WILL THE UNPROFESSIONAL LAWYER PLEASE STAND UP?

The steady decline in what most lawyers consider "professional" behavior is well documented. Continuing legal education seminars, publications and various legal groups regularly lament that the profession is becoming less "professional" each year. Yet, few of us would admit that our own behavior in anyway contributes to the deterioration of the climate in which we all practice. There is a disconnect. If the profession is in shambles, it is doubtful that the blame always lies with the other guy. If all the lawyers who sincerely claim that they are upholding the ideals of the profession were, indeed, behaving appropriately, there would be no crisis of professional behavior.

This disconnect between our perception of our own conduct, and the view from the other side of the table, arises from the tension that exists between zealous advocacy and unprofessional conduct. Clients reasonably expect lawyers to use every legal advantage available in order to further the client's goals. However, sometimes conduct, even though legal and ethical under the Rules of Professional Conduct, is perceived as unprofessional.

This program is designed to explore the intersection between conduct which is undoubtedly legal and ethical with conduct which is nevertheless considered unprofessional. For the purposes of this program, we use the term "unprofessional" to mean more than merely a violation of law or disciplinary rule. Those cases are easy. All of us agree that a lawyer acts "unprofessionally" if they violate one of the Rules of Professional Conduct. However, there may be much disagreement about conduct, which is legal and strictly ethical, but nevertheless unprofessional. The term "professionalism" in this program uses the same definitions Justice Peterson offered in 1984.

> *"Professionalism...has a different meaning for each of us. I have in mind that indefinable ingredient which goes towards making the practice of law an uplifting experience; an ingredient which arises from unwritten, but nevertheless, always present rules, the violations of which create no penalties or liabilities, and little or no social stigma, but are still violations."*

Professionalism, Are We Losing It? Honorable Edward J. Peterson, Chief Justice, Oregon Supreme Court, *Oregon State Bar Bulletin,* January 1984.

This program is offered to allow the Inn to discuss some of these unwritten cannons of professionalism. Tonight we have a panel discussion. However, the entire Inn is the panel. Hunter Emerick will facilitate group discussion focusing on three distinct areas: the procedures for notice prior to taking a default judgment, the lawyer's role in preparing and assisting a client with their testimony, and criminal lawyer's obligations when dealing with clients and victims. Our group has assembled authorities to help facilitate the discussion which are attached.

Will the Unprofessional Lawyer Please Stand Up?

Examining the Tension Between
Effective Advocacy and Professional Conduct

Location of Law Offices of Big, Shot, Hard & Case.
Characters: Mr. Big; Pat Newman, New Associate

Newman: Mr. Big, I understand you wanted to see me.

Mr. Big: Yes, I've had a great new case come in.

I would like you to work on it with me.

It's a dog bite case.

It looks like a slam dunk.

Our client was minding her own business walking down the street eating a liverwurst sandwich when this dog came off the defendant's porch, raced down the steps and leaped into our client's chest and head, biting her in a most vicious and unprovoked fashion.

Newman: That sounds interesting.

What's the status of the case?

Mr. Big: The dog owner is being represented by his homeowner's insurance company.

They've appointed Bill Williams as counsel.

We've been negotiating.

There's some letters in the file outlining their excuses and reasons for not paying what this claim is truly worth.

I'm afraid we're going to need to file a complaint.

Be sure to send a copy over to Williams.

I'm sure he will accept service.

Fade to Black

SCENE TWO

Same location, same individuals

Mr. Big: Well Newman, how's that dog bite case going?

Did you file the complaint?

I got a call last week from the client, she's really anxious to have something happen soon.

I'm counting on you to really dazzle her.

She says she's afraid you may be dragging your feet.

What's the status?

Newman: I filed the complaint like you asked.

I also sent a copy over to Williams for service.

He never responded.

It's like it went into a black hole.

I think the time for an appearance has run.

Why don't we just file a default?

Mr. Big: Well, did you give them notice that you intend to file a default?

