, 756 So.2d 79 (Fla.2000). *See also* SDCL 16-18-26(2) which states, "[e]very attorney at law who: ... intentionally delays his client's suit with a view to his own gain; ... is guilty of a Class 2 misdemeanor."

> FN4. *See generally* SDCL 16-19-46 which provides that in disciplinary proceedings "[n]either unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement or compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint."

[12][13][14] [¶ 32.] Additionally, Eicher's deliberate conduct created a conflict with his own cli-

ent which he did not report to the client. "The attorney is in effect a special agent limited in duty to the vigilant prosecution and defense of the rights of the client and not to bargain or contract them away." *Northwest Realty Co. v. Perez*, 80 S.D. 62, 65, 119 N.W.2d 114, 116 (1963). "The foundation of an attorney's relationship with clients and the legal system is trust." *Tidball*, 503 N.W.2d at 856 (citations omitted).[FN5] Eicher violated this duty.

FN5. In *Mattson*, we examined the nature of this attorney-client relationship:

> "The nature of the relationship between attorney and client is highly fiduciary. It consists of a very delicate, exacting and confidential character. It requires the highest degree of fidelity and good faith. It is a purely personal relationship, involving the highest personal trust and confidence." "By virtue of his fiduciary duties to his client, an attorney is forbidden from using his official position for private gain." While representing a client an attorney must not do anything knowingly that is inconsistent with the terms of his employment or contrary to the best interests of his client. This is "fundamental law."

2002 SD 112 at ¶ 44, 651 N.W.2d at 286-287. (citations omitted).

2. The Clayborne Complaint

[¶ 33.] During a criminal trial Eicher moved to dismiss the proceeding because the State failed to produce the original videotapes purporting to show his client taking money. Eicher claimed that the tapes provided exculpatory evidence and his ability to cross examine witnesses was impaired by the loss of the tapes. Eicher did not tell the court that he had a copy of the videotapes until Clayborne confronted him with this fact.

[15][16] [¶ 34.] While Eicher did not directly lie to the trial court, he intentionally misled the court concerning the availability of what he claimed was essential evidence. "Clearly, the requirement of candor towards the tribunal goes beyond simply telling a portion of the truth." *In re Discipline of Wilka*, 2001 SD 148, ¶ 15, 638 N.W.2d 245, 249.

> It requires every attorney to be fully honest and forthright.
>
> > We cannot overemphasize the importance of attorneys in this state being ***366** absolutely fair with the court. Every court ... has the right to rely upon an attorney to assist it in ascertaining the truth of the case before it. Therefore, candor and fairness should characterize the conduct of an attorney at the beginning, during, and at the close of litigation.
>
> [*Matter of Discipline of*] *Schmidt*, 491 N.W.2d [754] at 755 (citing *H. Drinker*, Legal Ethics 74 (1953)). There is no allowance for interpretation.
>
> *Id.*

[17][18] [¶ 35.] Eicher's professional obligation to represent his client does not exonerate him in this situation. "[T]here is a line that even the zealous advocate cannot cross." *Wilka*, 2001 SD 148 at ¶ 16, 638 N.W.2d at 249.

> It is absolutely necessary that each member of the bar comprehends the great responsibility that every person who has the privilege to practice law must strive for: to be a person of unquestionable integrity as he or she deals with the rights of people before the bar. A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means, or any other rationalization that would excuse less than complete honesty in the practice of the profession. Certainly, our Rules of Professional Conduct allow no such flirtation.

Matter of Discipline of Mines, 523 N.W.2d 424, 427 (S.D.1994). *See also* SDCL 16-18-19:

> It is the duty of an attorney and counselor at law to employ, for the purpose of maintaining the

causes confided to him, such means only as are consistent with truth and never to seek to mislead the judges by any artifice or false statement of fact or law.

