

TRIAL ADVOCACY

LAWYERS OWE ONE ANOTHER

by Roger J. Miner

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THE TITLE OF LAWYER carries with it some significant lifelong obligations: obligations to clients; to the courts to brothers and sisters at the bar; to employers, public and private; to opposing counsel and parties; and to the general citizenry. Of all these professional responsibilities, it seems to me that the duties lawyers owe to one another C honesty, fair dealing, cooperation and civility C have been the most neglected in recent years. It is my purpose here to examine these duties and to share some of my concerns about the increasing number of lawyers who fail to recognize their obligations.

The ethics of the profession command members of the bar to act honestly in their relations with each other. Both the Lawyer's Code of Professional Responsibility and the Model Rules of Professional Conduct include provisions prohibiting false statements of law or fact in the course of representing a client. Honesty requires that evidence not be concealed, altered or destroyed, and that witnesses not be secreted or made unavailable. Indeed, it is professional misconduct for a lawyer to engage in any type of conduct that involves dishonesty, fraud, deceit or misrepresentation.

Despite these ethical constraints, instances of lawyer-to-lawyer dishonesty seem to be on the rise. All too frequent now are the reports about those who deceive their colleagues by withholding documents that ought to be produced; by lying about the whereabouts of witnesses; by falsely promising to maintain the status quo pending resolution of a dispute; by holding out the possibility of settlement when there is none; by misrepresenting the extent of the authority conferred by a client; and by providing misleading information or omitting important details in regard to a client's assets or insurance coverage.

CLOSELY RELATED TO the duty of honesty is the duty of fair dealing. Both the lawyer's code and the model rules enjoin lawyers from communicating ex parte with a court or judge in an adversary proceeding, except in very limited circumstances, and from communicating with a party represented by another lawyer, except by consent or as authorized by law. Fairness also requires that lawyers keep their word in their dealings with one another.

More than 70 years ago, a British barrister wrote: There is no more heinous offence at the Bar than a breach of the confidence which counsel are entitled to place in each other. The nature of their business is such that more than in any other profession the members of the Bar must be able to rely implicitly upon each other's sense of honour. It is a trust which is seldom if ever betrayed.

The American College of Trial Lawyers has adopted a Code of Trial Conduct that instructs lawyers not only to adhere strictly to all

express agreements with opposing counsel, but also to adhere to those agreements "implied by the circumstances or by local custom." The trial conduct code goes so far as to prohibit a lawyer from causing the entry of a default or dismissal without first inquiring whether opposing counsel intends to proceed. Fair dealing at the bar mandates reasonable efforts to expedite litigation as well as reasonableness in making and complying with discovery demands.

Almost every judge and lawyer has a story to tell about a lawyer who somehow was unfair in his or her dealings with a colleague. In two recent decisions, my court was constrained to condemn contacts by prosecutors, acting through government agents, with individuals represented by counsel.

The Federal Rules of Appellate Procedure allow attorneys to bring to our attention pertinent authorities that come to their attention after the brief is filed and after oral argument but before decision. Rather than merely giving the supplemental citations and the reasons for them, some lawyers take advantage of the occasion by presenting further argument. I consider this to be an improper ex parte communication, and therefore a breach of the duty to deal fairly.

The erroneous notion that responsibility to clients supersedes all other professional responsibilities seems to be gaining popularity among the members of the bar. This notion has led an increasing number of lawyers to ignore agreements they have made with opposing counsel in order to advance the perceived interests of their clients. It also has led to a general decline in fair dealing between counsel during the course of litigation as well as in the performance of the other duties lawyers owe to one another.

ALTHOUGH THE OBLIGATION of lawyers to cooperate with one another long has been considered a significant professional obligation, it, too, has been more and more honored in the breach.

That certain matters arising during the course of legal representation are confided to the sole discretion of the lawyer is well established in the ethics of the profession. Those matters include extensions of time, continuances, adjournments, waivers of various procedural formalities, admission of facts and, other technical aspects of litigation not involving the merits. To abuse that discretion is, in my opinion, a serious breach of the duty to cooperate.

The lawyer's code teaches that "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his [or her] own." It also teaches that "[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding . . . matters which do not prejudice the rights of clients." The model rules advise that a lawyer, not being bound to press for every advantage on his client's behalf, is invested with "professional discretion in determining the means by which a matter should be pursued."

The purpose of imposing an ethical duty of cooperation is not to promote the collegiality of the bar, however desirable that may be, but to advance the cause of justice through a legal system that functions efficiently and expeditiously. Indeed, all the duties owed by lawyers to each other - honesty, fair dealing and civility, as well as cooperation - are imposed for the same purpose. The authors of a new book on building relationships as a means of dealing with differences have found that "the better the working relationship that the lawyer

has with opposing counsel, the better the client is served." Of course, the cooperation of counsel serves the interests of clients in the context of negotiation and deal-making as well as in the context of litigation. It is by now well established that in any representation of a client, there is a zone of discretion within which it is permissible for a lawyer to "exercise his [or her] professional judgment to waive or fail to assert a [client's] right or position."

Very recently, my brother told me that one of his clients raised a terrible fuss about an extension of time granted to an adversary. The client said the man he was suing was his enemy and that he did not wish to cooperate with that enemy in any way whatsoever. My brother was prepared to withdraw from further representation if the client refused to accept his authority as to matters ethically within his discretion. Indeed, the Code of Professional Responsibility requires a lawyer to refuse continued employment if the exercise of his or her independent professional judgment is likely to be affected.

