INSIDE: ETHICAL DEMANDS OF LEGAL PRACTICE: WHAT ARE OUR PROFESSIONAL DUTIES?

DELAWARE LAWYER

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

Volume 22 Number 4 $3.00 Winter 2004-2005

Office of Disciplinary Counsel

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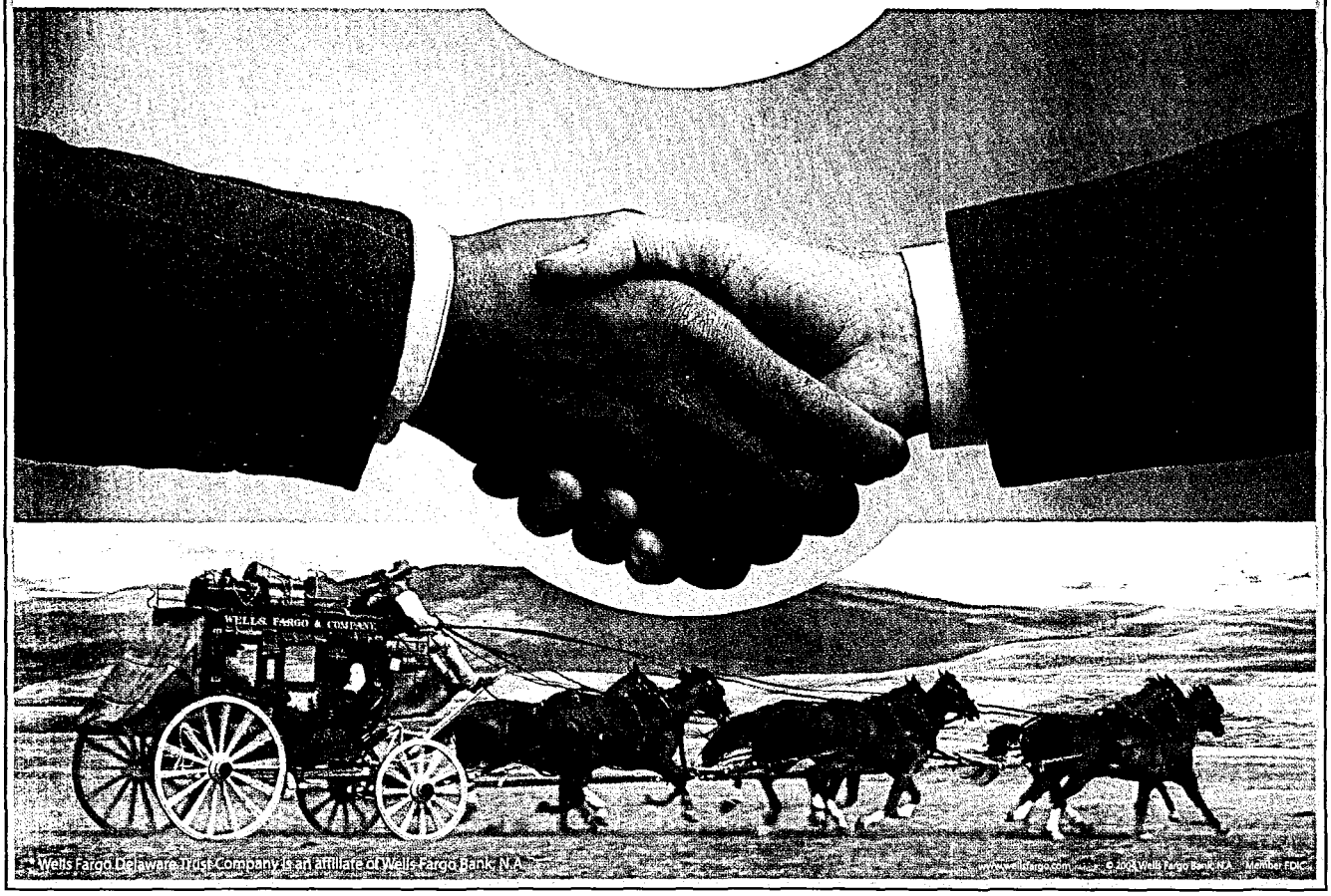

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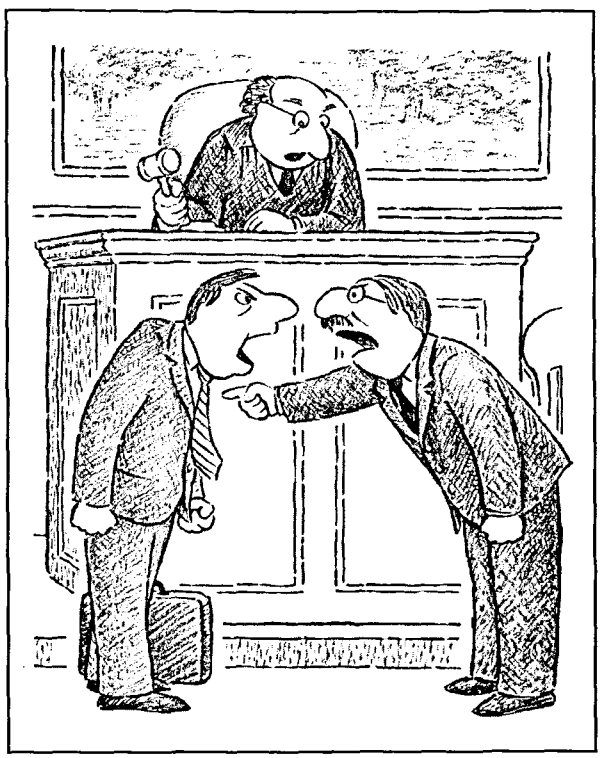

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PREFACE TO A RADICAL PROFESSIONALISM

David Curtis Glebe

On the cover: *The members of the Office of Disciplinary Counsel.*
Clockwise from the front: Andrea L. Rocanelli (Chief Counsel) Carolyn Hoard (administrative staff), Michael S. McGinniss (Disciplinary Counsel), Mary Susan Much (Disciplinary Counsel), Patricia Bartley Schwartz (Disciplinary Counsel), Margot R. Millar (administrative staff)

Cover photograph: *Lisa Morris*

Editorial cartoons: *Samantha Carol Smith*

EDITOR'S NOTE

In his book, *Beyond Morality*, Richard Garner (one of my former philosophy professors) explores how certain abstract concepts, like "right" and "duty," can motivate human conduct. This intriguing question also embodied Atticus Finch's closing argument during the trial depicted in Harper Lee's *To Kill A Mockingbird*. Finch's final exhortation to the jury: *"Do your duty."* Similarly, Immanuel Kant wrote that a central question of human existence was: *"How ought I act?"* And who can forget the pithy normative inquiry often raised by one or another of the Three Stooges: *"Hey fellas, what do we do now?"*

Although popular commentary often suggests that such evaluative questions have uncomplicated answers, I cannot agree. Having studied ethics for over 30 years, I have found that simple, slogan-like solutions to these queries, upon exposure to any quantum of serious thought, are invariably revealed as erroneous. The difficulty of finding answers does not, however, diminish the import of these questions, but rather, enhances it. In this vein, I wholly agree with Holmes that the mark of a civilized person is to have questioned acutely one's deepest convictions. The thoughtful articles in these pages examine, in the context of our membership in the legal community, various aspects of these normative issues.

I note at the outset that four of the seven articles arrive in packages appropriately stamped by the bar's trusted guardian of ethical conduct, the Office of Disciplinary Counsel, and that their authors represent the attorney composition of that agency in mid-1998 (just before I was abruptly informed that my professional services were no longer desired). This issue of *Delaware Lawyer* thus represents for me an "ODC reunion" of sorts, presenting our seasoned reflections about ethics and professionalism.

Judge Johnston's observational piece is an entertaining and informative look at the best and worst aspects of lawyer conduct, as viewed from her first year on the bench. Andrea Rocanelli provides important "think-twice" advice about a lawyer's decision to withdraw from a representation when faced with a disciplinary complaint. Matt Boyer's article is an enlightening analysis of the evolution in conflicts law, as related to disqualification motions. The insights of Paul Wallace regarding the special ethical duties of a prosecutor were inspiring to me, given my present duties as a prosecutor. Professor Hill's cutting-edge analysis of electronic communications by lawyers, and Kevin Gibson's instructive piece about the use of fiduciary duty claims in malpractice actions, round out this lineup of exceptional commentary. Finally, my "Opinion" piece proposes a "radical professionalism," an idea arising from my legal experience and academic background in ethics.

"What ought we do?" This appears to be a simple inquiry, capable of a straightforward answer, but it is not. Because our responses to that question and our subsequent conduct will come to embody who we are, some private reflection is prudent before choosing a course.

David Curtis Glebe

CONTRIBUTORS

MATTHEW F. BOYER

is a partner at the Wilmington firm of Connolly, Bove, Lodge & Hutz, practicing in the areas of employment law, business litigation, and legal ethics. He served as Delaware's Deputy Disciplinary Counsel from 1994 to 1998, and was previously an associate with Skadden Arps Slate Meagher & Flom. Boyer graduated in 1986 from the University of Virginia Law School, and received his undergraduate degree from Harvard University in 1980.

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(Continued on page 7)

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(continued from page 5)

Law School in 1978, she served as Assistant United States Attorney for the Northern District of Ohio. Professor Hill teaches and writes in the areas of contracts, wills and trusts, and professional responsibility.

Hon. MARY MILLER JOHNSTON

became a Superior Court judge on September 25, 2003, having formerly served as Chief Counsel of the Delaware Supreme Court's Office of Disciplinary Counsel. Following her admission to the bar in 1984, Judge Johnston practiced in the areas of corporate and complex commercial litigation as a partner at Morris, James, Hitchens & Williams.

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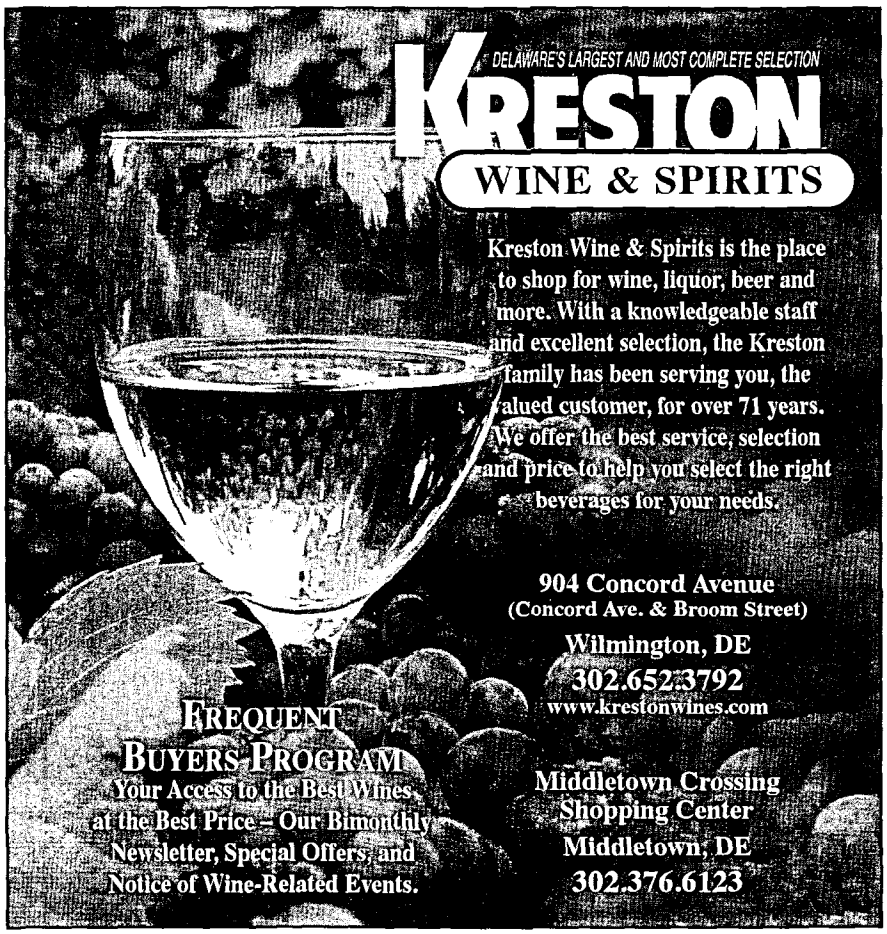
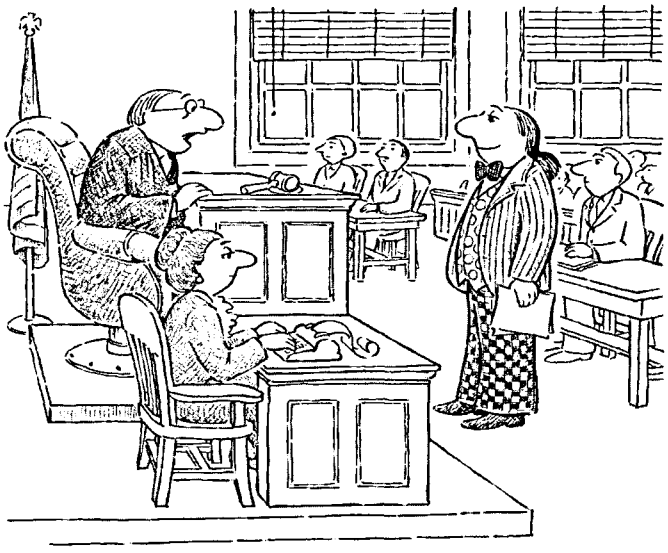


FEATURE

Mary Miller Johnston

A VIEW FROM THE BENCH: THE FIRST YEAR



"The Court believes you may have misunderstood the meaning of 'diversity suit,' Mr. Tompkins."

