Annual Institute on Mineral Law

Volume 45 *The 45th Annual Institute on Mineral Law* Article 15

3-26-1998

Professionalism

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The Fall From Atticus Finch, Esquire To Hairpiece v. Fat Boy
and
What The Bar Is Trying To Do About It

(Adapted from materials prepared by Frank X. Neuner, Jr. of the Lafayette Bar, to whom grateful acknowledgment is expressed.)

I. What is Professionalism and How is It Different from Ethics?

A. "Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro-bono obligations."

"Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected ...." See Section 1, Rule 3(c) of the "Rules for Continuing Legal Education" as amended by the Supreme Court on May 23, 1997.

B. "Professionalism seems to be the fashionable word for what used to be called character."··· "However defined, professionalism is a kind of excellence or, a word no longer fashionable, virtue." William P. Braithwaite, "Hearts and Minds", ABA Journal, September 1990, page 70.

C. "'Profession' comes from the Latin, *profesionem,* meaning to make a public declaration. The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling." Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 39 (1994), quoted in "Teaching and Learning Professionalism", 1996, American Bar Association.

D. Dean Roscoe Pound formulated perhaps the most famous definition of a profession as "pursuing a learned art as a common calling in the spirit of public service." Roscoe Pound, *The Lawyer from Antiquity to Modem Times* 5 (1953).

E. The definition of a professional lawyer adopted by the Professionalism Committee of the Section of Legal Education and Admissions to the Bar of the American Bar Association in its 1996 report was as follows: "A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good."

F. Generally, ethics rules tells us what we cannot do and professionalism

deals with what we should do.

G. The Golden Rule; What we should have learned in Kindergarten; or Just old fashioned good manners!

II. Who Has the Duty to Promote and Enforce Professionalism in the Legal System?

A. Louisiana Code of Civil Procedure

1. Article 371 -Duties of an Attorney as an Officer of the Court "...shall conduct himself at all times with dignity and decorum ..."
2. Article 863 -Signing of Pleadings, Effect "...It is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ..."
3. Article 864 -Attorney Subject to Disciplinary Action "...for a willful violation of any provision of Article 863, or for the insertion of scandalous or indecent matter in a pleading."
4. Act 1056 of 1997 Legislature amending Code of Civil Procedure Article 1443(0) regarding objections during depositions.

B. The Court's Duty

1. Scandalous and vindictive statements in a petition are sanctionable. See *Sanders* v. *Gore,* 676 So.2d 866 (La.App. 3 Cir. 1996) and *Gautreaux* v. *Gautreaux,* 576 So.2d 188, (La. 1952).
2. Abusive language during discovery and trial escalates the contentious nature of the proceedings and should be sanctioned. See *Carroll* v. *Jacques,* 926 F.Supp. 282 (E.D. Tx. 1996), affirmed, 110 F.3d 290, 1997 W.L. 154733 (CA-5, 1997) as one of the more egregious examples of gross language and conduct on the part of counsel in a deposition seen lately. The Court of Appeal for the Fifth Circuit affirmed a $7,000 sanction, as the least severe sanction available, against an attorney whose language can only be appreciated if read in the following excerpt from his deposition:

   "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: 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.

[PLAINTIFF'S COUNSEL]: You're not going to cuss me, Mr. Jaques.

THE WITNESS: You're a slimy son-of-a-bitch

[PLAINTIFF'S COUNSEL]: You can cuss your counsel. You can cuss your client. You can cuss yourself. You're not going to cuss me. We're stopping right now.

THE WITNESS: You're damn right.

[PLAINTIFF'S COUNSEL]: We'll resume with Judge Schell tomorrow. Thank you.

THE WITNESS: Come on. Let's go.

[PLAINTIFF'S COUNSEL]: Good evening, sir.

THE WITNESS: F-you, you son-of-a-bitch."

3. Another discussion which has acquired great notoriety as an example of some of the most egregious conduct on the part of an attorney seen in any reported case is found in the addendum to the decision of the Delaware Supreme Court in the case of *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A2d 34 (1994). Again, it is impossible to fully appreciate the truly egregious nature of counsel's conduct in this case without reading the offensive testimony itself which the court quoted, at page 53 of its opinion, as follows:

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 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."

4. In another case involving the same attorney, the following testimony was quoted in an article auspiciously entitled *Hairpiece* v. *Fat Boy,* Am. Law., Oct. 1992, page 82:

"JAMAIL: You don't run this deposition, you understand?

CARSTARPHEN: Neither do you, Joe.

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

JAMAIL: What do you want to do about it, asshole?

CARSTARPHEN: You're not going to bully this guy.

JAMAIL: Oh, you big tub of shit, sit down.