Last year, I was privileged to serve as President of the Albany Law School American Inn of Court. The Albany Inn is modeled after the English Inns of Court and is designed to educate law students and young lawyers in the skills of advocacy and the standards of ethical behavior. As an experiment, I had one of the student members of the organization conduct a small survey of lawyers to determine what courtesies they regularly extended to other attorneys without their client's consent. The results were astounding to an old-time lawyer like myself. Even as to such matters as adjournments, many lawyers said they would first seek the consent of their clients. If the client objects, their answer would be "no." What these lawyers fail to perceive, however, is that non-cooperation is counterproductive and ultimately disservice the client as well as the legal system.

IT SHOULD GO WITHOUT saying that lawyers should treat each other with decency and respect. The vigorous representation of clients is not inconsistent with civility. Yet there is a civility crises of major proportions involving the bar. Our ethical standards make it crystal clear that ill feelings between clients should not influence relations between lawyers, that a lawyer should not refer to opposing counsel in a derogatory way and that haranguing tactics interfere with the orderly administration of justice.

Civility demands that lawyers abstain from alluding to peculiarities and idiosyncrasies of opposing counsel and from using litigation papers as vehicles for charging an adversary with improprieties not relevant to the litigation. Uncivil conduct in lawyer-to-lawyer relations demonstrates a lack of respect for the legal system and for those who serve it. It tends to diminish public confidence in the system and in the legal profession, and is prejudicial to the administration of justice. It should be condemned strongly as a most serious violation of the ethical standards of the profession.

The official reports are rife with examples of uncivil conduct. In a reported decision in which I was constrained to deal with the issue of prosecutorial misconduct, among others, I noted that "the prosecutor addressed defense counsel at one point as 'you sleaze,' . . . at another as 'you hypocritical son-','. . . as being 'so unlearned in the law,'. . . and on several occasions the prosecutor objected to questions by the defense as 'nonsense.'" A reported decision of the District of Columbia Court of Appeals describes a landlord-tenant dispute in which one lawyer made ad hominem attacks on the ethnicity

and educational background of another lawyer. There are reported decisions of lawyers using vile and abusive language to other lawyers and of an assault perpetrated by one lawyer upon another. To make matters worse with regard to the assault, at least from my point of view, the judge and his law clerk tried to separate the fighting barristers and the judge was injured in the scuffle.

An unseemly account of attorney incivility surfaced in a New York City newspaper last year, when two attorneys accused each other of misconduct during a deposition. One lawyer was accused of interrogating a witness while ranting, raving, screaming and munching on a sandwich; the other lawyer was accused of making faces, rattling papers, waving his hands and cursing. A recent newspaper account described a courtroom scene in which a lawyer grabbed for a document held by his adversary and was "slugged" for his trouble. Even more recent was a dispatch in the National Law Journal reporting that two lawyers involved in a celebrated securities case now pending in the Southern District of New York "had a shoving match in front of a federal court clerk's window," No wonder the profession is held in such low repute!

Few lawyers condone coarse and uncivilized behavior or physical assault. All too many, however, condone and utilize tactics involving the neglect of their duties to colleagues. These tactics variously are described as "hardball," "scorched earth," "takeno prisoners," and "giving no quarter." They are practiced by lawyers who are pleased to compare themselves to Rambo and Attila the Hun. I call them legal terrorists and barbarians of the bar. They range from single practitioners to members of megafirms. Some of the large firm partners justify their conduct in these words: "I am a litigator." (In large firms in New York City, a litigator generally is one who moves litigation papers around but has never seen the inside of a courtroom.) Litigator or not, my teeth are set on edge by the Wyoming lawyer who said that his object is battle, and by the Cleveland lawyer who said that today "litigation is war, the lawyer is a gladiator, and the object is to wipe out the other side." I had been under the impression that past generations went through a great deal of trouble to construct a legal system in order to avoid trial by combat.

THE GOOD NEWS, of course, is that lawyers are beginning to talk about drawing a line between zealous advocacy and unacceptable conduct. Two articles in the American Bar Association Journal, "Playing Hardball," and "Rambo Litigation," have focused attention on the issue of attorney-to-attorney relations. The Committee on Federal Courts of the New York City Bar Association has published "A Proposed Code of Litigation Conduct," with the stated purpose of "address[ing] the way lawyers treat one another." One of the drafters of the report is quoted as saying: "We tried to draw the line between legitimate hardball and what some people on the committee called spitball."

Finding that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers, the judges of the U.S. District Court for the Northern District of Texas recently adopted standards of conduct for attorneys practicing before their court. The Cleveland Bar Association has adopted "A Lawyer's Creed of Professionalism" to deal with "uncivil, counterproductive and unprofessional conduct."

My own opinion is that all these new codes and standards are unnecessary. The relations of lawyers with each other are governed by traditional principles of professional responsibility. These principles

are embodied in the Lawyer's Code of Professional Responsibility and in the Model Rules of Professional Conduct, explicitly and implicitly, and have governed conduct at the bar from time immemorial. They require simply that lawyers be honest, civil, cooperative and fair in their dealings with one another in order to better serve clients, the legal system and society at large. By performing their duties to each other, lawyers honor the ancient and learned profession of which they are privileged to be a part.