By the time this issue of *Delaware Lawyer* goes to press, I will have been on the bench for over a year. I expected, and indeed found, that the past year would be a challenging climb up a very steep learning curve. Because the Superior Court is a court of general jurisdiction, no neophyte judge can possibly have expertise in, or even minimal exposure to, every type of case that must be decided. By its nature, this process toward facile competence must be undertaken in the most public of venues. In other words, the opportunities for making a fool of one's self, in front of God and everybody, are practically limitless.

To my great relief, the overwhelming majority of attorneys did not seize upon my state of relative naiveté as a means of sabotaging me, or of revenging whatever perceived slights I may have unwittingly perpetrated over my 20 years in practice. I am well aware that my immediate past life as chief counsel with the Office of Disciplinary Counsel probably made me *persona non grata* among more than a few lawyers. During that time, I often witnessed the dark underbelly of unethical and unprofessional behavior. Frankly, I expected the worst.

Instead, the past year brought a remarkable number of pleasant surprises. The following is my "top five" list.

PLEASANT SURPRISES

Number Five: "Thank You, Sir, May I Have Another?"

I am reminded of the scene from *Animal House* in which underwear-clad fraternity initiates must beg for repeated swats with a wooden paddle. Seasoned attorneys, as well as savvy beginners, routinely say "thank you" in response to a judge's adverse rulings. Not only is this habit courteous and professional, but it can also be an effective advocacy tool. Saying "thank you" can defuse a contentious situation, and lets the court know that the attorney has shaken off the disappointment and is ready to move on.

Number Four: Preparation and Competence is the Norm

As I learned at many national conferences of disciplinary counsel, it is easy for those whose job it is to field complaints about attorneys to become jaded and to assume that sloppy lawyering is the norm. Not true in Delaware. With very few exceptions, attorneys are very well prepared and proceed with a high degree of legal skill. I see neat trial notebooks instead

of unruly piles of documents. I hear thoughtful oral arguments and opening and closing statements. Only occasionally do I observe what appears to be aimless shuffling of papers. Most motions and briefs are well researched, and cogently apply the law to the relevant facts. The most reasonable conclusion, in my view: Delaware attorneys take great pride in the practice of law and work hard for their clients.

Number Three: Concession is Good for the Soul

The television-saturated public thinks that the best lawyers are the junkyard dogs, fighting to the last breath for every scrap. Emotional, fist-pounding speeches are winners. But we in Delaware know better. One of the hallmarks of an effective advocate is the ability to know when to concede a losing proposition. Continuing to argue a point that is obviously tenuous can only have a negative effect upon the attorney's credibility before the judge and the jury. When a judge sends the signal that the argument is a loser, counsel's only rational choice is to proceed gracefully to the next issue. Of course, a lawyer may be certain that the judge is in error (and the lawyer may ultimately be correct). Trial judges remember which attorneys consistently concede the weaknesses of their cases, but who are able to emphasize why those flaws are not dispositive. Judges — trial and appellate — trust those attorneys. Those attorneys win cases.

Number Two: The Court Staff Makes the Impossible Possible

It is not humanly possible for the staff of Superior Court Prothonotary Sharon Agnew to handle the work demanded by the ever-increasing case filings and criminal docket. Yet, the clerks and bailiffs keep things moving. They are courteous in the face of certifiably lunatic litigants, helpful in deciphering sometimes less-than-clear judicial rulings, and tactful about suggesting methods, consistent with the actual rules and established law, by which new judges may manage their responsibilities. In short, the people on the court's staff know what they are doing. Wise attorneys develop positive working relationships with these dedicated individuals, and rely on their advice.

Number One: Assistant Public Defenders and Deputy Attorneys General — Making Silk Purses Out of Sows' Ears

The attorneys with the offices of the Attorney General and the Public Defender are spread dangerously thin. But despite inadequate resources, the defenders represent their indigent clients competently and vigorously. Deputies prosecute cases effectively, although often hampered by delayed or non-existent forensic analyses — a result of the gross underfunding received by the medical examiner's office. Almost without exception, these attorneys appear to have the courage of their convictions, whether they are bringing accused criminals to justice, protecting the innocent, or ensuring the Constitutional right of every person to competent counsel.

PROFESSIONAL PITFALLS

Judicial meetings often are enlivened with stories of attorney mishaps or misbehavior. The following is my "top five" list of these anecdotes.

Number Five: Juries are Smarter than Lawyers Think

I am amazed whenever a trial attorney attempts to "get out of" jury duty. Even taking into account the obvious disruption and inconvenience, why would anyone who relies on juries for his or her very livelihood decline the golden opportunity to see how the process works from the inside? A few years ago, when the attorneys were running out of venire members, I must have been deemed as the least of the evils and was not stricken from a jury panel. I admit to having been skeptical about the ability of the disparate group of reluctant people to come up with a reasonable verdict. To my amazement, all of the issues I had spotted were addressed by someone else. The deliberations took on an almost ethereal atmosphere, and a just result (in my opinion) was reached.

As a judge, I often meet with juries post trial. Two things are clear. First, jurors take their duties very seriously. They understand what is at stake and truly care about the outcome. Second, they pay attention and are not fooled by tricky lawyer tactics. Highly educated attorneys sometimes mistake a lack of formal education for the lack of intelligence or critical discernment. Jurors know when they are being "talked down to" or even misled, and they more than likely will hold it against the attorney.

Jurors react negatively to *ad hominem* attacks on the character or veracity of opposing counsel. In addition, a likeable or apparently vulnerable witness is always a challenge in cross-examination, especially if the witness is viewed as being "bullied." For best results, those witnesses should be treated gingerly and with the utmost courtesy. Using this method, skillful lawyers often obtain favorable testimony without the witness realizing what has transpired.

Number Four: Were They Born in a Barn?

In the era of "business casual" (whatever that means), it is understandable that starched white shirts and gray pinstripe suits are not necessarily *de rigueur* for every court appearance. But on the other hand, when did gum-chewing and wrinkled khakis become acceptable in court appearances? And is it too much to ask that lawyers remove their overcoats before arguing a routine motion?

In England, barristers are never permitted to turn their backs to the judges, and must literally back out of the courtroom. While that level of pomp and circumstance is not required in the New World, is it so unreasonable to expect that attorneys actually face the bench when addressing the court?

Further, a judge is not a boxing referee. When counsel argue with each other instead of addressing their arguments directly to the court, it is not only just plain rude, but undermines a judge's control over the courtroom.

The judges of the Superior Court, in response to all of the foregoing, have accordingly promulgated specific standards, codified as "Expectations of the Superior Court for Attorneys' Professionalism and Civility in a Courtroom Setting."[1]

Number Three: Familiarity Breeds Contempt

Delaware's small legal community has many well-recognized advantages. Collegiality and trust are often the tools to avoid needless, contentious litigation and to narrow issues or to resolve cases without resorting to trial. The problem is that many laypersons already view lawyers as members of an insular club, dedicated to self-perpetuation. It is sometimes difficult for non-lawyers to understand that judges and attorneys can quickly shift gears from casual banter to serious advocacy and impartial review. The Office of Disciplinary Counsel regularly fields complaints

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from people who are convinced that attorneys and judges make behind-the-scenes deals without letting clients in on their secrets. As evidence, clients cite occasions on which attorneys and judges were joking or exchanging gossip. To avoid these results, the familiarity we prize as members of Delaware's bench and bar should be reserved for chambers and social occasions.

There is also a fine line between cordial courtesy and careless use of humor. For the most part, litigants do not find anything entertaining about the circumstances in which they find themselves. Very few attorneys (or judges) are adept at the use of humor, which should be reserved in open court primarily for alleviating tense situations. Whenever members of the public are present, lawyers and judges should conduct themselves in a manner consistent with the professional administration of justice.

Number Two: Know When to Hold 'Em, Know When to Fold 'Em

Some attorneys seem unable to resist the temptation to reargue, and reargue, and reargue an adverse ruling. These are the same lawyers who are so invested in their positions that they cannot control the urge to interrupt the judge — to make sure the judge has really listened to their arguments. I suppose that some judges become worn down by repeated entreaties, and as a result may change their minds. The better practice for an attorney is to politely request that the objection be noted "for the record." There are *no* judges, however, who react favorably to being interrupted, nor should they. If a judge is not treated with respect, it clearly affects in an adverse manner the public's confidence in the proceedings.

Number One: Common Courtesy

It is astonishing how many times attorneys simply fail to appear for telephone conferences, office conferences, pretrial conferences, or even motions noticed for hearing by the attorney. Such lapses may be tolerated once if there is an adequate excuse, but if an attorney, along with his or her secretary, cannot jointly navigate their calendaring and tickler system consistently, the attorney must take responsibility for making some appropriate changes. And it only adds insult to injury when lawyers sometimes attempt to shift the blame to the prothonotary's staff or to the judge's secretary. Although this might be justified on some occasions, attorneys should think about it twice — or three times. Just how fast do you think the judge hears about a lawyer who gives the judge's secretary a difficult time? Often, these lawyers are inexperienced and not properly mentored. Because good support staff is exceedingly difficult to find and retain, well-advised attorneys will cultivate good working relationships with court personnel and train their associates to do likewise.

* * * * *

For whatever it's worth, these are my impressions from my freshman year as a Delaware judge. The bottom line is this — justice is best served by ensuring mutual respect among judges, lawyers, litigants, and court personnel — and that is surely not a difficult task. If attorneys will simply behave as if they are being scrutinized by their mothers and kindergarten teachers, Delaware will continue to enjoy its well-deserved reputation as America's most civil and professional jurisdiction. ◆

FOOTNOTES

1. Expectations of the Superior Court for Attorneys' Professionalism and Civility in a Courtroom Setting:

1) An attorney should always face the bench while addressing the Court.

2) If an attorney expects to be late because of another court commitment, he/she should so inform the affected Judge as soon as practicable.

3) An attorney should not address opposing counsel directly without permission of the Court.

4) An attorney should always refer to other counsel by "Mr./Ms. _____."

5) An attorney should always rise before addressing the Court.

6) An attorney should not leave the courtroom or turn his/her back to the Court when a recess is declared by the Judge until the Judge has left the Courtroom.

7) An attorney should not address the Court unless appropriately attired. (This includes not wearing an overcoat.)

8) An attorney should organize witness schedules so as to make the most effective use of the Court's and attorneys' time.

9) An attorney should avoid inappropriate use of humor and gestures.

10) An attorney should wait until the Judge has finished speaking before speaking next.

11) An attorney should always introduce himself/herself at the time of first interaction with the Court.

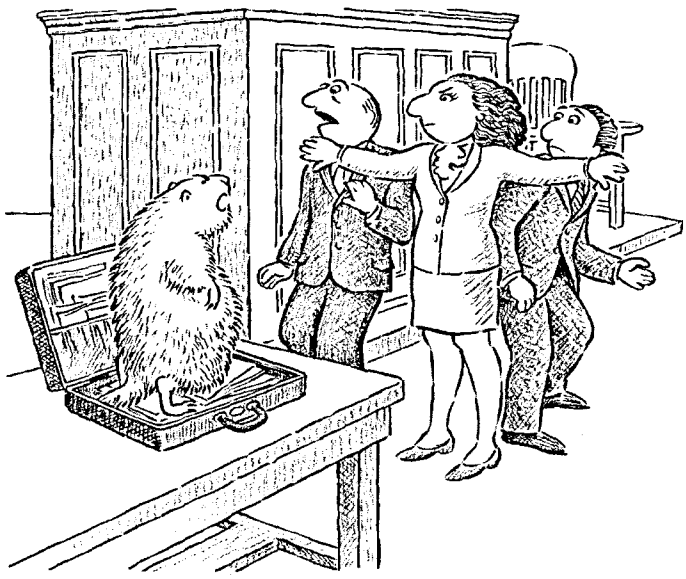
12) An attorney should begin with "May it please the Court" when beginning appropriate oral arguments, opening statements and closing arguments.