Eicher intentionally misled the court and "crosse[d] the line into improper and unprofessional conduct." *Wilka*, 2001 SD 148 at ¶ 16, 638 N.W.2d at 249. FN6

FN6. This was not the end of this type of conduct. A great portion of Eicher's objections to referee's report filed with this Court is nothing more than an attack on the integrity of board member Greg Eiesland. In that pleading Eicher castigates Eiesland for not recusing himself at the April board meeting where a complaint was filed against Eicher. What Eicher fails to tell this Court is that Eiesland did not sit on the board when the complaint was actually heard before the board in June of that year. "Selective omission of relevant information ... 'exceeds the bounds of zealous advocacy and is wholly inappropriate.' " *Dorothy*, 2000 SD 23 at ¶ 51, 605 N.W.2d at 509.

3. Board Generated Complaint

[¶ 36.] While investigating Eicher's meritorious complaint against Attorney M, the Board discovered a series of letters Eicher wrote. Throughout the correspondence, Eicher maintains that he will seek Rule 11 sanctions, allege barratry, and file disciplinary actions if Attorney M does not take the action Eicher seeks.

[¶ 37.] The Disciplinary Board and the Referee disagreed about Eicher's course of conduct in this matter. The Disciplinary Board found that Eicher's acts served no legitimate purpose, particularly when repeated several times in unrelated actions. The Board believed the letters demonstrated a pattern aimed to intimidate and threaten Attorney M so as to interfere with his professional obligation to his clients. The Referee found:

If, after investigation, an attorney justifiably believes, as does his employer (including a[sic] insurance agency), that a particular personal injury case is in some respects fraudulent, frivolous, or of highly questionable legal merit, then I believe he (they) should have right to so ***367** state, along with perceived legal ramifications. Attorney "M's" conduct was unacceptable and contributed to the suspicion and disbelief regarding the merit of these claims. There was a basic professional disrespect shown by Attorney "M" towards [Eicher]. Further, it appears that the attorneys involved have had a history of "frankness" with each other.

Based on my review of the letters, including Exhibit 2 [Eicher's] reply letter, as well as the testimony in this matter, [Eicher] and his respective employers had a reasonable basis to advise Attorney "M" of the consequences of proceeding with a perceived frivolous, and perhaps fraudulent, claim. I am *not* satisfied that the specific contents of the letters were intended to threaten, intimidate, or coerce Attorney "M" into agreeing with [Eicher] about how the cases ought to proceed.

The Referee concluded that Eicher's conduct did not violate any Rules of Professional Conduct.

[¶ 38.] We note that the current Federal version of Rule 11 requires a letter from counsel to opposing counsel before a motion for Rule 11 sanctions may be brought before the court. FN7 However, that is a far cry from the numerous letters written by Eicher to Attorney M which went well beyond a notice of a possible Rule 11 hearing and included threats of barratry and filing of disciplinary actions.

FN7. Federal Rule 11(c)(1)(A) adopted in 1993 contains a twenty-one day "safe harbor." If a lawyer intends to file a Rule 11 motion against an opposing lawyer, the first must give the other twenty-one days notice of the Rule 11 motion, thus allowing the "offending" lawyer the option of withdrawing the purported frivolous pleading

during the twenty-one day period. If the pleading is not withdrawn, then the Rule 11 motion may proceed to be heard by the Court.

South Dakota's version of Rule 11 (SDCL 15-6-11) is the 1983 version of the Federal Rule. It does not contain the twenty-one day notice provision.

[¶ 39.] Threats by counsel to file disciplinary charges against an opponent may, depending on the circumstances violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4 and 8.4(b). ABA Com. on Ethics and Professional Responsibility, Use of Threatened Disciplinary Complaint Again Opposing Counsel, Formal Op. 94-383. This opinion explains, in part,

A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness, or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

[¶ 40.] Eicher repeatedly told Attorney M that he would file disciplinary actions in the Bird Hat and Bernardo cases. He also repeatedly maintained that he would seek Rule 11 sanctions and allege barratry.

[19] [¶ 41.] SDCL 15-6-11(a):

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion and exhibits***368** or attachments thereto, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, embarrass another party or person, or to cause unnecessary delay or needless increase in the cost of litigation.