Newman: No. But I did look at ORCP 69 and technically we don't have to.

Mr. Big: What are you talking about?

Newman: Well, ORCP 69 says you only have to give notice of intent to take a default when the other side has actually made an appearance or has provided written notice of intent to file and defend the case.

I haven't gotten any correspondence from Williams since we sent over the complaint and asked him to accept service.

So technically he hasn't given us written notice of his intent to appear in the lawsuit.

We sent the complaint out and had the defendant served by a process server.

We can comply with ORCP 69 and take a default without having to give him notice. (Thinking and smiling proudly. This is just the type of hard nosed advocacy that will win me points with the firm. We can take a judgment by default the client will be duly impressed by the speed of our litigation department and me in particular. I love practicing litigation!)

SCENE THREE

Conference room
Characters: Witness, Mr. Big, Newman

Newman: (Thinking) I can't believe Judge Stevens set aside that default judgment.

I must be getting home towned.

Anyway, we should still be able to get a good settlement if our client does well in her deposition.

I'm looking forward to seeing how Mr. Big prepares her for the deposition.

Mr. Big: (Talking to the witness) Now the key to this deposition is to say as little as possible.

We want you to make them work hard.

So here are some rules to think about.

First, don't elaborate on any of your answers.

Only answer the precise question he asks you.

Even if you know what he's trying to get you to say.

Don't give in too easily. Make him work really hard.

Second, listen to my objections.

They will clue you in on how to answer a question.

For example, if I say, "Objection, calls for speculation." Make sure your answer is "I don't know."

The more times you can say, "I don't remember," or "I don't know" the better.

Third, if you see me put my pen down, I want you to stop talking, even if you are in mid sentence, just shut up.

We'll then go into the hallway and I can help you finish answering the question.

Now let's talk about your testimony.

I listened to most of your earlier discussions with my colleague, Mr. Newman, and I think most of your answers are going to be fine.

But I'm really concerned about one part of your testimony.

The Witness: Which part is that?

Mr. Big: Well, one of their defenses is that you provoked the dog by teasing it with your bologna sandwich.

Witness: Actually, it was liverwurst.

Mr. Big: Well, it doesn't matter.

I wasn't there and I don't want to put words in your mouth.

But let me tell you what you could say.

An okay answer would be to say that you were walking down the street and that you stopped to admire the garden gnomes in the defendant's yard and you bent down to look at one of them while you were eating your sandwich and the dog bit you in the face.

A really bad answer would be that you were walking down the street waiving your liverwurst sandwich and that you pretended to offer the dog some and then pulled your hand back really quickly.

But a GREAT answer would be that you were simply walking down the street minding your own business. That you didn't even look at the defendant's house and the dog simply jumped off the porch and attacked you in an unprovoked fashion.

That would be a great answer.

Now I want you to go home and think about that before your deposition.

I can't tell you what to say but search your memory and see if you can't remember precisely what happened.

SCENE FOUR

Law Offices of Criminal Defenders R US
Office of Bill Williams

The scene opens with Bill Williams sitting at his desk.

Voice (on intercom): Mr. Williams, you have a call from Sue Baker on line 1.

Williams: Who's Sue Baker?

Voice (on intercom) She is the wife of Bill Baker, the new domestic violence case you were just appointed on.

Williams: Thanks, I'll take the call.

(Williams picks up the phone)

Williams: Yes, Mrs. Baker, this is Bill Williams.

What can I do for you?

Williams (again): Yes, it really was unfortunate that you were injured in that little scuffle with your husband.

No, I wasn't aware that you had a problem with your equilibrium.

Do you fall down like that a lot?

Ms. Baker, I can't really help you with what you say to the District Attorney when she calls.

I don't represent you, I represent your husband.

Right now you are the alleged victim in this crime.

(PAUSE – hold the phone away from your ear)

Williams: Ms. Baker, there is really no need to yell at me.

I realize that you can get excited.

I am sorry, I cannot give you legal advice because you are not my client. I can only talk to your husband.

