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Maintaining Civility In Litigation

Every generation of lawyers has a name for it, but whether you describe the litigation tactic as “hardball,” “Rambo,” “scorched earth” or “stupid lawyer tricks,” it persists. The explosion of electronic discovery, the increasing competition in the legal profession, the stress, time pressure, and information overload inherent in twenty-first century life, and, frankly, the expectations of clients, all contribute to the age-old problem. In the past, document dumps in discovery might mean a warehouse of boxes. Now, the volume runs into the terabytes. In the past, a lawyer might hold his or her tongue because he or she knew that he or she would have to appear before a judge or litigate against an opponent again. Now, the bars and the judiciaries in many cities are so large that some lawyers appear to believe that accusations and profanities can be hurled at opponents with impunity. In the past, a deposition, conference call or meeting might be cancelled with 24 hours notice, while now, with cell phones and personal digital assistants, counsel can inconvenience lawyers, litigants, and support staff without even having to speak to a human being. In the past, women and minorities were often marginalized or excluded altogether from the profession. Amazingly — in 2011 — we still hear of stories of a female lawyer being asked by opposing (male) counsel to

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get coffee in depositions or an African-American lawyer referred to as “boy.”

Yet, as Justice Anthony Kennedy observed, “[c]ivility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself.” Justice Anthony Kennedy, Address at the ABA 1997 Annual Meeting (quoted in Louis H. Pollak, Professional Attitude, 84 A.B.A. J. 66, 66 (Aug. 1998)). Furthermore, a number of members of the judiciary have begun to sanction lawyers for discovery and other abuses. From the attorneys’ fees and disciplinary referral imposed in Qualcomm, Inc. v. Broadcom Corp., 2007 WL 4351017 (S.D. Cal. Dec. 11, 2007) to the order that counsel dine together in Huggins v. Coatesville Area Sch. Dist., 2009 WL 2973044 (E.D. Pa. Sept. 16, 2009), courts are taking both time-tested and innovative approaches to the problem.

In this article, we will highlight some of the applicable Federal Rules of Civil Procedure and Model Rules of Professional Conduct governing civility in the profession, give some practical tips for dealing with incivility and, finally, explain why — especially for the young lawyer — it pays to practice with those principles of civility in mind.

THE LAW GOVERNING LAWYER CONDUCT • “[T]here are any number of published standards that remind lawyers what it expected of them in terms of civility.” Huggins, supra, 2009 WL 2973044, at *3-4 (citing examples). In addition to state codes of professional responsibility, which apply generally to members of those state bars, a number of courts — both federal and state — have their own standards and rules of conduct. Some of these are binding rules of ethics, for which violations carry sanctions. Others are suggestions or guidelines for professionalism. Experienced and inexperienced practitioners alike would do well to review their state codes periodically, and also to review the rules for any specific court in which they are appearing. The American Bar Association provides links to many of these codes, standards, guidelines, and other resources on its Web site at http://www.abanet.org/cpr/ links.html and at http://www.abanet.org/cpr/professionalism/profCodes.html.

Many states have adopted some version of the ABA Model Rules of Professional Conduct. Links to the ABA Model Rules of Professional Conduct are available on the ABA's Web site at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. A touchstone of the Model Rules is the duty of a lawyer to zealously advocate for his or her client, following “the rules of the adversary system.” Preamble [2]. However, that duty does not allow a lawyer to ignore precepts of civility. Although many of the Model Rules address civility in some way or another, in particular Model Rules 3.3 and 3.4 are worth mentioning here.

Rule 3.3 governs lawyers’ obligations to the court:

“(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person in-
tends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

Rule 3.4 governs lawyers’ obligations to the opposing party and counsel:

“A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

In addition to these Rules, Rule 1.3 (Diligence), Rule 3.2 (Expediting Litigation), Rule 4.1 (Truthfulness in Statements to Others), and Rule 8.3 (Reporting Professional Misconduct), are also indicative of the standards of respect and truthfulness expected of lawyers.

EVERYDAY CIVILITY • In his excellent article Toward Civility in Civil Practice, Robert Kraus provides some useful “courses of action” that foster civility, including:

- Being courteous;
- Promptly returning phone calls and emails or communicating delay;
- Being considerate of others’ schedules;
- Meeting deadlines;
- Using temperate language;
- Sticking to any agreements or promises;
- Avoiding making promises that you cannot keep;
- Avoiding deceptive or misleading practices; and
- Communicating clearly.