Appropriate sanctions are provided for a violation of this rule. SDCL 15-6-11(b). However, Rule 11 motions must never be used as a mere tactic to bolster a response-whether meritorious or not-to a motion or pleading. *Caribbean Wholesales and Service Corp. v. U.S. JVC Corporation*, 101 FSupp2d 236 (S.D.N.Y.2000). The same is true of threatened Rule 11 sanctions and barratry claims, especially in the Bird Hat matter which was merely at a claim stage. *See* SDCL 16-18-16: "[i]t is the duty of an attorney and counselor at law not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest."

[20] [¶ 42.] Eicher's conduct, at a minimum, violated Rule 3.4, dealing with fairness to opposing counsel, Rule 8.3, dealing with the reporting of professional misconduct, and Rule 8.4, dealing with professional misconduct and engaging in conduct prejudicial to the administration of justice.[FN8] Therefore we uphold the Board's conclusions of law on this complaint.

FN8. SDCL 16-18-19 states:

It is the duty of an attorney and counselor at law to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of face or law.

4. Eicher Generated Complaint

[¶ 43.] While the three complaints against Eicher were pending, Eicher, within a five day period, filed four disciplinary complaints. Two were filed against Koch and Clayborne, the attorneys who had filed complaints against Eicher. Two were filed against Clayborne's law partners All were investigated, found meritless, and expunged.[FN9]

FN9. We express no opinion on the propriety of these complaints. *See* fn. 2.

[21] [¶ 44.] Rule 8.3(a), which mandates the reporting of a fellow lawyer's misconduct,

> [L]imits the rule to cases of known violations that directly implicate the integrity of the legal profession. The duty to report accordingly applies only to cases raising a "substantial question" about another lawyer's very fitness to practice law. This formula puts a burden on the reporting lawyer to make a preliminary judgment whether a violation rises to that level.

2 Geoffrey C. Hazard Jr., et al, The Law of Lawyering at § 8.3:102. Eicher's complaints against Clayborne and Koch did not rise to that level. The Disciplinary Board and the Referee correctly found that these were retaliatory in nature.

[22] [¶ 45.] SDCL 16-19-30 provides:

> Complaints submitted to the board or testimony with respect thereto shall be absolutely privileged and no civil action predicated thereon may be instituted. Members of the board, the board's counsel, board staff and any personnel or legal counsel appointed pursuant to § 16-19-29(2) shall be immune from suit for any conduct in the course of their official duties.

***369** Eicher claims that the immunity provided by this statute means no attorney may be the subject of a disciplinary action because the attorney filed a complaint ultimately rejected by the Board. Eicher misreads this court rule. SDCL 16-19-30 precludes a civil action predicated on complaints submitted to the Board. Article V § 12 of the South Dakota Constitution vests the ultimate authority for regulation of attorneys with this Court. It is hardly consistent with this mandate that this Court would enact a court rule that would preclude it from imposing discipline upon attorneys who violate the ethical rules by filing unwarranted complaints with the Disciplinary Board under the premise that such improper conduct is privileged. SDCL 16-19-30 does not preclude accountability for a violation of the Rules of Professional Conduct.

[23] [¶ 46.] The Referee and the Disciplinary Board concluded that Eicher's filing of retaliatory and meritless complaints violated Rules 3.1, 3.3, 3.4, 4.1, 4.4 and 8.4. Our review of the complaints against Clayborne and Koch establishes no error.

APPROPRIATE DISCIPLINE

[24][25] [¶ 47.] The appropriate discipline in a particular case is determined by considering the seriousness of the misconduct and the likelihood that it or similar misconduct will be repeated. *In re Discipline of Light*, 2000 SD 100, 615 N.W.2d 164. We also consider the prior record of the attorney. *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D.1994). Eicher's conduct in this case leads us to conclude that the Disciplinary Board's recommendation of public censure and the Referee's recommendation of public censure and private reprimand are too lenient.

[¶ 48.] Eicher is a familiar participant in the disciplinary process. His acts of disparaging others, threatening sanctions and disciplinary complaints against opposing counsel, attempting to bargain away a disciplinary complaint against himself by offering to give up his client's civil appeal rights, and filing retaliatory disciplinary complaints are prejudicial to the administration of justice and violative of the Rules of Professional Conduct. Nearly a century ago, this Court had cause to condemn as unprofessional conduct, those attorneys who abused the judicial process for improper means.