Williams: Oh, hello Mr. Baker, how are you?

(PAUSE)

Johnson: Yes, I can talk to you.

I'd be happy to advise you.

What's that?

Yes, you're right, it would be very difficult for the prosecution to proceed in this case if your wife doesn't show up in response to her subpoena.

But I can't tell you to tell her not to appear.

Yes, you are right, it would be very helpful if she took the stand and testified that she beat you up.

I'm not sure how we would explain the bruising around her neck and the bloody nose she reported to the officer.

Yes, you are right, the 5th Amendment does protect her from having to testify against herself.

But in order to invoke the 5th Amendment, she would have to be in a position to incriminate herself.

(PAUSE)

Incriminate means to testify against yourself.

For example, if Mrs. Baker was inclined to testify that she started the fight and that she was assaulting you when you attempted to defend yourself, she could be subject to prosecution by the District Attorney's Office.

If that were the case, she could decline to testify under the 5th Amendment.

(PAUSE)

Yes, you're right, it would be very difficult for the District Attorney to prosecute this case if the only witness for the prosecution took the stand and plead the 5th Amendment.

It was good talking to you Mr. Baker.

Don't forget, we have an appointment on the 15th to go over the facts of your case.

I'll see you then.

DEFAULT ORDERS AND JUDGMENTS RULE 69

A Entry of order of default.

A(1) **In general.** When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, declaration or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

A(2) **Certain motor vehicle cases.** Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an affidavit or a declaration showing:

A(2)(a) that the plaintiff has complied with subparagraph D(4)(a)(i) of Rule 7; and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

B Entry of default judgment.

B(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party seeking judgment submits an affidavit or a declaration stating that, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005;

B(1)(e) The party seeking judgment submits an affidavit or a declaration of the amount due;

B(1)(f) An affidavit or a declaration pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

B(2) **By the court.** In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. The party seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit or a declaration under this subsection, a default judgment may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits or declarations.

B(3) **Amount of judgment.** The judgment entered shall be for the amount due as shown by the affidavit or declaration, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) **Non-military affidavit or declaration required.** No judgment by default shall be entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the affiant or declarant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

D Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

E "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office. [CCP 12/13/80; §B amended by 1981 c.898 §8; amended by CCP 12/13/86; §§A,B(2) amended by CCP 12/10/88 and 1/6/89; §B amended by CCP 12/15/90; amended by CCP 12/12/92; §B amended by 1995 c.79 §406 and 1995 c.664 §101; §C deleted and §§D,E,F redesignated by CCP 12/10/94; §A amended by CCP 12/14/96; §B amended by 2001 c.418 §1; amended by 2003 c.194 §14]

RULE 70 [CCP 12/13/80; §C amended by 1981 c.898 §9; §A amended by 1987 c.873 §19; amended by 1989 c.768 §1; §C amended by CCP 12/15/90; §A amended by 1991 c.202 §20; §A amended by 1993 c.763 §3; §A amended by 1999 c.195 §4; §A amended by 2001 c.417 §2; §A amended by 2003 c.194 §15 and 2003 c.380 §5; repealed by 2003 c.576 §580]

INTEROFFICE MEMORANDUM

To: Norm Hill
From: Michael Elliott
Date: 1/10/08
Re: Professionalism in Depositions

Question Presented

1. Whether it is acceptable to prepare a witness for a deposition.
2. Whether it is professional to stop a deposition with no question pending to talk to the witness.

Short Answer

1. Yes. Preparing a witness is a professional duty of a lawyer, but the lawyer cannot coach the witness.
2. Depends. The professional code of conduct says we will not waste the financial resources of the opposing side so depending on how long and frequent the interruptions are it may not be professional.