13) An attorney should not eat, chew gum or drink beverages (other than water supplied by the Court) in a courtroom and should similarly so advise witnesses.

FEATURE

Andrea L. Rocanelli

RUNNING FOR COVER



In which the author re-examines defense motions.

It was a beautiful summer day, which my daughters and I had spent at the pool. My youngest daughter was ready to take a shower in the ladies' changing room, while the other two lingered in the pool until the last possible moment. While my five-year-old was in the shower, and I was dashing back and forth to the locker with shampoo and conditioner and soap, I saw a brown shadow from the corner of my eye. Being on guard in this suburban setting for critters of all kinds, I immediately suspected the worst. Upon closer inspection, it was indeed a groundhog that had wandered into the ladies' room, and he seemed as unhappy to be in close quarters with me as I was to see him in such close proximity.

Trying my best to remain calm and not frighten my youngest child, I quickly got her dressed and out of the locker room. The groundhog was now cowering in a corner. Once my daughter was safely beyond the groundhog's temporary lair, I spread the word that parents should keep their children out of the ladies' room because there was a large, frightened rodent trapped inside.

The teenagers quickly decided that they would solve the groundhog infestation problem. Armed with a broom and considerable bravado, they loudly descended upon the terrified creature, setting up an obstacle course with benches in an effort to steer the groundhog to freedom. My oldest daughter, a preteen, was also now in the ladies' room, watching the drama unfold from a respectable distance.

At this point, I had to venture back into the fray because I needed a ponytail band to finish putting up my youngest daughter's hair. (Those of you who have young girls with long hair will understand the urgency of getting that hair put up. It was clean, conditioned and combed; now was the time or it would quickly become tangled and unmanageable.) Choosing what seemed at the time to be the lesser of two evils, I returned to the ladies' room. Cautiously, I tiptoed in. I was on the opposite side of the teenagers' barriers, and felt that I was safely separated from the errant beast.

As I reached for the hair band, the groundhog saw me from across the room, made direct eye contact with me and, with a vicious look in its eyes, came right for me. I was convinced the animal was going to jump the 18-inch barrier that separated us! I screamed and ran from the room.

Just as I was about to make my escape to the relative safety of the outside world, my oldest daughter accosted me. Enjoying the pandemonium and chaos, she tried to stop me and contain me *inside* the ladies' room to ask me what was going on. In my panic, I grabbed her by the shoulders, pushed her aside and escaped — leaving her inside with that ravenous, presumptuous groundhog.

Not only did I *run for cover*, but I also abandoned my 11-year-old daughter. There would be no Parent of the Year Award for me this year!

* * * * * *

Lawyer is a solo practitioner who handles plaintiffs' personal injury matters, as well as criminal defense cases. Plaintiff is represented by Lawyer in connection with serious injuries sustained as the result of alleged medical malpractice. After fours years of extensive discovery and motion practice, trial is scheduled at last.

As the trial date approaches, Plaintiff is increasingly anxious. Plaintiff frequently contacts Lawyer by telephone for reassurance and hand-holding. But at the same time, Lawyer is representing a different client in another county on capital murder charges. The criminal trial is scheduled to be concluded three weeks before the start of Plaintiff's civil trial.

Needless to say, the weeks leading up to the capital murder trial involve increasing levels of intensity and focus by Lawyer and his staff. It is explained to Plaintiff, as well as to Lawyer's other clients, that Lawyer will be unavailable for a three-week period — the week prior to, and the two weeks during, the capital murder trial.

Lawyer typically answers all telephone calls within 24 to 48 hours. As expected, one week before the criminal trial, Lawyer cannot personally respond to all calls. Three days prior to the start of the capital murder case, Lawyer's voice mailbox is full. Plaintiff's lengthy, pleading messages seeking reassurance about his own increasing tension and anxiety constitute the majority of voice mail messages.

The civil trial is now five weeks away. Plaintiff has left six messages over eight days for Lawyer, none of which has been returned. Plaintiff logs on to the website of the Office of Disciplinary Counsel ("ODC") and files a formal complaint that is docketed for evaluation.[1]

Disciplinary Counsel is unable to contact Lawyer by telephone because Lawyer's voice mailbox is full. A review of Lawyer's annual registration statement from the prior year reveals that Lawyer had designated another attorney who would take over Lawyer's practice in the event of Lawyer's death or incapacity. Disciplinary Counsel contacts the designee, who informs the ODC that Lawyer is working day and night on a capital murder case, and has been so involved for the previous two to three weeks.

When Disciplinary Counsel contacts Plaintiff by telephone, Plaintiff admits he had been informed about the murder trial by Lawyer, and concedes that his need to contact Lawyer is not urgent. Disciplinary Counsel dismisses the complaint, on grounds that the aggregate of information gathered by the ODC is insufficient to raise a reasonable inference of misconduct or incapacity. A letter is sent to Plaintiff by the ODC informing him of this disposition, and a copy of the dismissal letter, along with the complaint, is forwarded to Lawyer.

At the conclusion of the murder trial, Lawyer turns his attention to the balance of his practice, including Plaintiff's case, in which trial is to take place in three weeks. Lawyer returns all telephone calls, and clears his voice mailbox. When Lawyer speaks to Plaintiff, they agree to meet at the end of the week to begin trial preparation. However, when Lawyer reads through his mail, he is astonished to learn that Plaintiff had filed a disciplinary complaint. Lawyer feels hurt, angry, and betrayed.

Immediately, Lawyer prepares and files a motion to withdraw as Plaintiff's counsel, citing a conflict of interest as his grounds. Lawyer cannot even conceive of continuing with the case after Plaintiff complained about him to the ODC. Lawyer does not accept Plaintiff's telephone calls, and refuses to prepare the case for trial. The scheduled meeting is canceled.

While the motion to withdraw is pending, and while Plaintiff continues unsuccessfully to contact Lawyer, Plaintiff is becoming desperate. Plaintiff once again contacts the ODC and considers filing a second formal complaint.

The Superior Court judge denies the motion to withdraw on the basis that there is no conflict of interest, and orders the case to proceed to trial as scheduled. Because the motion has been promptly resolved by the court, Lawyer still has sufficient time to prepare for trial. Plaintiff and Lawyer meet, and Lawyer takes all necessary steps to thoroughly prepare for the trial.

* * * * * *

The ODC receives approximately 300 formal complaints per year. In addition to those formal complaints, almost 200 inquiries are docketed, in which questions are raised but do not rise to the level of a formal complaint, and yet another 100 complaints are considered which involve ongoing criminal defense matters. (There are several other docket categories not relevant to the issues raised herein.) Complaints are made by clients, opposing parties, other counsel, and, sometimes, the courts. The bottom line is that the ODC receives numerous complaints about many lawyers. Many of the complaints are dismissed on their face as without merit. Many more are resolved with minimal intervention by the ODC.

Emotions run high when a complaint is filed by a client against the lawyer who is concurrently representing that client. Indeed, under these circumstances many lawyers *panic* and *run for cover* — assuming that the only way to protect one's career and reputation is to withdraw immediately from the representation. *However*, that might not be the appropriate course of action. Much like my failure to protect my daughter from the possible dangers posed by the groundhog-in-waiting, because I was thinking only of removing myself from harm's way, so might the lawyer fail in protecting a current client's interests by seeking to withdraw from the representation as a knee-jerk reaction to that client's filing of a disciplinary complaint.

In determining whether a lawyer should withdraw as counsel, there are many competing interests that need to be balanced. The interests of the client must be protected.[2] A client should not be penalized for filing a complaint with the ODC. On the other hand, the attorney-client relationship should not require a version of indentured servitude on the part of the lawyer, who must be permitted to withdraw under the proper circumstances.

If there is a true conflict of interest created by the filing of a disciplinary

complaint, then withdrawal *may* be necessary.[3] But if filing a disciplinary complaint does not create a true conflict, then withdrawal is not necessary, nor even appropriate. Indeed, in my judgment, the mere fact that a current client has filed a complaint against his or her lawyer does not create a conflict of interest. A complaint may be generated by a misunderstanding that might readily be clarified, or by a failure of communication which can easily be rectified. There are many gray areas and many "close calls."

Nevertheless, if a lawyer concludes that the termination of the lawyer-client relationship will be necessary, then it is mandatory that the lawyer comply with Rule 1.16(d). To the extent it is practicable, the lawyer must take the steps necessary to protect the client's interests, including, if applicable, giving notice to the client, allowing time for successor counsel to be retained, surrendering papers and property, and refunding any advance fee. If the matter is being litigated, and the lawyer has filed an entry of appearance, then the lawyer is obligated to continue with the representation until such time that withdrawal is permitted by the court.

* * * * *

In the preceding scenario, with a trial just three weeks away, and a disciplinary complaint already dismissed, it is not necessary for Lawyer to withdraw in order to protect his own interests at the expense of protecting Plaintiff's interests. However, if Lawyer decides to file a motion to withdraw, then Lawyer is *required* to continue to represent the client's interests until such time as there has been a ruling on the motion. Had Lawyer's failure to take that preventive course come to the ODC's attention, as the result of a second complaint from Plaintiff or a referral from the court or opposing counsel, regardless of whether or not Lawyer was justified in seeking to withdraw, the ODC would have evaluated Lawyer's conduct while the motion was pending.

Therefore, do as I say and not as I did — do not *panic* and *run for cover.* Withdrawal as counsel may not be necessary or appropriate under the circumstances. But if you conclude that you must withdraw, then take care to protect your client's interests in a manner consistent with your professional obligations. When I flew from the ladies' room in abject terror of the more terrified groundhog, I should have pushed my daughter ahead of me out of the door, rather than pushing her aside and leaving her behind. ◆

Ms Rocanelli is grateful for the assistance of Michael Tipton, a law student at Widener University who is serving an externship with the ODC.

FOOTNOTES

1. Under Rule 9(a) of the Delaware Lawyers' Rules of Disciplinary Procedure, the ODC must evaluate all information coming to its attention concerning possible misconduct by or incapacity of a lawyer.

2. Rule 1.16(d) of the Delaware Lawyers' Rules of Professional Conduct ("Rules") states, in relevant part:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

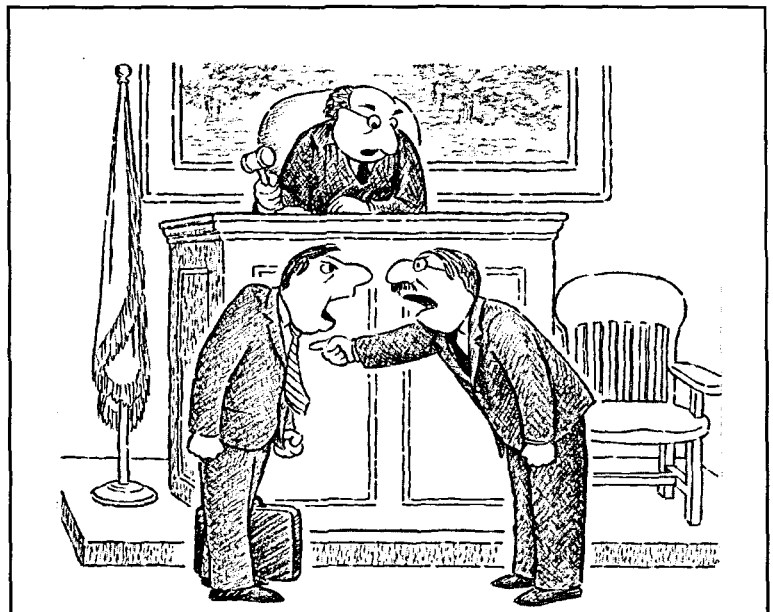
3. Rule 1.7(a)(2) states, in relevant part:

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer.

FEATURE

Matthew F. Boyer

IN THE WAKE OF *INFOTECHNOLOGY*: STRICTER SCRUTINY OF ATTORNEY DISQUALIFICATION MOTIONS



"Enough, gentlemen. You've definitely demonstrated a conflict of interest here."