Attorneys should never forget that they are of-

> ficers of the court; that justice under the law is all that their clients are entitled to and all that they have a right to seek for them; that theirs is an honorable profession who true votaries never try to justify their acts on the old saw, "The end justifies the means."

In re Swihart, 42 S.D. 628, 635, 177 N.W. 364, 366 (1920) (six months suspension ordered).

[26] [¶ 49.] Eicher attempts to avoid responsibility for his acts by pointing to the judges who presided over the legal proceedings that produced these complaints. He argues that since none of the complaints were generated by the judge presiding at those proceedings but rather by disgruntled opposing attorneys, he is absolved of any finding of wrong doing. However, Canon 3(D)(2) of the South Dakota Code of Judicial Conduct provides, in part:

> A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a ***370** lawyer in other respects shall inform the appropriate authority.

SDCL 16-2, Appx. This Canon clearly provides that a trial judge may take "appropriate action" in its court without reporting it to the Disciplinary Board. It is only when a violation raises a "substantial question" as to the "lawyer's honesty, trustworthiness or fitness as a lawyer" that a mandatory obligation to report to the Disciplinary Board is invoked. Thus, these trial judges may have considered the issue and taken what they deemed to be "appropriate action." Simple communication with the lawyer satisfies the judge's ethical duty. Our record does not inform us on that issue. Moreover, each of those judges only had one incident before them. We have the benefit of an extensive record with multiple complaints all showing similar inappropriate conduct.

[27] [¶ 50.] In addition, judges do have authority to deal with misconduct committed before them by contempt, Rule 11 sanctions and other inherent authority. Article V § 12 of the South Dakota Constitution vests this Court with disciplinary authority of members of the bar concerning their right to practice law in this state. While Rule 11 sanctions may also flow from the attorney's ethical violations, it is a separate legal consequence of the misconduct. A trial court has no more authority to disbar, suspend or publicly censure an attorney for an infraction committed before it in a legal proceeding than it does to absolve that attorney of a charge of an ethical violation in the same proceeding.

[28] [¶ 51.] Eicher further defends his actions by arguing that his conduct is no worse than that of some other attorneys in his area of practice. "Arguments that [Eicher] is no worse than the supposed bottom of the barrel that have been admitted [to the bar], all fail to pass muster." *Ogilvie*, 2001 SD 29 at ¶ 70, 623 N.W.2d at 70 (Gilbertson, J. dissenting).

[¶ 52.] Eicher refuses to acknowledge the impropriety of his actions. This, coupled with his penchant for blaming others and the repeated unprofessional attacks that have continued throughout this appeal underscore the need for discipline. Here, Eicher attempts to absolve himself by blaming the conduct of opposing counsel and parties for his situation.[FN10] He has also cast unwarranted aspersion on the impartiality of the Disciplinary Board and unjustly attacked the Court's Referee for failing to follow what he perceives to be the correct disciplinary procedures. He is totally unrepentant.

> FN10. Eicher's own pleadings filed with this Court unmistakably reveal his inability to understand his ethical breaches. His pleadings also reveal the substantial likelihood his wrongful activity will continue in the future. For example, with respect to an appropriate sanction, Eicher suggests that

> to "draw to a close the litany of impermissible errors prejudice and personal animus of certain Board members [Eicher] is reminded that if the findings and recommendations of the Referee and the Board are followed, a warranted public rejoinder by [Eicher] would certainly be permissible." Eicher then asks rhetorically "[i]n what other way could the public be informed that the complaints are irrelevant to the conduct owed by attorneys to their clients. How else would the public-which is to be protected from the wrongful conduct some lawyers [sic]-be protected, as well as fully informed."