Discussion

1. Whether it is acceptable to prepare a witness for deposition.

Preparing a witness for a deposition is extremely important for an attorney's case. The attorney can review the case with the witness; explain the rules of the deposition to the witness and provide needed assurance to the witness. Preparation also enables the attorney to gauge the effectiveness of the witness, as well as their credibility. "Witness Preparation and the Trial Consultant Industry" *available at* http://findarticles.com/p/articles/mi_qa3975/is_200407/ai_n9454530/pg_1

The problems occur when preparing a witness starts to become coaching a witness. The Oregon Rules of Professional Conduct (ORPC) state that to "counsel or assist a witness to testify falsely" is prohibited. ORPC 3.4(b). This includes putting words into the witness' mouth or encouraging them to report an incorrect version of the facts. "Legal Ethics of Preparing a Witness for Deposition"

http://www.lawyertrialforms.com/ethics_of_preparation.htm. Any preparation that starts to encroach on false testimony must be avoided. *Id.*

The problem is that courts have not discussed the boundaries of when preparation turns into coaching. "Witness Preparation and the Trial Consultant Industry" *available at* http://findarticles.com/p/articles/mi_qa3975/is_200407/ai_n9454530/pg_1. Oregon case law is similarly silent on this point. Instead, the Oregon cases focus on prosecutorial misconduct in not revealing a witness to the defense or preventing a witness from speaking with the defense. *See State v. York*, 291 Or. 535 (1981). Oregon statutes do not govern witness preparation either. They simply allow the victim to refuse all contact with the defense. ORS 135.970. Lawyers are left in a gray area without much guidance.

Oregon's Statement of Professionalism provides some guidance. It states that a lawyer should not use tactics solely designed to harass or delay the other side. Oregon Statement of Professionalism 2.2. This could include preparing the witness to the point that every time a question is asked the witness thinks about the question for an exceedingly long time or constantly asks to speak with their lawyer. Similarly, the Statement of Professionalism provides that lawyers should continue to "preserve[e] the ideals of integrity, honesty, competence, fairness, and devotion to the public interest. *Id.* at 1.5. This would prevent a lawyer from preparing a witness to the point that they are no longer being honest or attempting to tell the truth. However, the Statement of Professionalism likewise does not provide significant guidance to lawyers in preparing witnesses.

All agree that lawyers should not coach witnesses. The ORPC prohibit the encouragement of having a witness testify falsely. Further the Statement of Professionalism provides that a lawyer should not delay or harass the opponent. However, there is no apparent statutory or case law on the issue and not much else to help a lawyer in determining where the line is in the gray area. The best a lawyer can do is make sure the witness is comfortable; tell the witness what the law says; encourage the

witness to be as clear and unambiguous as possible; and let the witness know what are the points of contention. "Legal Ethics of Preparing a Witness for Deposition" http://www.lawyertrialforms.com/ethics_of_preparation.htm. This will help the witness and keep the lawyer on the side of preparing the witness but not coaching the witness.

2. Whether it is professional to stop a deposition with no question pending to talk to the witness.

A tactic that lawyers can use to help get a witness through a deposition is to stop the deposition, providing there is no question pending, and talk to the witness outside of the deposition room. However, there is a question of whether it is professional for lawyers to do so. So long as the lawyer does not encourage the witness to testify falsely, the lawyer will not violate ethical rules. ORPC 3.4(b). The question still remains whether such conduct is professional.

The Oregon Statement of Professional Conduct provides some insight. Paragraph 2.2 states that a lawyer "will not use tactics that are intended solely to delay, harass, or drain the financial resources of the opposing party." Statement of Professionalism 2.2. This includes interruptions of depositions. If the interruptions are frequent enough or used solely to delay or harass the other party, then a lawyer could be seen as violating the Statement of Professionalism. If however the interruptions are to reassure the witness or provide some much needed counseling, then it appears that the interruptions would not necessarily violate the statement of professionalism.

The stopping of a deposition to talk with a witness is another gray area of professionalism. If done for the right reasons then it can provide needed assistance to a witness for the lawyer's side. If however, the lawyer attempts to do this for other purposes, such as harassment and delay, then the lawyer may be acting unprofessionally.