CARSTARPHEN: I don't care how many of you come up against me.

JAMAIL: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit."

5. In a case recently tried in Federal District Court in New Orleans, *United States of America* v. *Carl W. Cleveland, et al,* Docket Number 96-CR-207-R, the following exchange, quoted directly from the official trial transcript of that case, took place:

"MR.. UNGLESBY: Call Harold Daves.

THE COURT: Let me make it clear. I think you can explore what was said and the relationship between Carl Cleveland and Edwin Edwards as it relates to Truck Stop Gaming, the meetings and discussions between the two of them. I think that's fair game because Carl Cleveland is a party to this case and it goes to whether or not the governor had a relationship with the parties to this case.

Now, the Harold Daves stuff hasn't been hooked up as far as asking him whether he is getting money from-

MR.. MAGNER: Your Honor-

MR..UNGLESBY: Your Honor has ruled. I think Mr. Magner is trying to intimidate the Court-

MR.. MAGNER: I feel like my hands are being tied and only because this witness is being given substantial-MR. UNGLESBY: You are a liar, Mr. Magner. If you want to stop being a U.S. attorney for one afternoon, I'll whip your ass.

THE COURT: This is out of line. Mr. Unglesby-

MR.. UNGLESBY: This is man-to-man stuff."

6. *In Hall v. Clifton Precision,* 150 F.R.D. 525 (B.D. Pa. 1993) the Court detailed guidelines for counsel's conduct at depositions. The Court ruled that:

- The witness had to "ask deposing counsel rather than the witness's own counsel for clarification, definitions, or explanations."
- Objections were permitted only to assert a privilege, make a motion under Rule 30(d), enforce a court ordered limitation on evidence, or prevent waiver of an objection under Rule 30(dX3)(B).
- Counsel could not direct or request that witness not answer a question, unless due to a privilege or a court imposed limitation on evidence.
- Counsel could state the basis for an objection and nothing more and not make any statements which might suggest an answer to the witness.
- Counsel and witness-clients could not have private, off the record conferences, even during breaks and recesses except for the purpose of deciding whether to assert a privilege and a witness's counsel was to note in the record the fact of every conference and explain its purpose and outcome with opposing counsel being permitted to inquire to ascertain whether there was any witness coaching and if so, what.
- Counsel and his witness-client had no right to discuss documents privately before the witness answered questions about them, but the deposing counsel had to provide the witness's counsel with a copy of each document shown to the witness, either when shown or prior thereto.

A. The Organized Bar's Duty

1. Code of Professionalism approved by the Louisiana Supreme Court on January 10, 1992.
2. Louisiana State Bar Association Professionalism and Quality of Life Committee.

3. Louisiana Bar Foundation: Proposed Handbook on Professionalism and Civility in the Practice of Law.

4. Mandatory CLE on Professionalism.

5. Are we doing enough?

III. What is the Client's Role in Promoting Professionalism?

A. Are Incivility and Contentiousness New Problems or Merely a Reflection of our Society as a Whole?

These problems were discussed by Dean Roscoe Pound in his 1906 address to the American Bar Association:

"The idea that procedure must of necessity be wholly contentious ...leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach [deals] with the rules of the sport.

The effect...is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law .... If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it."

B. What is the Public's Perception?

1. "The lawyer's a man of sorrow, and acquainted with grief;
Among all the sinners, he's considered the chief.
His friends all admire him when he conquers for them;
When he chances to lose, they're quick to condemn.
They say, "Ah! He is bought!" if he loses a case;
They say, "Ah! He is crooked!" if he wins in the race.
If he charges big fees, they say he's a grafter;
If he charges small fees, "He's not worth going after."
If he joins the church, "it's for an effect;"
If he doesn't join, "He's as wicked as heck."
But here is one fact we all must admit:
When we get into trouble our lawyer is IT."

Poem by John W. Davis
Published in Lawyer's Lawyer -The Life of John W. Davis, P. 411 (U. Va. Press 1990)

2. From an article in the U. S. News and World Report, April 22, 1996: "Outside the profession, lawyers have become symbols of everything crass and dishonorable in public life; within it, they have become increasingly combative and uncivil toward each other."

3. The title of a recently published book is enough, alone, to cause alarm: "Why Lawyers Lie and Engage in Other Repugnant Behavior",

Mark Perlmutter (1997).

4. In a paper entitled "Language of the 2111 Century", a Republican political advisor teaches Republicans how to attack lawyers: "It's almost impossible to go too far when demonizing lawyers. But before you get too carried away, remember to talk about the victims of our society's litigiousness: Small business owners, teachers, doctors and homeowners whose lives are ruined by baseless lawsuits."