> To gain [and maintain] admission to the bar, [a person] does not have to fit into any preconceived stereotype. Membership in the Bar should be [as] diverse as is the public it is charged with serving. However, for the legal system to properly function, certain common denominators are mandatory. One of these is that members and applicants for membership, exhibit good moral character. In South Dakota a three piece suit and ***371** leather briefcase is not a prerequisite to be a lawyer----good moral character is.
> *Mattson*, 2002 SD 112 at ¶ 53, 651 N.W.2d at 289 (citations omitted).

[¶ 53.] Eicher further attempts to justify his conduct by wrapping himself in the protection of the First Amendment. This record is replete with his misdeeds, not free speech. Under such circumstances, rather than attempting to assure this Court his misdeeds will not be repeated, his objections to the Referee's report as well as his presentation to this Court at oral argument and his post oral argument submission lead us to conclude his unwarranted view of the cause of his present situation will result in his continuing to practice law in the same inappropriate manner. *See Dorothy*, 2000 SD 23 at ¶ 41-2, 605 N.W.2d at 505. The manner of the practice of law Eicher has engaged in and continues to pursue has never been allowed in this State and will not be allowed in the future.

[29] [¶ 54.] The disciplinary options at this Court's disposal include private remand, public censure, placement on probationary status, suspension for up to three years and disbarment. *Mattson*, 2002 SD 112 at ¶ 51, 651 N.W.2d at 288; SDCL 16-19-35. SDCL 16-19-31 states in part: "[t]he license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the court." Upon such a record as this, we cannot conclude Eicher is meeting or will meet this standard. Eicher's egregious conduct involved in this case combined with his disciplinary history, lack of respect for the legal system, and complete lack of remorse is of such serious professional nature that it warrants a one hundred (100) day suspension from the practice of law. SDCL 16-19-35(2). We feel that this adequately protects the public while allowing Eicher sufficient time to educate himself on the proper conduct of an attorney and moreover, justify to this Court that the public would be benefited by his readmission to being a full-time practitioner. *See* SDCL 16-19-83.

> History is replete with those who have overcome a weakness or character flaw and risen to what Attorney at Law Abraham Lincoln declared to be the "better angels of our nature." Perfection is not required-good moral character is.

Ogilvie, 2001 SD 29 at ¶ 72, 623 N.W.2d at 71 (Gilbertson, J., dissenting). *See also Application of Widdison*, 539 N.W.2d 671, 679 (S.D.1995).

[¶ 55.] In addition, Eicher is required to submit an affidavit to this Court stating under oath that:

> 1) he has reviewed the Rules of Professional Conduct;
>
> 2) upon reinstatement, he will maintain professional malpractice insurance along with proof

thereof;

3) he recognizes fully that his conduct violated the Rules of Professional Conduct by which he is bound;

4) he pledges he will devote every effort in his future practice to fully abide by the South Dakota Rules of Professional Conduct;

5) he will be taxed and required to pay, allowable costs and expenses as provided in SDCL 16-19-70.2; and

6) he is to fully comply with the requirements of a suspended attorney found in SDCL 16-19-78 and 79.

See Wilka, 2001 SD 148 at ¶ 19, 638 N.W.2d at 250. He must also take and successfully pass the Multistate Professional Responsibility Examination either prior to reinstatement or within six ***372** months thereafter. *Matter of Discipline of Johnson*, 488 N.W.2d 682 (S.D.1992).

[¶ 56.] SABERS, ZINTER and MEIERHENRY, Justices, and MILLER, Retired Justice, concur.
[¶ 57.] KONENKAMP, Justice, disqualified.

S.D.,2003.
In re Discipline of Eicher
661 N.W.2d 354, 2003 SD 40

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	AR-CS
Citation Text:	247 S.W.3d 868
Lines:	61
Documents:	1
Images:	0

H

Supreme Court of Arkansas.
Stark LIGON, as Executive Director of the Supreme Court Committee on Professional Conduct, Plaintiff,
v.
R.S. McCULLOUGH, Defendant.

No. 04–1395.
Jan. 25, 2007.

Background: Attorney filed motion to abate fine imposed by Professional Conduct Committee.

Holding: The Supreme Court held that disrespectful language in motion to abate fine justified striking the motion.

Motion struck.