Long ago, in what seems like a galaxy far away, Delaware courts exercised their supervisory powers liberally in granting motions to disqualify counsel based on alleged conflicts of interest. In one representative decision from the early 1980s, the Court of Chancery stressed that its task was not to treat such motions "with hair-splitting nicety," but to "resolve all doubts in favor of disqualification," in order to avoid even the appearance of a conflict.[1] But in recent years, Delaware courts have come to weigh such motions with great caution and to regard disqualification as "a severe sanction" that "is not favored."[2] The primary force that triggered this sea change was the 1990 opinion of the Supreme Court of Delaware in *In re: Appeal of Infotechnology, Inc.*[3] Strictly speaking, *Infotechnology* resolved a narrow issue of third party standing in ethical disputes — whether a non-client litigant (who has not been previously represented by opposing counsel) or its lawyer has standing to enforce the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") in a non-disciplinary proceeding. *Infotechnology* has nevertheless profoundly influenced judicial review of all attorney disqualification motions, including those brought by former or current clients of opposing counsel. After *Infotechnology*, doubts are now resolved against, rather than in favor of, disqualification. To prevail, the moving party must now not only prove a conflict of interest (or other violation of the DLRPC) but also demonstrate that continued representation by opposing counsel would so undermine the integrity and fairness of the proceedings that the opposition should be deprived of its choice of counsel.

The *Infotechnology* Test

Infotechnology arose in the hothouse climate of late 1980s merger and acquisition litigation. Counsel for the corporate target, Infotechnology, Inc. ("Infotech"), sought to disqualify counsel for the would-be acquirer, Avacus Partners, L.P. ("Avacus"), based on an alleged conflict involving a non-party investment banker, Prudential-Bache Securities, Inc.

("Prudential"). Prudential had provided Infotech with a fairness opinion regarding a defensive measure used to fend off Avacus' hostile takeover bid, and Avacus' counsel sought discovery from Prudential. The conflict arose, Infotech claimed, because Avacus' counsel represented Prudential in other, non-related matters. The Court of Chancery held that while Infotech did not have standing to enforce the DLRPC, Infotech's counsel did. The court disqualified Avacus' counsel for breaching their duties to Prudential under DLRPC 1.7(a), even though Prudential had not joined in the motion.

The Supreme Court of Delaware granted an interlocutory appeal and reversed. As a threshold matter, the court drew a line in the sand on the issue of where authority to enforce the DLRPC resides. While acknowledging that the state courts had the general authority to control the conduct of litigants, the court held that "this Court, alone, has sole responsibility for ... enforcing the Rules of Professional Conduct."[4] The court then expressed skepticism about the "high minded view" of Infotech's counsel, who claimed an independent right and duty to vindicate the profession's concerns about the alleged conflict.[5] Citing commentary in the DLRPC, the court warned that the purpose of the disciplinary rules could be subverted when they were invoked by opposing parties as procedural weapons.[6] While the court did not adopt a bright line rule against third-party standing, the court did attempt to minimize abusive disqualification motions by non-client litigants by fashioning the following two-part test:

> Recognizing the potential abuses of the [DLRPC] in litigation, we conclude that the burden of proof must be on the non-client litigant to prove by clear and convincing evidence 1) the existence of a conflict and 2) to demonstrate how the conflict will prejudice the fairness of the proceedings. [7]

The court imported the "clear and convincing" standard of proof from disciplinary proceedings, thus eliminating any advantage gained from the less-demanding "preponderance of evidence" standard normally used in civil motions. The court took the "fairness" requirement from a comment to DLRPC 1.7(a), which stated that: "[w]here a conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question [of conflict]."[8]

Because the court limited its holding to motions brought by non-client litigants and their counsel, the question remained whether courts would apply the *Infotechnology* test in garden variety disqualification motions, brought by present or former clients of opposing counsel. Would Delaware courts also require client-litigants to meet a clear and convincing standard of proof? And would courts require such movants to prove, not only the existence of a conflict, but a conflict so serious that the fairness of the proceeding was threatened? Over the next decade or so, these questions have been largely, but not entirely, answered in the affirmative.

"Cautious Scrutiny"

Post-*Infotechnology* decisions have stopped short of formally adopting a clear and convincing standard of proof for motions brought by current or former clients. However, Delaware courts have adopted a de facto standard that approximates the clear and convincing evidence requirement. Decisions require a movant to present "evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice."[9] Courts are "cautious" in deciding motions "when the facts are not clear."[10] Courts generally acknowledge that disqualification motions are disfavored, since they often are filed for tactical reasons.[11]

This approach has not been entirely the result of *Infotechnology*, and has not been uniformly applied. Shortly after the Supreme Court of Delaware adopted the DLPRC in 1985, the state's courts began to approach disqualification motions with "cautious scrutiny"[12] and to regard disqualification as a "weighty step."[13] In one fairly recent decision, the Court of Chancery invoked the earlier concept that "to avoid demeaning the legal profession in the public's eyes ... disqualification is favored in close cases."[14] But on the whole, post-*Infotechnology* courts require the moving party to make a strong showing — essentially a clear and convincing showing — of an ethical violation.

A Threat to the Fairness of the Proceeding

As noted above, *Infotechnology* requires that non-client litigants prove, not only the existence of a conflict, but a threat to the fairness of the proceeding. Delaware courts now apply this requirement in all motions, even those brought by current or former clients. In other words, it is no longer enough simply to demonstrate the existence of a conflict in violation of the DLRPC by opposing counsel with respect to a current or former client. As the Court of Chancery has held, "[u]nless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only [the Delaware Supreme Court] has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary procedure."[15] Courts have required that the threat be tangible — such as a threat that confidential information gained from a former client will actually give the opposing counsel an unfair advantage.

Two recent Court of Chancery decisions illustrate how this requirement can result in different outcomes depending upon the particular circumstances involved. In *Unanue*, the court denied a disqualification motion that arose in the context of a shareholder consent proceeding. The plaintiffs, Goya Foods Inc. ("Goya") and two members of its board of directors, sought to vindicate the removal of a third director, Joseph Unanue ("Joseph") by shareholder consent. Goya alleged that counsel for Joseph violated DLRPC 1.7 by representing him in disputes among the directors of Goya at the same time that counsel was still representing Goya in other matters. Joseph's counsel countered by arguing that his representation of Goya had concluded by the time Joseph's disagreements with the other directors had crystallized into a matter adverse to Goya itself. While finding that the facts were "sufficiently close that one reasonably could question" the conduct of Joseph's counsel, the Court of Chancery held that this was "not sufficient to warrant denying [the director] his chosen counsel" without considering whether the challenged conduct would "adversely affect the fair and efficient administration of justice."[16]

Goya claimed prejudice in that Joseph's counsel knew considerable confidential information about Goya from his lengthy representation of the company. But the court rejected this argument, reasoning that since Joseph had served on the board and as an offi-

cer for 58 years, and was a member of the Unanue family, it was "not credible" to suggest that Joseph's counsel knew more than his client about Goya's confidential information. Therefore, the *Unanue* court concluded that the continued representation would not likely result in the release of detrimental client confidences, nor threaten to undermine the fairness and integrity of the proceeding, to a degree sufficient to warrant disqualification.

Shortly after the *Unanue* decision, the Court of Chancery reached the opposite result in *Acierno*, a land use dispute between a developer ("Acierno") and the State of Delaware Department of Transportation ("DelDOT"). DelDOT moved to disqualify Acierno's counsel for a violation of DLRPC 1.9, alleging that counsel had previously represented DelDOT in a materially related proceeding. The court found a substantial relationship between the pending action and a prior action in which Acierno's counsel had represented DelDOT because the two actions involved "some of the same transactions and legal disputes."[17] This conflict alone, however, did not warrant disqualification. Again, the case turned on the threat of prejudice to the pending proceeding. Noting that an attorney who opposes a former client in a subsequent, but substantially related action is in a better position to know where to look and what questions to ask in discovery, the court held that the prior representation of DelDOT by Acierno's counsel in substantially related matters gave him a unique perspective on the litigation before the court, and permitted a reasonable inference that the knowledge gained in counsel's prior representation would provide Acierno with an inequitable advantage. Finding that, if Acierno's counsel continued in the matter, there was a substantial risk that "confidential information such as normally would have been obtained in the prior representation of DelDOT would materially advance Acierno's position," the court disqualified Acierno's counsel.[18]

In both *Unanue* and *Acierno*, the court's finding of questionable conduct under the DLRPC is not the end of the analysis, but in a sense only the beginning. A current or former client can no longer win disqualification simply by proving a conflict of interest. A client must demonstrate a threat to the fairness of the proceeding at hand.

Conclusion

In light of *Infotechnology* and its application by Delaware courts, lawyers who believe that opposing counsel is violating the DLRPC should pause before complaining to the tribunal. The motion will be scrutinized closely, and moving counsel's motives will be questioned alongside opposing counsel's alleged ethical impropriety. Also, courts will require the movant to demonstrate that the conflict poses a real threat to the integrity of the pending proceeding. The policies underlying the conflicts rules serve both "intrinsic" values, such as loyalty and trust, as well as "instrumental" objectives, such as ensuring the quality of a specific proceeding.[19] However, in disqualification motions, courts focus on the integrity of the proceeding and leave to the Supreme Court the regulation of members of the bar generally.

Over the last 20 years, we have gone from a time when the appearance of a conflict would result in disqualification to a time when an actual conflict is not enough to obtain disqualification. Underlying this fundamental shift is a concern that the integrity of judicial proceedings is more likely to be threatened by counsel's use of the ethics rules as "procedural weapons" than by the public's perception of an appearance of impropriety. We have met the enemy, and (in many cases) he is us.◆

Over the last 20 years, we have gone from a time when the appearance of a conflict would result in disqualification to a time when an actual conflict is not enough ...

FOOTNOTES

1. *Gieder v. Waxman*, 1983 WL 21397, at *5 (Del. Ch. 1983), *quoting* 7A *Corpus Juris Secundum*, "Attorney & Client," §158(b) (1980).

2. *Unanue v. Unanue*, 2004 WL 602096, at *7 (Del. Ch. 2004). The author's law firm is counsel for Joseph and Andrew Unanue in this litigation.

3. 582 A.2d 215 (Del. 1990).

4. *Infotechnology*, 582 A.2d at 218.

5. *Id.*, at 218, n.1.

6. *Id.*, at 221.

7. *Id. See also In re Estate of Waters*, 647 A.2d 1091, 1095-1096 (Del. 1994) (the "corollary holding" in *Infotechnology* is that non-client litigants "have standing to enforce the [DLRPC] ... when they can demonstrate to the trial judge that the 'opposing counsel's conflict somehow prejudiced his or her rights' and calls into question the 'fair or efficient administration of justice'").

8. This comment was deleted from the ABA Model Rules of Professional Conduct in 2002, and subsequently deleted from Delaware's revised version of the DLRPC, effective July 1, 2003.

9. *Kanaga v. Gannett Co., Inc.*, 1993 WL 485926, at *28-9 (Del. Super. 1993), *quoting Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 652 F. Supp. 1281, 1283 (D. Del. 1987); *see also Unanue, supra.*

10. *Duptula v. Steiner*, 2003 WL 23274846, at *1 (Del. Super. 2003).

11. *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp.2d 579, 581 (D. Del. 2001) ("motions to disqualify are generally disfavored").

12. *Satellite Fin. Planning*, 652 F. Supp. at 1283.

13. *Cardoni v. Power International, et al.*, 1990 WL 35307, at *2 (Del. Super. 1990).

14. *Del-Chapel Associates v. Ruger, et al.*, 2000 WL 488562, at *5 (Del. Ch. 2000).

15. *Acierno v. Hayward*, 2004 WL 1517134, at *4 (Del. Ch. 2004), *app. dism.*, 2004 W L 2294666 (Del. Supr. Oct. 4, 2004). The author's firm represents DelDOT in the *Acierno* litigation.

16. *Unanue, supra*, at *6.

17. *Acierno, supra* at *5.

18. *Id.*, at *7

19. Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, Vol. 1, Section 10.1, at 10-6(2004).

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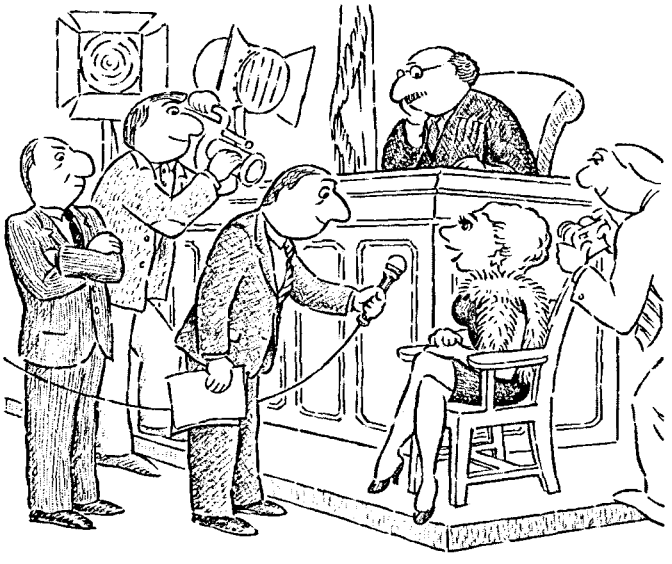
FEATURE

Paul R. Wallace

PROSECUTING IN THE LIMELIGHT



"Now remind me again, what's my motivation here?"