C. The Client's Civility Pledge

"As a client and retainer of attorneys, the undersigned hereby declares that every lawyer who represents our interests is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests."

"We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others retained by us in a position that would compromise their ability to meet the Guidelines for Conduct." (See the Guidelines for Conduct of the Section of Litigation of the American Bar Association.)

IV. Do We Know Unprofessional Conduct When We See It? Cases Illustrating the Hazy Line Between Ethics and Professionalism

A. Solicitation

1. Prospective client did not think she was being solicited so solicitation has not been proved by clear and convincing evidence. See *In re Frank J. D 'Amico, Jr.,* 668 So.2d 730 (La. 1996).

2. The line between solicitation and a recommendation by a satisfied client is difficult to draw. The Bar Association has the burden of proof in an attorney disciplinary proceeding and the Supreme Court held that it failed to prove solicitation by a taxi driver who happened to be a client and friend of the lawyer. See *Louisiana State Bar Association v. Douglas St. Romain,* 560 So.2d 820 (La. 1990).

B. Contact with Doctors who have Treated an Adverse Party

1. Louisiana Code of Evidence Article 510(e) does not "preclude, prevent or prohibit the flow of information from a litigant, an attorney or anyone else for that matter to a health care provider." See *Hortman v. Louisiana Steel Works,* 96 CA 1433, (La.App. 1st Cir. June 20, 1997). See Judge Kuhn's dissent wherein he felt the defendant's conduct "...clearly impugns on the Code's mandate of professionalism."

2. Impermissible *ex parte* communication with plaintiff's physician prejudice the plaintiff and warranted reversal when the physician

divulged privileged information which startled counsel for plaintiff and impaired the plaintiff's overall credibility as a witness. See *Boutee v. Winn Dixie Louisiana, Inc.*, 674 So.2d 299 (La.App. 3 Cir. 1996).

C. Contact with Employees and Former Employees of a Party

1. Is it proper to contact employees and/or former employees of a represented party: it is proper to contact former employees of a represented party (See *Jenkins v. Wal-Mart Stores, Inc.*, 956 F.Supp. *695, V.S.D.C.*, W.O. Louisiana, Lake Charles Division and "Ethics Opinions", Louisiana Bar Journal, Volume 45 No.1 at pages 58-59).

2. It is not proper to contact current employees of a represented party. (See *Jenkins* v. *Wal-Mart Store, Inc.*, 956 F.Supp. 695, U.S.D.C., W.O. Louisiana, Lake Charles Division and "Ethics Opinions", Louisiana Bar Journal, Volume 45 No.1 at pages 58-59).

3. *Schmidt* v. *Gregoria,* 1993 WL 852155 (La.App. 2 Cir.). There is nothing improper about contacting former employees of a corporate defendant, but see Judge Hightower's dissent regarding releasing this case for publications four years later!

D. Defaulting the Opposing Party When you are Aware that they are Represented by Counsel

1. The Supreme Court has held that the plaintiff's attorneys' actions in taking a default judgment and not notifying opposing counsel of his intent to do so in an ongoing petitory action constituted an "ill practice" under Louisiana Code of Civil Procedure Article 2004 and annulled the judgment See *Russell* v. *Illinois Central Gulf Railroad Company, 686* So.2d 817 (La. 1997).

V. Professionalism Obligations of Judges --The Code of Professionalism in the Courts

A. Background: Deterioration of Relations Between Lawyers and Judges

1. The report of the Committee on Civility of the Seventh Federal Judicial Circuit, Judge Marvin E. Aspen, Chairman, reported that 56% of lawyers and judges felt relations among judges and lawyers were marred by incivility.

2. The comments set forth in the report, issued in 1991, included the following judicial observations about the civility problem between judges and lawyers:

- Ego on the part of judges. A lack of appreciation of the judicial task on the part of the bar.
- Some judges seem to have little understanding of the problems of attorneys and perhaps vice versa.
- A few judges do not treat lawyers with civility. Some lawyers

seek to "control" the course of litigation by attempting to intimidate the trial judge.

- Some judges misuse their judicial power to coerce attorneys to settle, etc. Some attorneys goad judges by irate behavior to provoke error.

- Far too many judges and attorneys resort to sarcasm and rudeness during the proceeding which is a disservice to the litigants and an affront to the dignity and authority of the court.

- Younger members of the bar are confrontational, often rude and poorly trained in courtroom demeanor.

3. The report also noted comments by lawyers about judges' conduct which were quite direct and blunt:

- Rude, arbitrary treatment of lawyers; impatience; unwillingness to give adequate time to complex matters.

- Several of the judges, who have virtually no litigation experience, are extremely rude and uncooperative.