West Headnotes

[1] Attorney and Client 45 ⚿32(8)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(8) k. Dignity, Decorum, and Courtesy; Criticism of Courts. Most Cited Cases
Attorney's disrespectful language in motion to abate fine by Professional Conduct Committee justified striking the motion.

[2] Motions 267 ⚿12.1

267 Motions
267k12 Form and Requisites
267k12.1 k. In General. Most Cited Cases
Attorneys' motions should not contain irrelevant, disrespectful, and caustic remarks that only serve to vent a party's emotions such as anger or hostility.

****869** R.S. McCullough, pro se.

Nancie M. Givens, for Stark Ligon, as Executive Director of the Supreme Court Committee on Professional Conduct.

PER CURIAM.

[1] ***598** Mr. R.S. McCullough filed a motion to abate a $550 fine imposed on him from the Professional Conduct Committee. In his motion for abatement, McCullough argues that he is indigent and cannot pay the fine. However, intermingled ***599** into his substantive request for abatement, Mr. McCullough uses unnecessary, strident, and disrespectful language towards Mr. Stark Ligon, who represents the Committee on Professional Conduct as its Executive Director and attorney (officer of the court). Examples of Mr. McCullough's remarks follow, and we note that Mr. McCullough, throughout his motion, refers to Mr. Ligon using lower case letters:

> [McCullough] received a rather infantile and asinine communication from stark ligon dated October 19, 2006.
>
> * * *
>
> [B]ased upon the venom which ligon appears to harbor for [McCullough] in particular and other black lawyers, in general, he saw fit one weekend to let his little mind come up with the complained of communication and its attachments.
>
> * * *
>
> Perhaps [Ligon's] ignorance in a matter of this type is clouded by the fact that when he lost his judgeship to a 90+ year old man, he got picked up by “the system” to be a librarian in a library rarely, if ever, used.

In view of this disrespectful language, Mr. McCullough's motion to abate is stricken in its entirety.

[2] We have, on prior occasions, expressed a

displeasure with attorneys who have directed disrespectful language towards courts and officers of the court. *See White v. Priest,* 348 Ark. 135, 73 S.W.3d 572 (2002)(brief of attorney for petitioner seeking recusal of all justices would be stricken, in view of attorney's continued strident, disrespectful language used in his pleadings, motions, and arguments, and his repeated refusal to recognize and adhere to precedent); *McLemore v. Elliot,* 272 Ark. 306, 614 S.W.2d 226 (1981)(striking appellant's brief due to "intemperate and distasteful language" toward trial judge). In the same vein, we caution attorneys from filing motions containing irrelevant, disrespectful, and caustic remarks that only serve to vent a party's emotions such as anger or hostility.

Because this matter implicates a breach of the Model Rules of Professional Conduct, we refer Mr. McCullough to the Professional Conduct Committee and request the Committee to take whatever action it believes his actions warrant under the Model Rules of Professional Conduct.

Ark.,2007.
Ligon v. McCullough
368 Ark. 598, 247 S.W.3d 868

END OF DOCUMENT

Westlaw Delivery Summary Report for WL WATCH F&P,

Date/Time of Request:	Monday, December 10, 2012 17:23 Central
Client Identifier:	FINDANDPRINT
Database:	KY-CS
Citation Text:	929 S.W.2d 181
Lines:	208
Documents:	1
Images:	0

H

Supreme Court of Kentucky.
KENTUCKY BAR ASSOCIATION, Complainant,
v.
Louis M. WALLER, Respondent.

No. 96–SC–119–KB.
Aug. 29, 1996.

Attorney disciplinary proceeding was brought. The Supreme Court held that attorney's statement in court-filed papers that judge was a "lying incompetent ass-hole" violated rule prohibiting unfounded statements concerning qualifications and integrity of a judge and warranted six-month suspension from practice of law.

Suspension ordered.

Stumbo, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Attorney and Client 45 ⚿43

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 k. Contempt of Court. Most Cited Cases

Constitutional Law 92 ⚿2046

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2046 k. Statements Regarding Judge or Court Officials. Most Cited Cases
(Formerly 92k90.1(1.5))

Attorney's statement in court papers that particular judge was "lying incompetent ass-hole" was not protected by the First Amendment and could be basis for disciplinary suspension from practice of law. U.S.C.A. Const.Amend. 1; Sup.Ct.Rules, Rule 3.130, Rules of Prof.Conduct, Rule 8.2(a).