There seem to be two types of criminal cases that become "high profile" — those in which individuals we view as extraordinary commit ordinary offenses (e.g., Winona Ryder's shoplifting), and those where ordinary people commit extraordinary crimes (e.g., Andrea Yates' drowning of her five children). It has become clear to me, as one who has prosecuted such cases, that they present incomparable challenges to the prosecutor's office. The multifaceted duties of the prosecutor — to represent the state with a level of professionalism and ethics unequaled in other attorneys' experiences — become even more demanding when the prosecution of a high-profile case is undertaken.

The arduous task of prosecuting the high-profile case arises directly from the prosecutor's unique duty as an advocate, which includes a special concern about the possible dire consequences to his or her "opponent," viz., the stigma of a criminal conviction, the pain of incarceration, or even death. No other type of attorney shoulders such burdens. Almost seventy years ago, Justice Sutherland eloquently described the prosecutor's dual obligation in this often-quoted passage:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor; indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[1]

Our own state supreme court has similarly, and even more pointedly, explicated the responsibility of the state's attorney to protect the rights of those on both sides of the "*v.*":

> A prosecuting attorney represents all the people, *including the defendant who was being tried.* It is his duty to see that the State's case is presented with earnestness and vigor, but it is equally his duty to see that justice be done by giving the defendant a fair and impartial trial.[2]

These sentiments extend to the propriety of acts throughout the prosecutorial process, from investigation through pretrial litigation, and to all other aspects of the trial itself. For a prosecutor handling a high-profile matter, additional ethical constraints are imposed relating to publicity and media relations, charging and discovery during the pretrial process, and actual courtroom conduct. Typically, even when the facts fully support a finding of guilt, the ways in which a prosecutor may obtain a conviction and proper sentencing are very different — in light of the prosecutor's solemn duties — from those of any other lawyer. And the intense media spotlight associated with a high-profile case brings into sharp relief the especially difficult topography that prosecutors must travel.

Case Publicity

It is no secret that the general public finds criminal cases to be more understandable and interesting than other legal proceedings. One need look no further than nightly television newscasts to get a sampling of the diet of "legal news" that is regularly served. With the recent increase in the number of drama, reality, and magazine shows focused on crime and punishment, the public's fascination with the inner workings of the criminal justice process has also grown. At the same time, a spate of sensational prosecutions has occurred over the last decade in Delaware, garnering intense media attention. In turn, Delaware attorneys and courts have become keenly aware of the influence of the press in the investigation and trial of such cases. The obvious concern is that one side will attempt to "try the case in the media." Such charges have sometimes even required remedial action by the courts.[3]

Engaging the media to help obtain a conviction is, of course, inappropriate as a legal strategy, as well as a matter of ethics. The prosecutor's initial concern is with the effects that media exposure may have on the efficient handling of a case. To begin with, the pool of potential jurors may be so inundated by sensationalized information demonizing the alleged offender that the defendant's guilt is taken as conventional wisdom. In such circumstances, costly challenges to venue may arise.[4]

Further, prosecutors who make public comments are far more constrained than other attorneys, who are only bound to refrain from communications that are likely to "*materially prejudice* an adjudicative proceeding."[5] By contrast, prosecutors must avoid any extrajudicial comment that is likely to "heighten ... public condemnation of the accused."[6] Arguably, almost any public comment by a prosecutor that ratifies a criminal accusation poses the risk of condemning that person in the community. Although it would appear that the prosecutor's safest route would be to avoid all public comment, this would violate other aspects of the prosecutor's duties.

After all, as "the people's lawyers," prosecutors have the same duty as other counsel to keep their clients "reasonably informed" about the matters they handle.[7] Hence, prosecutors must "strive to protect both the rights of the individual accused of a crime *and* the right of the public to know in criminal cases."[8] But the more scintillating the case, the more aggressive the media becomes in attempting to prod communication from the prosecution.[9] It therefore becomes increasingly difficult for prosecutors to formulate a properly measured response to critical, and sometimes distorted, press coverage. The fact that prosecutors regularly demonstrate the appropriate restraint is evidenced by the almost nonexistent body of case law reporting otherwise.

Pretrial Activity

Prosecutors have the singular official discretion to initiate and direct investigations, to decide whether to prosecute, and to designate the crimes, if any, to be charged. The courts impose relatively little restriction over such functions. The manner in which prosecutors exercise their discretion not only impacts individual offenders, but also shapes the perception of victims and the community regarding the effectiveness of the criminal justice system as a whole. When a particularly heinous crime is committed, or a well-known person is suspected, the added media attention can visit incredible pressure upon the prosecutor. At the outset, the prosecutor should be tough in making the charging decision — certainly a safe and generally popular move. But the prosecutor must be careful not to institute charges or permit the continuation of a criminal case in the absence of admissible evidence sufficient for a conviction.[10] And the prosecutor is forbidden from making these decisions based upon any personal or political consequences that might be involved, especially in cases that have attracted a great deal of publicity.[11]

When prosecutors decide to bring charges in a heavily publicized case, they invite the "scorched earth" defense tactics that are unfortunately becoming common in such cases. Every otherwise routine proceeding becomes an event, and each motion becomes an opportunity to sway public opinion in the accused's favor. Even when the defense attempts to gain an often-unfair advantage, the state's attorneys are forbidden from doing so, given "the special role played by the American prosecutor in the search for truth in criminal trials."[12]

This special status is unique in the law, and foreign to the adversarial context in which other lawyers engage. The prosecutor is both legally and ethically bound not only to turn over known evidence helpful to the accused, but also to actively seek out such evidence.[13] It would be almost unthinkable for other attorneys in high-profile cases — where "failure" would be most unbearable — to surrender any weapon to the opposition. But for prosecutors, success is not measured by convictions, but when the ultimate results are just, thus requiring the highest standards of conduct of any professional advocate.

Courtroom Conduct

Neither the prosecutor, nor obviously the defendant, benefits from a conviction where the facts indicate innocence of criminal culpability. In this crucial and elementary sense, the interests of the state and the defendant converge. Because justice is served only when convictions are based upon actual guilt, the prosecutor is guided by the ABA's standards for criminal justice, which address both the prosecution and defense functions. The problems implicating these standards often arise in the questioning of witnesses and argument before the jury. Judicial scrutiny under these standards should, of course, be evenhanded, in a way that embodies the ideal espoused by Justice Cardozo more than seventy years ago:

> [J]ustice, though due the accused,

> is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.[14]

But while the standards and the case law admonish both prosecutors and defense counsel to engage the same level of propriety, the application of these performance guidelines is much more exacting towards the prosecutor.[15] To avoid possible reversal in a high-profile case, a court may take the safest approach, and fail to reign in the defense. In turn, the failure of defense attorneys to meet the challenge of these standards occurs with some regularity and is rarely reviewed. This is because the state may not successfully file appeals when criminal defendants are acquitted, even with the benefits of their counsels' improper behavior. Moreover, the convicted defendant whose counsel engaged in "slash-and-burn" tactics has no need to complain of that behavior on appeal. Therefore, the prosecutor's unenviable, but always daunting, challenge in the heat of these highly publicized legal battles is to insure that his or her conduct before a jury is above reproach.

Trial conduct is not the only area of challenge for the prosecution within the confines of the courtroom, however. The Delaware Supreme Court has acknowledged the tensions inherent in our criminal courts, and has reminded attorneys that the utmost patience and civility will be expected from *all* participants, even in the face of sometimes unwieldy pressures.[16] It is clear that in Delaware there has recently been a conscious and concerted effort to reinvigorate our commitment to professionalism and civility, and to recognize that both the bar and the bench must take responsibility for fostering mutual respect and reasonable standards of collegiality.[17]

In the "intense arena of open court work"[18] involved in a high-profile criminal case, problems of professionalism and ethics may certainly arise more frequently. The pressure upon prosecutors to maintain their exceptional standards becomes much greater, for example, in light of the more recent defense strategy in high-profile matters of launching personal attacks on the prosecutors.[19] But there is no doubt that prosecutors in these cases have refrained from making improper responses, either inside or outside the courtroom, to combat such tactics. This is because prosecutors cannot allow the public to suffer because of their personal concerns or frailties. Despite such personal attacks, Delaware prosecutors have continued, and will continue, to keep in mind their primary responsibility to see that justice is accomplished.

It is no secret that the general public finds criminal cases to be more understandable and interesting than other legal proceedings.

Conclusion

Prosecutors in high-profile cases must balance many important but often-competing interests when carrying out their duties to represent the public. The pressure of intense publicity taxes the resources and tests the abilities of prosecutors to remain focused upon the true goal in any criminal case — to serve the citizenry with the utmost integrity, and to insure that a just result is obtained. ◆

FOOTNOTES

1. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960) (emphasis in original).

3. *See, e.g., In re Zimmerman*, 764 S.W.2d 757 (Tenn. 1989); *State v. Grossberg*, 705 A.2d 608 (Del. Super.), *app. den. sub nom., Gottlieb v. State*, 697 A.2d 400 (Del. 1997).

4. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961); *Patton v. Yount*, 467 U.S. 1025 (1984).

5. Delaware Lawyers' Rules of Professional Conduct, Rule 3.6 (emphasis added) (hereinafter "DLRPC __").

6. DLRPC 3.8.

7. DLRPC 1.4.

8. National District Attorneys Association, *National Prosecution Standards* § 33.1 (2d 1991) (emphasis added) (hereinafter "NDAA Standards, ___"); *see also* Commentary, ABA *Standards for Criminal Justice: Prosecution Function and Defense Function*, "Prosecution Function Standards," 3-1.4 (3d 1993) ("there are vital societal interests served by the free dissemination of information about ... legal proceedings ... [m]oreover, the public has a legitimate interest in the conduct of judicial proceedings") (hereinafter "ABA Standards, ___").

9. *See, e.g.*, "Enough Time," *The News Journal*, Nov. 13, 2002, p. A14; *Matter of 2 Sealed Search Warrants*, 710 A.2d 202 (Del. Super. 1997) (media sought to open sealed warrants during investigation); *State v. Tallman*, 537 A.2d 422 (Vt. 1987) (same).

10. ABA Standards, 3-3.9(a); NDAA Standards, 43.6(a).

11. ABA Standards, 3-3.9(d); NDAA Standards, 42.4(a).

12. *Strickler v. Greene*, 527 U.S. 263, 279 (1999).

13. *Kyles v. Whitley*, 514 U.S. 419 (1995); *see also* ABA Standards, 3-3.11(d), *and* NDAA Standards, 52.1(a) (both of which impose *stricter* requirements than those in the federal constitution).

14. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

15. *Compare* ABA Standards, 3-5.8 (for prosecutors), *with* ABA Standards, 4-7.7 (for defense counsel); *see also Michael v. State*, 529 A.2d 752 (Del. 1987), *and Bennefield v. State*, 567 A.2d 863 (Del. 1989).

16. *In re Hillis*, 2004 WL 728539 (Del. 2004) (*per curiam*).

17. For example, on November 10, 2003, the Supreme Court of Delaware, *per* Holland, J., issued an *Order adopting Principles of Professionalism for Delaware Judges and Principles of Professionalism for Delaware Lawyers.*

18. *Hillis*, at *6.

19. *See, e.g.*, "For Michael Jackson — A Day in Court," *Washington Post*, Aug. 17, 2004, p. C01; "Gordon's Top Aide, in Primary Race to Succeed Him, Says Allegations Politically Motivated," *The News Journal*, May 28, 2004, p. A1.

FEATURE

Louise L. Hill

ELECTRONIC COMMUNICATIONS BY LAWYERS

When spam filters fail.

Almost all lawyers use electronic communications as a means of disseminating information related to their practices. In 2003, the Delaware Supreme Court recognized the importance of electronic communications when adopting comprehensive changes to the Delaware Lawyers' Rules of Professional Conduct (collectively, the "Rules," and individually, "Rule ___"). Largely following the revisions to the Model Rules of Professional Conduct adopted by the American Bar Association in 2002, the Rules as amended identify electronic communications as a permissible form of lawyer advertising, and acknowledge that distinctive website addresses are professional designations.

