“Mejor un Pendejo que Dos” (Don’t Let Your Adversary Establish Your Level of Professionalism)

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“Mejor un Pendejo que Dos”:
Don’t Let Your Adversary Establish Your Level of Professionalism

“We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.” —The Texas Lawyers’ Creed

Lawyers Behaving Badly

In recent years, courts and bar associations have grappled with improving the troublesome public perception of lawyers and issues relating to whether and how to regulate the civility and decency of lawyers. The goals have been both external, to improve the profession’s image, and internal, to improve the quality of professional life for lawyers.

Consider the following exchange between lawyers that occurred during a deposition:

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.
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're continuing the deposition.
Mr. Jamail: You don't run this deposition, you understand?
Carstarphen: Neither do you, Joe.
Mr. Jamail: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.
Carstarphen: Well, that's not your job, Mr. Hairpiece.
Witness: As I said before, you have an incipient—
Mr. Jamail: What do you want to do about it, asshole?
Carstarphen: You're not going to bully this guy.
Mr. Jamail: Oh, you big tub of shit, sit down.
Carstarphen: I don't care how many of you come up against me.
Mr. Jamail: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit.
The conduct was denounced by the court in Paramount Communications, Inc. v. QVC Network, Inc. 637 A.2d 34 (Del. 1994): “This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case.” Because the offending lawyer was neither counsel of record in the case nor a member of the Delaware bar, the court determined it was unable to impose sanctions, at least until and unless the lawyer ever appeared before the court in the future.

The following similar exchange occurred in a deposition of a lawyer-witness in another case:

Q So, you knew you had Mr. Carroll's file in the--
A Where the f-- is this idiot going?
Q --winter of 1990/91 or you didn't?
[Defendant's Counsel]: Nonresponsive. Objection, objection this is harassing. This is--
The Witness: He's harassing me. He ought to be punched in the g--damn nose.
Q How about your own net worth, Mr. Jaques? What is that?
[Defendant's Counsel]: Excuse me. Object also that this is protected by a--
The Witness: (Interrupting) Get off my back, you slimy son-of-a-bitch.
[Plaintiff's Counsel]: I beg your pardon, sir?
The Witness: You slimy son-of-a-bitch [Shouting].
[Plaintiff's Counsel]: You're not going to cuss me, Mr. Jaques.
The Witness: You're a slimy son-of-a-bitch [Shouting].

Despite the fact that there were no provisions of the ethics rules violated by this conduct, the federal courts had no difficulty in determining that the conduct was sanctionable under the inherent powers of the courts to regulate the conduct of lawyers: "We find entirely appropriate the court's expectations of a heightened standard of conduct by a litigant who is also an attorney. An attorney, after being admitted to practice, becomes an officer of the court, exercising a privilege or franchise. As officers of the court, attorneys owe a duty to the court that far exceeds that of lay citizens.” The court observed that it is not acceptable for a party--particularly a party who is also an attorney--"to attempt to use the judicial system . . . to harass an opponent in order to gain an unfair advantage in litigation." A total of $7,000 in sanctions against the offending attorney was imposed. Carroll v. The Jacques Admiralty Law Firm, 926 F. Supp. 1282 (E.D. Tex. 1996), aff’d, 110 F.3d 290 (5th Cir. 1997).

On similar facts, other courts have found no right of the courts to impose sanctions. See, e.g., Saldana v. Kmart Corporation, 260 F.3d 228 (3rd Cir. 2001)(repeated use of the word “fuck” in depositions and phone calls and referring to an opposing expert as a “Nazi” in a postverdict letter to a juror insufficient to authorize sanctions under a court’s inherent powers).

These transcript excerpts are neither isolated nor the worst examples. Many more have been collected by commentators, such as Professor Jean M. Cary of Campbell University School of Law:

“A couple of years ago, I compiled research on the reported cases of lawyer-to-lawyer incivility during depositions. I was shocked by the taunting, rude, and demeaning epithets lawyers hurled at their opposing counsel while speaking "on the record" The presence of the court reporter did not appear to deter this behavior. For instance, the undisputed transcript in one disciplinary proceeding revealed the respondent calling his opposing
counsel a "lying son-of-a-bitch," "asshole," "child and a punk," "fat slob," "f--ker," and "c--ksucker." In another proceeding, the respondent verbally attacked his opponent with a religious slur in the middle of the deposition. In yet another case, the plaintiff, who was also an attorney, accused the opposing attorney of being "so scummy and so slimy and such a perversion of ethics or decency because you're such a scared little man." During a deposition in another case, an attorney "threw the contents of a soft drink cup on the plaintiff's attorney and grabbed him near or around his neck, restraining him in his chair." Needless to say, that deposition ended prematurely.