[2] Attorney and Client 45 ⚿43

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 k. Contempt of Court. Most Cited Cases

There can never be a justification for a lawyer in pleadings or in open court to state that particular judge is "lying incompetent ass-hole," not because judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for law and for judicial system; officers of the court are obligated to uphold dignity of court and are required to refrain from making such scurrilous comments. Sup.Ct.Rules, Rule 3.130, Rules of Prof.Conduct, Rule 8.2(a).

[3] Attorney and Client 45 ⚿43

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 k. Contempt of Court. Most Cited Cases

Attorney and Client 45 ⚿59.13(3)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.13 Suspension
45k59.13(2) Definite Suspension
45k59.13(3) k. In General. Most Cited Cases
(Formerly 45k58)

Attorney's statement in court papers that particular judge was a "lying incompetent ass-hole," for which he was found in contempt, violated rule prohibiting unfounded statements concerning qualifications and integrity of a judge and warranted six-month suspension from practice of law, although Board of Governors recommended only public reprimand, as attorney's pleadings in underlying civil action, in contempt proceedings, and in disciplinary proceedings were generally scandalous and bizarre, and lawyer was utterly unrepentant and apparently intent on convincing court of truth of assertions. Sup.Ct.Rules, Rule 3.130, Rules of Prof.Conduct, Rule 8.2(a).

***181** Jay R. Garrett, Kentucky Bar Association, Frankfort, KY, for Complainant.

Louis M. Waller, Russellville, KY, Pro Se.

OPINION AND ORDER

In June of 1994, respondent, Louis M. Waller, represented a client in a civil matter in the Logan Circuit Court. During the pendency of the action, but after having granted an injunction, the regular judge recused himself from hearing the case "because his impartiality might reasonably be questioned." A special judge, the Hon. William Harris, was then appointed.

After the appointment of Judge Harris, Waller filed a motion to set aside the earlier temporary injunction. On June 21, 1994, Waller filed a memorandum styled as "Legal Authorities Supporting the Motion to Dismiss" which contained the following introductory language:

> Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade....

On June 24, 1994, Special Judge Harris ordered Waller to appear before the Logan Circuit Court and show cause why he should not be adjudged in contempt for filing such a scurrilous pleading. On June 29, 1994, Special Judge Harris rendered his findings of fact and conclusions of law, and found Waller to be in contempt of the Logan Circuit Court for his intemperate language and for his failure "to maintain the required respect due this court and the regular Judge thereof." For this contempt Waller was fined $499.00 and sentenced to thirty days in the county ***182** jail. The Court of Appeals affirmed the contempt judgment and we denied discretionary review on January 11, 1996.

Based upon information provided by Special Judge Harris, the Inquiry Tribunal of the Kentucky Bar Association initiated a complaint against Waller, which charged him with one count of violating SCR 3.130–3.5(c) for using disparaging language that was intended to disrupt the court; one count of violating SCR 3.130–4.4 for using language that served no purpose and was intended to embarrass the regular circuit judge; and one count of violating SCR 3.130–3.4(e) when he used the specific language to describe the regular circuit judge who had recused, and thus knowingly and intentionally alluded to a matter not relevant to the cause under consideration by the court of supported by admissible evidence. The Inquiry Tribunal later issued an amended complaint in which Waller was charged with violating SCR 3.130–8.2(a) for making an unfounded statement concerning the qualifications and integrity of Judge Fuqua. Waller submitted an answer to all charges. He was found not guilty of Counts I, II, and III, but a unanimous Board of Governors found Waller guilty of violating SCR 3.130–8.2(a). The Board then recommended that Waller be publicly reprimanded. On April 25, 1996, we noticed review of the decision of the Board of Governors pursuant to SCR 3.370(8).