Lawyers who undertake electronic communications must be aware, however, that mandates other than those established in the Rules may apply. For instance, lawyers who send commercial e-mail messages must comply with the CAN-SPAM Act of 2003 (the "Act").[1] This article will examine revised provisions of the Rules, highlighting those relating to electronic communications, and will also address the relevant provisions of the Act, which applies to all commercial e-mail messages primarily intended to advertise goods or services.

Rule 7.2(a) specifically addresses lawyer advertising of professional services, permitting the practice "through written, recorded or electronic communication, including public media." Such advertisements are also subject to other requirements under the Rules. For example, Rule 7.1 is a general provision relating to communications about legal services, and prohibits an attorney from making "a false or misleading communication about the lawyer or the lawyer's services." Rule 7.3(a) generally forbids the solicitation of professional employment by "in-person, live telephone or real-time electronic contact," when the lawyer's pecuniary gain is a significant motive. These communications are permitted only if the recipient "is a lawyer; or has a family, close personal, or prior professional relationship with the lawyer," although an expressed desire not to be solicited precludes even these contacts.

Significantly, under Rule 7.1 attorney communications considered false or misleading are not limited to contacts containing "a material misrepresentation of fact or law," but extend to any communication that "omits a fact necessary to

make the statement considered as a whole not materially misleading." More specifics are addressed in the commentary to the Rule, which acknowledges that truthful statements may nevertheless be misleading.

In particular, the commentary indicates that a truthful statement will be deemed as misleading under Rule 7.1 if there is "a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation." In addition, the commentary states that a truthful report of a lawyer's achievements on behalf of clients may be misleading if it is "presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." Also characterized as misleading is an "unsubstantiated comparison of the lawyer's services or fees with the services of or fees of other lawyers," if presented "with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." The commentary to Rule 7.1 eliminated the notion, however, that advertisements containing client endorsements would be considered likely to create unjustified expectations about results that the lawyer might achieve.

Rule 7.3, in addition to prohibiting certain real-time electronic contacts, addresses targeted solicitation under subsection (c), providing that each "written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication." The commentary to Rule 7.3 notes that this labeling requirement is not applicable to communications that are "sent in response to requests of potential clients or their spokespersons or sponsors." Nor are general announcements by lawyers — such as those relating to changes in personnel or office location — subject to the labeling requirement, since these are not considered to be communications soliciting professional employment from clients known to be in need of legal services.

Rule 7.5(a), which addresses law firm names and letterheads, somewhat redundantly prohibits a lawyer from using "a firm name, letterhead or other professional designation that violates Rule 7.1." But with the increasingly widespread use of electronic communications, questions have arisen as to the proper characterization of a firm's domain name. In apparent response, the revised commentary to Rule 7.5 specifies that a "lawyer or law firm may also be designated by a distinctive website address or comparable professional designation." Solidifying the fact that a website address is a professional designation, it must be treated as such and comply with the requirements of Rule 7.1.

The Act overrides any state or local laws specifically regulating the use of electronic mail to send commercial messages ...

Rule 7.2 permits lawyers to "pay the reasonable costs of advertisements or communications" allowed thereunder. Included in the commentary to Rule 7.2 is the recognition of specific expenses related to electronic communications, such as the costs of on-line directory listings, domain name registrations, and the compensation of website designers.

Notably, Rule 7.2(b)(2) authorizes lawyers to "pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service." A qualified lawyer referral service is defined under the commentary as "one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients."[2] Because the Internet is used by the public as a means to find lawyers, the notion of "qualified lawyer referral services" opens the door for online for-profit lawyer referral services. Arguably, for-profit lawyer referral services already exist, although they may be characterized in terms of group advertising,[3] or the fee may be structured in such a way that the lawyer is not ultimately responsible for payment.[4]

Eliminated from Rule 7.2 is the two-year archiving requirement for lawyer advertising, which was deemed an unnecessary burden because such records were seldom used for disciplinary purposes.[5] However, Rule 7.2(c) requires that communications "include the name and office address of at least one lawyer or law firm responsible for its content." Since electronic communications make it just as easy for someone to access a lawyer who is located miles away, as it is to access a lawyer located next door, this provides the public with useful information.

The commentary to Rule 7.2 recognizes that "electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule." Of significance in this regard is the Act, effective January 1, 2004, which applies to all commercial e-mail messages intended to advertise goods or services, and not just "spam."

Establishing a "uniform nationwide regime governing commercial e-mail practices," the Act overrides any state or local laws specifically regulating the use of electronic mail to send commercial messages, except for statutes prohibiting messages with false or deceptive content.[6] Delaware is one of thirty-four states to have adopted its own spam law, having passed legislation in 1999 prohibiting unsolicited bulk commercial e-mail, including electronic messages containing falsified routing information.[7] Although the broad scope of the Act is considered somewhat unclear, it appears that the Delaware legislation may large-

ly be preempted by the Act.

The Act applies to transactional as well as commercial electronic mail. A message is considered "commercial" if its primary purpose is "the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)."[8] Transactional or relationship messages — which are related to order fulfillment, warranty information, and the like — are specifically distinguished from, and generally exclusive of, commercial messages.[9]

The Act prohibits electronic messages containing materially false or misleading header information, or deceptive subject lines. Further, all *commercial* messages must include a "clear and conspicuous" notice to the recipient of the right to "opt out" of receiving future messages from the sender. The opt-out mechanism must allow the recipient at least 30 days following transmission of the message to make the request. Unless the recipient has consented to receipt of a message, commercial e-mail must be clearly identified as such, although the specific label "advertisement" or "solicitation" need not be used, but the sender's physical postal address must be indicated.[10] In addition, the Act requires senders of commercial e-mail to "scrub" the list of recipients before sending any message, to make sure no one has opted out.[11]

Plainly, some of the Rules that regulate lawyer advertising are similar to the mandates adopted under the Act. For instance, Rule 7.1 precludes communications that are false or misleading, while the Act requires that all commercial and transactional e-mails include a non-misleading header, along with an accurate "from" designation and "subject" line. Rule 7.2 requires all advertising to include the name and office address of at least one lawyer responsible for its content, while the Act requires that commercial e-mail messages contain the sender's postal address.

Similarly, while the label "Advertising Material" is mandated under Rule 7.3 for solicitations targeted to prospective clients known to be in need of legal services, the Act generally requires that the "commercial" nature of e-mail messages be clearly identified as such. Rule 7.3 also forbids the solicitation of professional employment if the prospective client has manifested a desire not to be solicited, while the Act specifically establishes an opt-out mechanism by which recipients can choose to be included on a "Do Not E-Mail" list. Once so notified, the sender is given 10 days to honor that request.

Finally, an attorney who does not comply with the Rules may be subject to professional discipline. By comparison, failure to comply with the Act's requirements may engender criminal or civil penalties, on a sliding scale based upon the volume of messages transmitted — with fines that could amount to millions of dollars.[12]

Electronic communications have become vital tools for many lawyers, but these tools must be properly used.

Electronic communications have become vital tools for many lawyers, but these tools must be properly used. Attorneys who engage in such communications must follow the directives contained in the Rules, as revised. But counsel must also be mindful that other legal mandates, such as those adopted in the Act, may be applicable to their electronic communications. While some of the provisions under the Rules and the Act are similar, attorneys must recognize that the latter imposes additional responsibilities and may require more extensive dislosures. Careful lawyers should accordingly monitor their electronic communications to see that all applicable rules and laws are followed. ◆

FOOTNOTES

1. Pub. L. No. 108-87 (108th Cong., 1st Sess. 2003). CAN-SPAM is officially known as the "Controlling the Assault of Non-Solicited Pornography and Marketing Act."

2. The commentary to Rule 7.2 references the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act, which specify certain requirements for organizations identified as lawyer referral services.

3. *See* Louise L. Hill, "Change is in the Air: Lawyer Advertising and the Internet," 36 *U. Rich. L. Rev.* 21, 30-32 (2002). The bar association of Nassau County, New York approved AmeriCounsel.com as group advertising, by which a user seeking legal representation makes a selection from a list of available counsel. AmeriCounsel then forwards to the lawyer the user's name, a brief description of the matter, and a list of related parties. If the lawyer identifies no problems, such as conflict of interest, AmeriCounsel notifies the user. Participating attorneys keep their entire legal fee and the user pays a separate fee to AmeriCounsel for the service. *Nassau County (N.Y.) Bar Assn. Comm. on Prof. Ethics,* Op. 2001-4 (2001).

4. *See N.Y.C. Bar Assn. Comm. on Prof. & Jud. Ethics,* Op. 2000-1 (2000) (hypothetically approving plan under which lawyers could respond to invitations to bid on legal projects through Internet website, where no legal fees were shared with service provider, and client paid separate fee for access to provider's information).

5. *See* Report with Recommendation, ABA Comm. on Evaluation of the Rules of Prof. Conduct (Aug. 2001).

6. *See* Glenn B. Manishin & Stephanie B. Joyce, "Overview of Current Spam Law & Policy," in *Complying with the CAN-SPAM Act and Other Critical Issues* 11, 15 (Manishin & Sernovitz, eds., 2004).

7. Delaware's statute, added by 72 *Del. Laws, c.* 135, applies to messages originating outside the state if the recipient is in Delaware and the sender is aware of facts making the recipient's presence in Delaware a reasonable possibility.

8. *See* note 1, *supra*, at Sec. 3(2)(A).

9. *Id.*, at Sec. 3(17). However, a transactional or relationship message, or a non-commercial e-mail, may include an advertisement or promotional message so long as it is ancillary to the primary transactional/relationship or non-commercial purpose. *See* Terri J. Seligman, "Open Issues & Special Concerns in Commercial Email Law and Practices," in *Complying with the CAN-SPAM Act and Other Critical Issues* 69, 70-71 (Manishin & Sernovitz, eds., 2004).

10. *See* note 1, *supra*, at Sec. 5(a); *see also* Seligman, at 71.

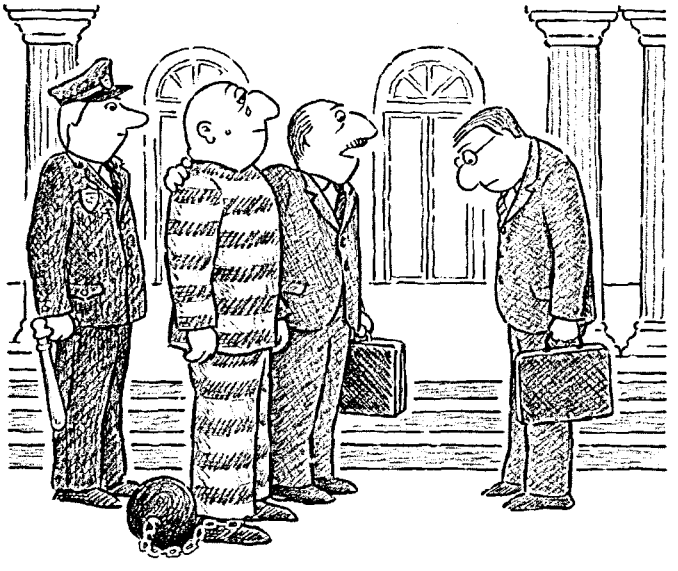
11. *See* Seligman, at 72.

12. *Id.*, at 70

FEATURE

Kevin William Gibson

BREACH OF FIDUCIARY DUTY



"Mr. Bowers feels your negligence has hurt him deeply."

Legal malpractice actions have traditionally been grounded upon tort theories and breach of contract claims. But in the last decade, as the number of these lawsuits has steadily increased, use of the previously underdeveloped doctrine of the breach of fiduciary duty has grown. Moreover, and as discussed below, the action for breach of fiduciary duty is adaptable to other circumstances, outside of the attorney-client context.

Fiduciary Duty Defined

In general, the fiduciary relationship between an attorney and client imposes upon the lawyer a "duty to exercise ... the most scrupulous honor, good faith and fidelity to his client's interest." *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky.Ct.App. 1978). This sometimes-elusive doctrine typically requires from the attorney an "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception" with respect to the client. *Perez v. Kirk*, 822 S.W.2d 261, 265 (Tex.App.1991). (Although allegations have been raised in a handful of Delaware cases regarding a lawyer's breach of fiduciary duty, this author is unaware of any reported Delaware case defining in detail the scope of such duties.)

There is no invariable rule that determines when a fiduciary relationship exists. Furthermore, in order to address new situations, the courts have purposely avoided narrowing the fiduciary concept to a standard definition. The case law recognizes certain elements, however, that are typically present. Namely, a beneficiary is generally deemed to retain confidence in the fiduciary, often in a manner that evidences an inequality between the parties, with the beneficiary exhibiting a dependence — especially in the form of inferior knowledge or expertise regarding the relevant facts — which gives the fiduciary an advantage over the beneficiary. *See, e.g., Yuster v. Keefe*, 90 N.E. 920 (Ind.App. 1910).