Unfortunately, this outrageous behavior of one attorney towards another attorney does not appear to be limited to the deposition room. Attorneys are attacking each other both verbally and physically in the hallways outside court, in judicial chambers, and even in the courtroom. The Fourth District court of Appeal of Florida recently affirmed the thirty-day contempt of court sentence against an attorney who called opposing counsel "a f--king c--t" and threatened that he would "see her later" during a conversation in the hall outside the Courtroom immediately following the granting of her Motion for Directed Verdict. Similarly, the Supreme Court of Indiana imposed a sixty-day suspension on an attorney who struck opposing counsel at the end of a meeting in judicial chambers. A Massachusetts Superior Court judge fined an attorney $500, the maximum fine allowable in a summary contempt proceeding, for "[u]sing abusive and vulgar language with an opposing attorney within earshot of the Court, during a motion session, and while within the bar enclosure."


Defining the Undefinable

Principles of professionalism are much more difficult to define and enforce than black-letter ethical rules. The basic distinction between ethics and professionalism is that rules of ethics tell us specifically what we must do and professionalism deals with generalities of what we should do. For all that has been written and discussed on the subject, there is no precise definition of standards of professionalism; it is like the famous statement of Justice Potter Stewart, who, in speaking of pornography, said "I know it when I see it." J. George, The “Rambo” Problem: Is Mandatory CLE The Way Back to Atticus?, 62 La. L. Rev. 467 (2002). In a sense, we are as unsure of where we are going as Yogi Berra warned against in his famous statement: "If you don't know where you're going, when you get there, you'll be lost."

In general, most will agree that professionalism incorporates concepts of civility, charity and consideration. Teaching them is difficult, because these concepts are as imprecise as The Golden Rule in recommending that we do unto others as we would have others do unto us.

Despite the imprecision and difficulty in defining, teaching and enforcing the concepts, many jurisdictions now have mandatory CLE requirements in professionalism subjects and have adopted professionalism credos like the following:

**A Lawyer’s Creed of Professionalism**

*As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.*
A. In all matters:

"My Word is My Bond."

B. With respect to my client:

1. I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice;
2. I will endeavor to achieve my client's lawful objectives in business transactions, in litigation and in all other matters, as expeditiously and economically as possible;
3. In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes;
4. I will advise my client against pursuing any course of action that is without merit and against insisting on tactics which are intended to delay resolution of the matter or to harass or drain the financial resources of the opposing party;
5. I will advise my client that civility and courtesy are not to be equated with weakness;
6. While I must abide by my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.
7. I will keep my client informed about the progress of the case and the costs and fees being incurred;
8. I will charge only a reasonable attorney's fee for services rendered;
9. I will be courteous to and considerate of my client at all times.

C. With respect to opposing parties and their counsel:

1. I will endeavor to be courteous and civil, both in oral and in written communications;
2. I will not knowingly make statements of fact or of law that are untrue;
3. In litigation proceedings I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
4. I will endeavor to consult with opposing counsel before scheduling depositions and meeting and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;
5. I will refrain from utilizing litigation, delaying tactics, or any other course of conduct to harass the opposing party;
6. I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;
7. In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from disrespect;
8. I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will unfairly limit the other party's opportunity to respond;  
9. In the preparation of documents and in negotiations, I will concentrate on matters of substance and content;  
10. I will clearly identify, for other counsel or parties, all changes that I have made in documents submitted to me for review.

D. With respect to the courts and other tribunals:

1. I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;  
2. Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;  
3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit or are superfluous;  
4. I will refrain from filing frivolous motions;  
5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;  
6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;  
7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and, if appropriate, the court (or other tribunal) as early as possible;  
8. Before dates for hearings or trials are set — or, if that is not feasible, immediately after such dates have been set — I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;  
9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;  
10. I will be punctual in attending court hearings, conferences and depositions;  
11. I will at all times be respectful toward and candid with the court;  
12. I will avoid the appearance of impropriety.

E. With respect to the public and to our system of justice:

1. I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;  
2. I will endeavor to keep myself current in the areas in which I practice and, when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;  
3. I will be mindful of my obligation, as a member of a self-regulating profession, to be an active participant, when appropriate, in the disciplinary process;
I will be mindful of the need to protect the image of the legal profession in the eyes of the public and particularly will be so guided when considering methods and contents of advertising or other public communications;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.

In 2001, the Conference of Chief Justices and the ABA Center for Professional Responsibility held a conference sponsored by the Open Society Institute for state supreme court justices entitled, "The Role of the Court in Improving Lawyer Conduct and Professionalism: Initiating Action, Coordination Efforts and Maintaining Momentum." A draft implementation plan for the National Action Plan was presented and discussed. The Chief Justices approved the Implementation Plan for the National Action Plan and the Conference "urge[d] its members to present the Implementation Plan to their respective courts for use as feasible and appropriate in their respective jurisdictions."

Mejor un Pendejo Que Dos

Not surprisingly, most attempts to comply with the various CLE requirements that have been adopted around the country are exercises in frustration. One of the most helpful concepts I have found was not in a CLE program, but was expressed in a Spanish "dicho," a folk adage that a New Mexico colleague told me he learned from his grandfather: "Mejor un pendejo que dos," which figuratively, and more socially acceptably, means "better one jerk than two."

Essentially, it means that you should not let someone else determine your own standards of conduct. So many unpleasant situations between people, including lawyers, develop as a result of tit-for-tat responses to real or perceived slights by others. In the words of a great humanitarian, "an eye for an eye leaves the whole world blind."