- Some judges are arbitrary and hassle an attorney without good reason. A few circuit judges seem inclined to flaunt their supposed erudition and exhibit ignorance of the practical realities of litigation.

- Judges no longer are treating attorneys with respect like they once did. The courts seem to resent the lawyers.

- Some federal judges seem more interested in "putting down" attorneys than practicing judicial temperament.

- Many judges in district court and 7th circuit are unnecessarily rude and nasty. Also lack compassion and understanding for attorneys for positions advanced by attorneys that they disagree with.

- Judges are unusually rough with lawyers, threatening, scolding, ignoring arguments.

- It was once a pleasure to litigate in federal court. Judges and attorneys were very "civil" on the whole. The decline in civility on the judicial side seems to arise out of a general disrespect for practitioners, almost a presumption that attorneys are trying to engage in misconduct at the court's expense. This attitude is expressed on certain benches and in pretrial matters. Unfortunately, it filters down. Lawyers begin to apply the same presumption to each other. Many of us prefer to operate with the opposite presumption --that our colleagues, both bench and bar, deserve civility unless they demonstrate that they are unworthy of it. This judicial attitude makes civility very difficult.

4. As a result of its survey, the 7th Circuit Court of Appeals promulgated "Standards for Professional Conduct Within the Seventh Federal Judicial Circuit", which included a section entitled "Courts' Duties to Lawyers" and "Judges' Duties to Each Other."

5. In August, 1997, the Louisiana Supreme Court promulgated a Code of Professionalism in the Courts, the preamble to which states:

"The following standards are designed to encourage us, the judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of professionalism and civility, both of which are hallmarks of a learned profession dedicated to public service."

VI. Should Professionalism Rules Be Made Mandatory and Enforceable by the Bar Association?

A. Issue Presently Under Consideration by the Committee on Professionalism and Quality of Life of the Louisiana State Bar Association.

B. See Memorandum of Professor Dane S. Ciolino regarding this issue, attached to these materials.

VII. The American Inns of Court Movement

A. History of Development and Formation of the American Inns of Court Movement

1. Founded at the Urging of Then Chief Justice Warren Burger in Early 1980's.

2. Response to concerns of Chief Justice Burger and many others at the spread of the "all too common example of the sort of 'Rambo tactics' that have brought disrepute upon attorneys and the legal system." *McLeod, Alexander, Powel & Apffel, P.c.* v. *Quarles,* 894 F.2d 1482, 1486 (CA-5, 1990).

3. Chief Justice Burger and others were intrigued by the models of integrity, civility and collegiality afforded by the Inns of Court in England.

B. Growth of the Movement

1. There were nineteen American Inns of Court chartered by the Annual Meeting in May of 1986;there are approximately 325 American Inns of Court around the country in 1998.

2. Membership includes over 20,000 active judges, trial lawyers and graduating law students, with 1,000 more alumni or *emeritus* members.

3. Included in those numbers are nearly 800 state court judges and over 25% of the federal judges in the country.

4. The Inns movement has been called "the fastest growing legal organization in our nation today."

C. Described in the Following Terms by Ambassador Sol M. Linowitz in his Book "The Betrayed Profession: Lawyering at the End of the Twentieth Century":

"It is for people who still have stars in their eyes about being lawyers,

and we need such people urgently. Ideally, such an institution would encourage those in each locality who are most concerned about the future of the profession to learn to work together. It could help the judges, many of whom have not practiced for years, understand the problems of the lawyers who appear before them, and help the lawyers remember that they are members of a profession. 'When you are a member of a profession,' said Jesse Choper, dean of the University of California Law School, 'playing hard ball is unthinkable. '"

Addenda [not reproduced]

1. Treatise entitled "Professionalism" by David Hricik of Texas

2. The Louisiana State Bar Association Code of Professionalism

3. Article entitled "Plane, Trains and ...Civility" by Charles Wilson, American Bar Association *Journal,* January 1990

4. "Teaching and Learning Professionalism -an Excerpt", a Report of the Professionalism Committee of the Section of Legal Education and Admissions to the Bar, American Bar Association, August 1996, including bibliography.

5. Decision of the Firth Circuit Court of Appeal in *Carroll v. The Jacques Admiralty Law Firm.*

6. Addendum, opinion of the Supreme Court of Delaware, *Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34,51057 (1994).

7. Article from "Miss Manners" column re professional ethics and courtesy.

8. New York Times Magazine article, "The Trashing of Professionalism"

9. Memorandum of Dane S. Ciolino to the Louisiana State Bar Association Professionalism Committee dated March 10, 1998

10. Cartoon, *Wall Street Journal,* March II, 1998