A review of the record in this proceedings reveals that respondent's pleadings in the underlying civil action, in the contempt proceedings, and in the later disciplinary proceedings, are generally scandalous and bizarre. When given an opportunity to show cause why he should not be found in contempt, respondent filed a document styled

"Memorandum In Defense of the Use of the Term 'As–Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office" which, as indicated by its title, continued to assert corruption in the judicial system. He asserted that "[t]he undersigned would show the honorable reviewing tribunal that he does not know fear and if, while this case is pending in the courts, some interim punishment is deemed appropriate suggests, in all sincerity, flogging, caning or other physical torture." In an earlier pleading denominated "A Showing Of Cause," respondent asserted that the regular judge was a liar, a racist, that he was incompetent, and that he had a personal interest in proceedings before him. Respondent went further and offered:

> Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined—first lost—then won.

Apparently not yet satisfied, respondent continued filing similar bizarre pleadings throughout the disciplinary process. In his "Answer to First Amended Complaint," respondent repeated his allegations of corruption and included a "P.S.", as follows:

> And so I place this message in a bottle and set it adrift on a sea of papers—hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form ... [o]r is it too formitable (sic) a task and will you yourself have to forego a place at the trough? There is a better and happier way and—with due temerity I claim to have found it—it requires one to identify an ass hole when he sees one.

[1] Even in his brief to this Court, respondent takes the view that his statements were true, that the matter is not one that concerns the judiciary but rather "a private matter between the parties for which a private remedy exists," and that such comments are protected by the First Amendment to the United States Constitution. Such a claim is without merit. *See, e.g., In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959); *Kentucky Bar Association v. Heleringer,* Ky., 602 S.W.2d 165, 167–68 (1980). Respondent's assertion that he was denied an evidentiary hearing to prove the truth of his ***183** allegations is also without merit as only a question of law was presented.

[2] Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

[3] The Board of Governors recommended only that respondent be publicly reprimanded. While we have given due regard to the Board's recommendation and would agree if this were an isolated incident of intemperate language accompanied by a meaningful expression of regret, such is not the case. Respondent is utterly unrepentant and apparently intent on convincing this Court of the truth of his assertions. As such, we must impose a punishment of sufficient severity to forcefully inform respondent that he is wrong. Regardless of his personally-held views, if respondent desires to continue practicing law in the Commonwealth of Kentucky, he must conform his professional conduct to

minimum acceptable standards. Consideration should be given to the desirability of professional counseling.

IT IS THEREFORE ORDERED:

That the respondent, Louis M. Waller, be, and he is hereby, suspended from the practice of law in Kentucky for a period of six (6) months, and is further ordered to pay the costs of this proceeding.

The respondent shall, within ten (10) days of the date of entry of this order, notify all courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar legal matters of his inability to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly and timely placed in the United States Mail, and the respondent shall simultaneously and in the same manner provide a copy of all such letters to the Director of the Kentucky Bar Association.

STEPHENS, C.J., and BAKER, GRAVES, KING, LAMBERT, and WINTERSHEIMER, JJ., concur.
STUMBO, J., files a separate opinion concurring in part and dissenting in part.
ENTERED: August 29, 1996.

/s/ Robert F. Stephens

/s/ Chief Justice

STUMBO, Justice, concurring in part and dissenting in part.

Respectfully, I dissent from that part of the opinion which imposes a suspension from practice upon Mr. Waller. The Board of Governors saw fit to recommend only a public reprimand, a punishment with which I agree. Mr. Waller has previously been found to be in contempt of the Logan Circuit court for his words and has paid a fine in addition to serving a sentence in the county jail. There is no evidence in this record that until this case arose, he has been the recipient of discipline by this or any other Court in the course of nearly forty years of the practice of law. I would not further punish him by depriving him of his livelihood. To paraphrase Justice Leibson, "[forty] years of meritorious service at the bar ought to count for something." *Kentucky Bar Ass'n v. Jernigan*, Ky., 737 S.W.2d 693, 695 (1987) (Leibson, J., dissenting).

Ky.,1996.
Kentucky Bar Ass'n v. Waller
929 S.W.2d 181

END OF DOCUMENT