In the attorney-client context, a lawyer's special knowledge and skills regarding the subject matter of the representation usually permit the attorney to assume the dominant role. The courts have accordingly required attorneys, as fiduciaries, to place the interests of their clients before their own, and often find implicit in fee agreements a promise by the lawyer to exercise ordinary judgment, care, and diligence in the rendition of legal services. *See, e.g., Kartikes v. Demos*, 214 So.2d 86 (Fla.Dist.Ct.App. 1968); *Gill v. DiFatta*, 364 So.2d 1352 (La.Ct.App. 1978).

In the recent cases involving claims that a lawyer has breached fiduciary duties, the courts have carefully scrutinized the nature of the attorney-client relationship to determine whether the parties were, or were not, on an equal footing when the representation was initiated. For example, in *Raymark Industries, Inc. v. Butera, et al.*, 1997 WL 746125 (E.D. Pa. 1997), the plaintiff corporation sought the return of a non-refundable retainer, in the amount of $1 million, that had been paid to the firm of its former counsel, Michael Beausang. Raymark contended that Beausang's firm had breached its fiduciary duty by collecting an excessive fee.

The federal court approached the plaintiff's claim by acknowledging that Raymark was a sophisticated client with extensive experience in the asbestos litigation that Beausang's firm was retained to handle, indicating that Raymark was under no disadvantage when the terms of the representation were negotiated. The court concluded that because the fee agreement had been freely entered into by competent parties, the terms must have been considered fair by both sides, such that the defendant attorneys were entitled to keep the retainer.

The *Raymark* case was unusual because the terms of the representation, including the amount and non-refundable nature of the retainer, were set by the client, not the attorneys. There was no evidence of overreaching by the attorneys, or of any other unequal bargaining power, with respect to the fee agreement. Although the court observed that a fiduciary duty exists in connection with an attorney's fee arrangements, that duty was not violated under the facts presented.

In another recent case, *Werther v. Rosen*, 2003 WL 1861579 (Pa.Com.Pl. 2003), a majority shareholder of a corporation claimed that the company's attorney breached his fiduciary duties. The shareholder alleged that, in addition to representing the corporation, the attorney represented a minority shareholder and his new company as well, and thus harbored interests purportedly in conflict with those of the corporation. The court found, however, that because the minority shareholder was also the manager and principal of the primary corporation, there was no danger that the attorney could disclose information that the minority shareholder did not already know. The court observed that in any event, a mere breach of professional duty that might engender only nominal or speculative damages was not sufficient to create a cause of action.

Nevertheless, because attorneys owe fiduciary duties of loyalty and fidelity to their clients, the courts will generally consider breaches of that duty as actionable, whether or not the disputed conduct might also constitute professional negligence. *See Ruthardt v. Sandmeyer Steel Company*, 1995 WL 649142 (E.D. Pa. 1995).

Statutes of Limitation

Although the breach of fiduciary duty has primarily been treated as a tort for the purposes of available damages, the courts remain divided with respect to the applicable statute of limitations. In jurisdictions recognizing a relatively lengthy limitations period of four years (or longer) for a breach of fiduciary duty, most courts will scrutinize the cause of action to ensure that the matter has been properly pleaded as such. In addition, some jurisdictions will permit the application of the discovery rule, which can extend the limitations period beyond the initial four years. *See, e.g., Gerdes v. Estate of Cush*, 953 F.2d 201 (5th Cir. 1992). On the other hand, some courts, like those in Texas, lump all of these claims together as malpractice tort actions regardless of the "fiduciary duty" label, meaning that the applicable limitations period is only two years. *See Estate of Degley v. Vega*, 797 S.W.2d 299 (Tex.App. 1990).

In Pennsylvania, the statute of limitations for negligence allegations and claims for breach of fiduciary duty is two years. *See* 42 Pa.C.S.A. Section 5524(7). The limitations period for tort actions begins "when the alleged breach of duty occurs." *Garcia v. Community Legal Services Corp.*, 524 A.2d 980, 986 (Pa. Super. 1987). When the discovery rule is applied, the limitations period may be tolled until the injured party, in the exercise of due diligence, knew or should have known of the injury. *Pocono International Raceway Inc. v. Pocono Produce Inc.*, 468 A.2d 468 (Pa. 1983). Notably, a claim accrues when a plaintiff is harmed and not when the precise amount or extent of damages is determined. *Adamski v. Allstate Insurance Co.*, 738 A.2d 1033 (Pa. Super. 1999). For the practitioner who may be filing a breach of fiduciary action, it is therefore imperative to be certain as to the applicable statute of limitations for the jurisdiction in which you are bringing suit.

Causation

As discussed, the breach of fiduciary duty is generally treated as a tort for the purpose of determining remedies, and may also entitle the plaintiff to extraordinary relief. Under the tort theory, the plaintiff is entitled to all damages proximately caused by the breach.

When determining causation, the courts have often lumped together the several distinct theories generally utilized in malpractice actions. For example, in Utah the standard for legal malpractice actions based upon an alleged breach of fiduciary duty is identical to the standard for legal malpractice actions sounding in negligence — the alleged wrong of the attorney must proximately cause the client's injury. *See, e.g., Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah 1996).

The court in *Kilpatrick* observed that the standard of causation for legal malpractice has grown in the context of actions based upon negligence. Moreover, even though an action for breach of fiduciary duty relates to different wrongs from those in a negligence action, the court determined that the same standard of causation applied, whether the alleged wrong was a negligent act, a fiduciary breach, or a contractual breach.

Such results show how the courts sometimes fail to distinguish among the various types of legal malpractice actions, and alternatively, interpret a breach of fiduciary duty action as a malpractice action based upon claims of professional negligence.

Damages

Under a breach of fiduciary action, the plaintiff may be able to recover a variety of damages, including punitive, emotional, and "extraordinary means," unlike the kinds of damages available for malpractice actions based upon negligence or contract theories. Significantly, an "extraordinary means" recovery may include disgorgement of fees, based upon the idea that an attorney who profits through a breach of fiduciary obligations will be held accountable to the client for that profit, regardless of whether the breach caused was detrimental to the client's interests. *See Maritrans GP, Inc. v. Pepper,*

Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992), *and Swenk v. Asbury*, 62 Pa.D.&C.4th (Pa.Com.Pl. 2003).

In *Maritrans*, the Pennsylvania Supreme Court held that counsels' representation of clients with conflicting interests was actionable as a breach of the lawyers' common law fiduciary duties to the clients, regardless of the actual monetary damages that might have been incurred, and ordered disgorgement of fees. The court stated:

> Our common law imposes on attorneys the status of fiduciaries vis-a-vis their clients; that is, attorneys are bound ... to perform their fiduciary duties properly. Failure to so perform gives rise to a cause of action ... [and] ... such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable. [Citations omitted.] The Superior Court here emasculated these common law principles, in effect turning the ethical or disciplinary rules governing lawyers into a grant of civil immunity for conduct which has been condemned from time immemorial.

Id., 602 A.2d at 1283. The *Maritrans* court drew support from the U.S. Supreme Court, which had ob-served in an early decision:

> There are few of the business relations of life involving a higher trust and confidence than those of attorney and client or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Id., quoting Stockton v. Ford, 52 U.S. (11 How.) at 247. The court in *Maritrans* further reprimanded the lower court for "elevating attorneys above the law" by granting them greater rights than other fiduciaries. *Id.*, 602 A.2d at 1283.

In *Swenk*, the court applied *Maritrans*, ruling that an attorney representing clients with conflicting interests breached fiduciary duties even when the clients were not necessarily harmed by the conflict. The case arose out of an automobile accident in which an attorney, Michael Verlin, initially represented three persons with resultant injury claims. After one of the three retained separate counsel, Verlin continued to negotiate with the insurance carrier on his former client's behalf. When the client's new attorney obtained a separate settlement, Verlin demanded a share as his fee. The court disagreed, ruling under *Maritrans* that Verlin was not entitled to recover any fee in light of his breach of fiduciary duty in continuing to represent a client who had retained new counsel.

With regard to damages for emotional distress, in Pennsylvania an attorney does not generally have a fiduciary responsibility to protect a client from psychological harm, although in extreme cases involving a breach of fiduciary duty by a professional, such damages may be permitted. *See, e.g., Brown v. Philadelphia College of Medicine*, 674 A.2d 1130 (Pa. Super. 1996).

There are few of the business relations of life involving a higher trust and confidence than those of attorney and client or, generally speaking, one more honorably and faithfully discharged ...

Evidentiary Burdens and Scope of Claims

The claim for breach of fiduciary duty is also different from a typical malpractice claim with respect to evidentiary burdens. While malpractice actions usually require expert testimony that the defendant attorney violated the standard of professional care, an action for breach of fiduciary duty only requires a showing that the attorney violated an obligation of undivided loyalty, which may not necessitate expert testimony. In addition, the professional negligence action allows attorneys to take their own interests into account when assessing the question of whether legal services were rendered in a reasonably prudent manner. By contrast, the concept of fiduciary duty does not contemplate such a balancing of attorney and client interests.

Further, counsel's fiduciary duties may extend to non-clients, thus giving such parties a claim against the attorney that is generally unavailable in a malpractice action based in contract, due to lack of privity. For example, in *Granewich v. Harding*, 945 P.2d 1067 (Or. App. 1997), the court concluded that an attorney who assisted a client in tortuous conduct against a non-client could be held to have breached a fiduciary duty to the non-client. By contrast, although the courts have recognized the right of non-clients to sue an attorney for professional negligence, such rights are not open-ended, and are generally limited to third parties whose injuries are foreseeable and outside the scope of an assumed risk.

Conclusion

The evolving action of breach of fiduciary duty is a very powerful tool that is often overlooked in the legal malpractice context. Although the courts have sometimes failed to distinguish this cause of action from claims based upon negligence and breach of contract, the theory of fiduciary duty has its own distinct requirements and characteristics, which over time will likely be properly recognized. ◆

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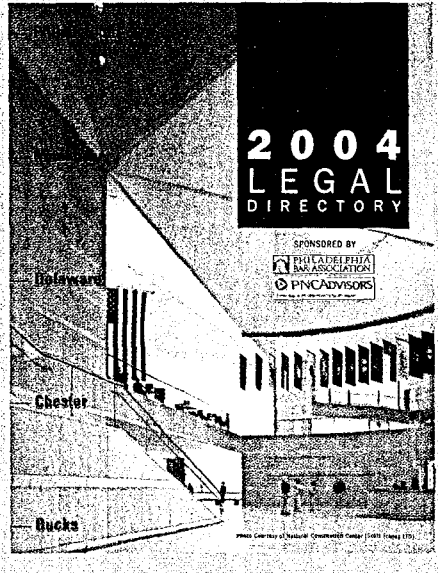

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(Continued from page 36)

Although he didn't follow this observation with: "You chump, there's a lot of money involved here," that morsel of unspoken *dictum* was implied. (So much for the "testing my professionalism" idea.)

As a result, I squirmed nervously in my chair, ears burning, not knowing how to react to The Partner's disparaging — and pretty downright *un*-professional — remark about those extraneous annoyances called "the ethics rules." I did not pursue the subject any further, and fortunately, we moved on to other topics.

But The Partner's matter-of-fact dismissal of our "professional" responsibilities made me consider, in a freshly conscious and self-critical manner, my own sentiments about those extraneous annoyances. Did I take this legal ethics stuff too seriously? Was I too idealistic, too impractical about such things? Did The Partner's reaction characterize the way I was supposed to think, if I expected to advance successfully in the law and someday attain his lofty level of professionalism?

After joining the Office of Disciplinary Counsel a few years later, I continued to ponder The Partner's pithy declaration. For one thing, it became apparent to me that an attorney like The Partner — stationed securely in his corporate megafirm, and whose "professionalism" was established and unquestioned — rarely became the subject of formal discipline. Given his institutional insulation from the disciplinary system and its annoying "rules," The Partner could afford to blithely shrug off the vacillating attempt of a rookie pitcher (like me) to throw an ethical brush-back.

But for another thing, The Partner's rebuff of my simple question forced upon me the uncomfortable conclusion that he had not accepted "the ethics rules" as a subjective, personal motivating force. Instead, his "professionalism" appeared to emerge from the external appearance of propriety (e.g., his tailored suits and expensive white shirts) rather than an internal directive.

About two years into my tenure at the ODC, something similar occurred.