An example is a recent hard-fought case in which opposing counsel persisted in litigation ambushes, with minimal notice and bad timing, such as filing significant moving papers at the close of business on Wednesday afternoon before Thanksgiving, when they knew I had already left my own office, a stone’s throw from their own. Instead of responding in kind, I visited with them and told them that I was not going to respond in kind, and although I could not insist on it, I would simply hope they would show similar consideration in the future. The next time I had papers to file, I made a point of letting them know in advance when they were coming, and I walked courtesy copies over to their office, instead of dropping them in the mailbox, as they had been in the habit of doing. Their conduct ultimately changed, whether out of enlightenment or shame, and it was a good example of breaking the tit-for-tat cycle. Similar experiences have left me convinced that you can avoid getting into that cycle and still serve your client not only adequately, but much more effectively.

A few years ago, I dropped by a courthouse in Canada to see one of their criminal trials. The most significant memory I have is of the prosecutor pausing in the middle of a direct examination and saying, "Before I ask my next question, it occurs to me that my learned friend (how they refer to opposing counsel) may wish to raise an objection." The "learned friend" advised that he had no plans to object, and the direct examination continued. That may be a little too civilized for rough-and-tumble American lawyers, but I was struck by how fair it made the prosecutor seem to the jury. He really stood to lose little by the civility, and he certainly gained. As a practical matter, we will not
lose anything to which our clients are entitled from us by behaving in a considerate and civilized manner, and we often gain credibility and effectiveness in the eyes of the jury, the judge and other lawyers. For whatever it is worth, we will also feel better about ourselves and our work. Being involved in constant urinating matches is physically and mentally taxing.

**A Functional Analysis in 5 Easy Pieces**

One overriding concern in many decisions about professionally appropriate responses is whether we are acting inconsistently with our professional obligations to our clients when we strive for civility and decency. The black-letter ethical rules require that we provide “competent” representation, defined in Model Rule 1.1 as “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Sixth Amendment similarly requires “reasonably effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668 (1984).

Most of us agree with the expectations of our clients that we should set our aims higher than the “close enough for government work” standard established by *Strickland*, even though the prevailing ethical rules do not technically mandate “zealous” representation. We certainly do not want to surrender our efforts to provide the highest level of ethical assistance of counsel that we can provide, even in the interest of personal peace and professional civility.

On the other hand, our clients are not entitled to have us try to win by any means we can come up with, legal or illegal, fair or foul. Hopefully, we could agree that we should not smuggle a pistol into the jail or suborn perjury in order to extricate the client. The problems arise in the situations that do not involve unethical or other potentially illegal choices, but call instead for a more difficult analysis of our very purposes and roles as lawyers in the justice system. It can help us resolve those issues if we ask ourselves questions like the following:

1. What does my client have a right to demand or expect of me in this situation?
2. Would I feel comfortable having all concerned know about my choice and my behavior?
3. Would I feel comfortable looking myself in the mirror, knowing about my choice and my behavior?
4. Would I feel comfortable practicing in a system where all lawyers felt free to make the choice I am contemplating?
5. Am I letting someone else establish my own standards of professionalism?

**Exercises in Professionalism**

During today’s oral presentation, we will discuss various scenarios that provide examples of how we might analyze appropriate ethical behavior.

**Scenario 1**

A new prospective client arrives at your office to inquire about your taking the case. He tells you that he is looking for the most aggressive, backside-biting, junkyard dog lawyer in town, someone who has not only legal skills, but an ability to make the adversary’s life miserable. What do you tell him?

**Scenario 2**

You have a motion and brief deadline at 5 PM today and your spouse has just called to remind you of your child’s school performance that you are expected to attend in about an hour. You cannot attend the performance and meet the deadline, too, so you call opposing counsel to request concurrence in a one-day extension. The knee-jerk, “if it’s something the defense wants, I’m
opposed,” prosecutor refuses.

A few weeks later, the prosecutor calls to ask for a similar extension, based on the very same kind of situation. What would be the best response?

**Scenario 3**

You are at the prosecutor’s office to review discovery, which has been put in boxes on a table for you to look at. The prosecutor is called out of his office for a few minutes on another matter. You notice that, over on his desk under a paperweight, there is a memorandum marked “confidential” which appears to be an internal memo analyzing weaknesses in his case. Do you read it?

**Scenario 4**

You are in trial and you notice opposing counsel’s fly is unzipped. Do you tell him about it?

**Scenario 5**

At a motions hearing, the prosecutor launches into a nasty personal attack on your evil motives in seeking certain discovery. There is a lot that you could tell the judge about what an unpleasant jerk the prosecutor has been in your dealings with her. Should you?

**Scenario 6**

You have a hearing on a defense motion scheduled for hearing the Monday after the next weekend. You realize on Friday that you will have to withdraw a major portion of the motion at some point before the hearing begins. You expect the prosecutor to have to work over the weekend to prepare for the part of the motion that you plan to withdraw. Do you make a special effort to get the word to your adversary before the weekend?