What do you do when opposing counsel is disregarding these principles? Initially, informal methods, such as documenting or confirming every communication, may work best to defuse the conduct. Also, realize that opposing counsel’s conduct is a tactic — albeit an ill-advised one — and do not take it personally or get drawn into the incivility. Talking the issues through with a trusted colleague or mentor may assist in the formulation of an effective response. If these strategies still fail to defuse the situation, you may wish to consider moving for sanctions, moving to strike pleadings, or otherwise involving the court. Resort to state disciplinary authorities might be warranted, but is obviously a step that should be taken with extreme caution and certainty about the facts.

**CIVILITY IN DEPOSITIONS** • Because depositions are a typical setting in which lawyer incivility rears its head, and in which an immediate response is required, we have devoted a bit of space to that topic in particular.

Flat-out misconduct or borderline conduct often takes place in depositions. No judge is present to referee. Counsel may be unable to resist the temptation to show their client and/or opponent just how aggressive they are by harassing or haranguing a witness, engaging in speaking objections, instructing the witness not to answer, and ending or interrupting the deposition for no good reason. Even in videotaped depositions, the ability to “go off the record” remains.

The Federal Rules of Civil Procedure have been amended to address some of this conduct. For example, Federal Rule of Civil Procedure 30 tempers the conduct of depositions by giving the court discretion to impose sanctions for impeding, delaying, or frustrating a deponent’s examination. See Fed. R. Civ. P. 30(d)(2). It also allows a party to move to terminate or limit a deposition if it is being conducted “in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.” Fed. R. Civ. P. 30(d)(3)(A).

Courts have sanctioned deposition misconduct, sometimes in creative ways. During a deposition in one recent case, counsel for both parties had “heated, personal, rude, and pointless” exchanges which prompted the federal court to impose a unique sanction on both attorneys, ordering them “to join each other for an informal meal in an effort to facilitate the repair of their professional relationship.” Huggins, supra, 2009 WL 2973044, at *4. The court was clear that “counsel’s behavior [fell] short of that which lawyers are to exhibit in the performance of their professional services.” Id. at *3. See also, *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007) (attorneys sanctioned for harassing witness during deposition); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648 (D. Colo. 2001); *Calzaturificio v. Fabiano Shoe Co.*, 201 F.R.D. 33 (D. Mass. 2001) (sanctions imposed for coaching witness and engaging in ad hominem attacks).

Likewise, a deposition can be tainted by incivility during the witness preparation process. “An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.” *Ibarra v. Baker*, 338 Fed. Appx. 457, 465 (5th Cir. 2009) (citation omitted). For example, the Fifth Circuit recently affirmed the imposition of sanctions against attorneys representing the defendants in a 42 U.S.C. §1983 action for improperly coaching witnesses for deposition. *Id.* at 467-68.

In terms of practical approaches to combating incivility in depositions, the first step is to go off the record and persuade the offender to “knock it off.” For the young lawyer, often it is enough to stand up to the offender and show that you will not be
cowed. One of the authors has had the experience of being called out of a deposition by a more senior, male opposing counsel, who essentially told her to stop asking certain questions because he was more experienced and the questions she was asking were irrelevant. Her response was, “This is my deposition and I am asking the questions. If you have an objection to one of my questions, please feel free to put it on the record. Now let’s resume the deposition.” The deposition continued with no further problems. Other junior lawyers have reported calling senior partners during breaks for advice. Again, the key is not to take the behavior personally, and not to respond by engaging in incivility.

Sometimes an obstreperous lawyer won’t be deterred, however. In the face of continuing bad behavior, the best approach is to make a record of the behavior so that the appropriate motions can be filed with the court. In some courts, judges are available to referee disputes in depositions as well. Obviously, deciding to involve the court during a deposition is one to be made with good judgment and in consideration of the gravity of the misconduct, the ability to reconvene the deposition, the local practices of that court, and the specific practices of the judge.

**CONCLUSION: WHY YOU SHOULD CARE**

- Apart from the fact that you may be subject to court discipline for failure to abide by the rules discussed above, for young lawyers, practicing with civility is essential to building and maintaining a good reputation. Your reputation is one of your most important tools to establishing credibility with the court, other counsel, and potential clients. Furthermore, once you have damaged your reputation in a legal community, repairing it can be a difficult, time-consuming process.

As one court has recognized, the consequences of incivility are profound: “When lawyers place a higher value on being heard than on being understood, when they trample on civility, or when their supposed devotion to their clients leads to stridency or worse, they undercut the belief in the law and in the legal profession. At a minimum, uncivil, abrasive, abusive, hostile or obstructive conduct by lawyers impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.” Huggins, supra, 2009 WL 2973044, at *1. Furthermore, incivility does not serve the interests of clients or lawyers. On the whole, it makes litigation more expensive. And it makes lawyers’ already stressful lives even more stressful.

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