After several lawyers were sanctioned for falsely notarizing documents, the Supreme Court asked me in 1992 to draft a memorandum explaining why false notarization was ethically improper. The court apparently liked my memorandum, which I titled: "*Professional Integrity and the Delaware Lawyer*," because a copy was promptly sent to every Delaware attorney, worldwide, accompanied by a "take heed" letter from the chair of the Supreme Court's Board on Professional Responsibility. My memorandum was also published in *Delaware Lawyer, In Re:*, and some other legal periodicals, and was afterwards regularly distributed to all new members of the bar.

Following that mass distribution, however, I received several strange telephone calls from Delaware attorneys, generally along these lines:

Caller: David, I enjoyed reading your article about false notarization, but I have a question or two for you.

Me: Sure. What's the problem?

Caller: Well, I don't know exactly how to put this, but, uh ... in your article you discussed how a lawyer, when notarizing a document, certifies that the signer "personally appeared before me." Remember that?

Me: Yes. The lawyer's attestation is called the jurat, which shows that a person with authority has officially wit-

nessed the document.

Caller: Yeah, ... right. But my question is — when a lawyer attests that the signer "personally appeared before me," that doesn't mean that the person *really* has to appear personally before the lawyer, does it?

Me: Of course it does. What else *could* it mean?

Caller: Well, David ... that's not exactly how, uh ... *some lawyers* have been doing it. And I'm talking about very well-respected attorneys, too. They've been notarizing documents for many, many years now, and they've never required a person signing a notarized document to be actually present in front of them. It's just not convenient. As long as we — I mean *they* — as long as *they* know the signature they're notarizing is authentic, there wouldn't be any ethical problem with that, would there?

Me: There sure would be an ethical problem. If you certify, as a notarial officer, that the signer "personally appeared before you," and in fact the signer *did not* personally appear before you, then your attestation is a false statement, which not only violates the ethics rules, but is arguably a criminal violation.

Caller: Well, I suppose technically you might say that. I guess technically you could say it would be ... umm, false. In a technical way. Technically false, that is.

Me: If by "technically," you mean "plainly," then that's right. It's plainly a false statement, and so, it's plainly an ethical violation. That was the whole point of my memorandum — we all took an oath as Delaware lawyers "to use no falsehood" in our affairs. But are you really saying that you need to report someone for false notarization?

Caller: Oh, no. NO, NO. Don't misunderstand, I didn't want to do anything like that. I just wanted some clarification about the correct procedure, you know, to make sure we keep on doing everything properly. Wouldn't want to get into trouble with the old ODC, eh? *Heh-heh-heh.* Anyway, thanks a lot for talking with me, David, you've been very helpful. You guys keep up the good work. [Click.]

During many of these conversations, some of which involved well-established practitioners, I recall thinking, "*What am I missing here?*" I understood, of course, that proper notarization procedures were not always "convenient," especially for attorneys who conducted complex and sophisticated transactional practices. But should mere inconvenience excuse patently unethical (and therefore unprofessional) conduct, like falsely notarizing a document?

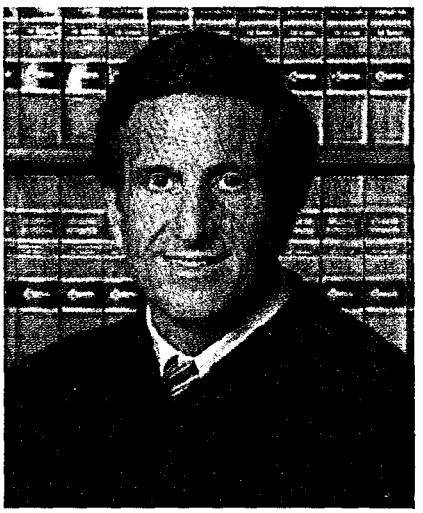
These incidents further emphasized the realization engendered by my previous episode with The Partner, namely, that for certain lawyers, the fact that some course of conduct *was* unethical, all by itself, did not seem to be a personally compelling "professional" force, and that to avoid such conduct, the objective, external threat of disciplinary action was required. This was a disillusioning thought, especially because it appeared that some of these lawyers belonged in the same category as The Partner — at the pinnacle of what was typically called "legal professionalism."

This situation reminded me of how Justice Holmes had suggested we demystify certain abstract notions, such as "legal duty" or "legal right," by adopting the pragmatic perspective of a "bad man" towards the law, viz., looking only at the predictable conse-

(Continued on page 35)

JUSTICE RANDY J. HOLLAND
To Receive Delaware Bar Foundation Award

The Board of Directors of the Delaware Bar Foundation is pleased to announce that **Justice Randy J. Holland** has been selected to receive the prestigious **Delaware Bar Foundation Award** for his outstanding service to the Delaware Bar Foundation.



Justice Holland served as a member of the foundation board for many years during the past two decades and demonstrated an unyielding commitment to the foundation's mission. In particular, his dedicated contributions to the cause of legal services for the poor have been invaluable. The award will be presented to Justice Holland at the 2005 Law Day awards ceremony.

The mission of the Delaware Bar Foundation is to improve and facilitate the administration of justice in Delaware by:

DELAWARE BAR FOUNDATION

1) Providing legal services for the poor;
2) Promoting study and research in the field of law;
3) Fostering knowledge of citizenship rights and responsibilities; and
4) Enhancing public respect for the rule of law.

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quences resulting from a given course of action. Thus, to say, "*S has a legal duty to do P*," means in Holmesian terms no more than, "*If S does not do P, then R will occur.*" Holmes' "legal realism" is commonly adopted by jurisprudential scholars today.

I imagine that many lawyers do not conceive of their ethical obligations as a "bad" person would, and who harbor an internal, personal sensibility that motivates them to avoid an unethical course of action, not because disciplinary consequences might result, but rather, because the conduct is, all by itself, unethical. But since I'm unaware of any empirical evidence about the subjective ethical propensities of the members of the Delaware bar — or any other bar — this supposition may only be wishful speculation.

Alternatively, does it really matter if attorneys approach the ethics rules as internal, personal guidelines, or merely accept those standards in a begrudging fashion — as external, discipline-enforced annoyances? In Holmesian terms, does it matter if even the majority of lawyers do not act out of a subjective appreciation of ethical conduct per se, so long as their objective behavior is consistent with the rules? Should we even care about these deontological issues?

Because this article is not called the "Opinion" piece for nothing, it is my view that — to the extent we desire the concept of "professionalism" to be something that is significant and meaningful — we *should* care.

As disciplinary counsel, I participated in many continuing legal education programs in which "professionalism" was discussed. But I was often disappointed by the wishy-washy fashion in which many lawyers and judges treated this notion, focusing primarily upon things like politeness and good manners, being punctual, wearing appropriate clothing, showing deference to authority, refraining from "Rambo-like" litigation tactics, and so on.[1] I continually heard "professionalism" characterized in insipid terms, with wistful, by-golly references to the genteel, aristocratic conduct practiced in the "good old days" by the "lawyers of yesteryear."[2]

By contrast, I approach the idea of "professionalism" by seeking meaning in a radical sense, by looking at the root of the concept — "to profess." In this critical manner, an examination of "professionalism" becomes an inquiry into the things that we as lawyers *profess*. What do we stand for? And what do we stand against? Are outward appearances like wearing white shirts to court and adherence to civility codes — while privately disparaging "the ethics rules" as irrelevant nonsense — really what we profess? Does the external gloss of practicing law as we did in "those golden days of yore" really capture our "professionalism?"

The notion of being a legal professional should mean much more, and should *demand* something more, than robotic compliance with elitist rules ...

In my view, such shallow concerns trivialize the concept. The notion of being a legal professional should mean much more, and should *demand* something more, than robotic compliance with elitist rules of etiquette and other wholly arbitrary customs. Being a "professional" in this sense, by going back to the roots of what we profess, should commit us to something fundamental, and something important. In other words, what I am proposing is that we trade-in the old, antique model of wishy-washy professionalism for a radical new one.

Assuming that candid, self-conscious analysis of our choices and our conduct is always worthwhile, I suggest as a starting point that we approach our ethical obligations as attorneys in a highly personal way, as the standards representing what we stand for and who we are, rather than as extraneous, often inconvenient annoyances that may require a disciplinary threat for compliance.

The ethics rules challenge our conduct. But it seems to me that we can embrace that challenge by internalizing it, by choosing to make that challenge a part of our identities in an internal, subjective, and positive sense. I think that accepting this personal commitment to a radical professionalism would make us stronger and better, both as advocates and as persons.

Of course, maybe I'm wrong.

So, if my proposal is asking for too much, I have an alternative. Is it possible that we as lawyers could give this concept of "professionalism" — as conceived in radical terms to represent what we really stand for — a little more serious thought? Could we entertain the proposition that being a "professional" should mean more, and demand more of us, than outward compliance with the niceties of traditional norms and customs? Is such further consideration too much to ask? ◆

FOOTNOTES

1. It is notable that in the movie *First Blood*, John Rambo was a quiet, unassuming man looking to avoid trouble, but who, as an outsider in a small town, was unfairly provoked by the arrogant and egregious conduct of the "insider" authorities. He *tried* being courteous and respectful, but was forced into extreme tactics by those who abused their established positions of trust. Standing up against the unjust use of authority takes considerable courage, which is why Rambo is the hero of the story, not the villain. In the present context, the often-criticized "Rambo litigation tactics" may in fact represent conduct that some parties, as outsiders opposing insiders who are playing unfairly, have been forced to adopt.

2. Many of those "lawyers of yesteryear" were the same ones who, because of their apparent unwillingness to indulge in the self-conscious and critical examination of their own irrational traditions, did not for many generations permit women, non-Christians, and persons of color to join their profession. *See The Delaware Bar in the Twentieth Century* (Delaware State Bar Association, 1994), pp. 633-684.

OPINION

David Curtis Glebe

PREFACE TO A RADICAL PROFESSIONALISM

"Don't preach ethics to me, young man. I've forgotten more than you'll ever know!"

What do we want the concept of "professionalism" to mean?

That was the unarticulated question slowly baking in my subconscious oven as I squirmed nervously in my chair, not knowing how to respond to the lawyer's startling comment. Nor did I know how — as a lowly associate at the firm — I was *expected* to respond.

Perched across from me behind his mammoth hardwood desk was "The Partner." And not just any partner, but a corner-officed, French-cuffed, head-of-department partner, a nationally prominent specialist who, to the naked eye, represented the embodiment of "professionalism." Someone whose standard-setting excellence I was supposed to emulate.

The Partner and I had toiled for several months on a complex set of interconnected lawsuits, representing an out-of-state bank. He called the major shots, while I as the humble apprentice struggled to implement those calls. We were discussing litigation strategies when he casually proposed a particular tactic — I can't even remember now specifically what he said — that set off an alarm bell in my head.

"*Wait a minute,*" I mused silently, continuing the thought with, "*I don't think we could do that. It would be unethical.*"

But I hesitated to speak. After all, I was essentially an inexperienced schlep, only a few years out of Penn Law, without the professional standing to challenge anyone so distinguished and experienced. Most likely I had only misunderstood The Partner's passing suggestion.

I took more notes as The Partner talked. Then he mentioned the same tactic, and my ethicsense began to tingle again ...

What am I missing here? Will I get in trouble by pointing out an ethical problem? Or will he appreciate my sensitivity to those concerns? Is he actually testing my professionalism now? And will I flunk the test if I don't say something?

So I decided to speak up. And what came out of my mouth — concededly in a somewhat sheepish, whiny tone — were these words:

"*But wouldn't that violate the ethics rules?*"

The Partner glared at me, as if I had just dropped a *non sequitur* about some bizarre development in quantum mathematics. His demeanor evidenced his immediate irritation with my question, and in a tone best described as "contemptuously dismissive," these exact words — which I will never forget — came out of his mouth:

"*I don't give a shit about the ethics rules.*"

(Continued on page 32)

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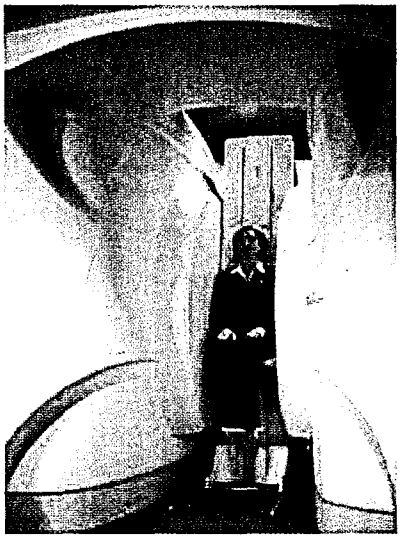

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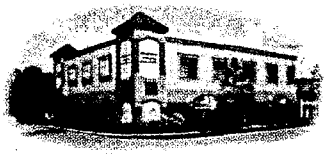

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