PROFESSIONALISM AND ETHICS FOR THE MARITIME PRACTITIONER

Hon. Virginia M. Hernandez Covington

Professionalism and Ethics for the Maritime Practitioner

Virginia M. Hernandez Covington
United States District Judge
Middle District of Florida
Jacksonville, Florida
October 26, 2007

I. The Maritime Bar

A. MLA

1. Founded in 1899

2. Membership - lawyers, judges, law professors, and distinguished maritime professionals. Members from all over the World, not only the United States.

B. Maritime bar relatively small in size, compared to other bars. Considered by most in the legal community to be a very close-knit, collegial group. The Maritime bar maintains a reputation as being a cut above other lawyers in regard to their level of professionalism and ethics.

C. Maritime attorneys must maintain the good reputation with which you are attributed and hold yourselves to that high standard to which other lawyers should emulate. Yet, maritime attorneys are still subject to same ethic concerns facing other lawyers.

II. Ethics - The Basics

A. **Rule 11, Federal Rules of Civil Procedure**

1. **Rule 11 (b): Representations to Court.** By present to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that

to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

a. **Rule 11 (b)(l):** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

b. **Rule 11 (b)(2):** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

c. **Rule 11 (b)(3):** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

d. **Rule 11 (b)(4):** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief

B. **ABA Model Rules**

1. **ABA Model Rule 3.1** - a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

2. **ABA Model Rule 3.3(a)(2)-** a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the

lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

3. **ABA Model Rule 4.4(a)-** In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

C. **MLA Code of Conduct**

1. **(1)** I will comply with all rules and codes of professional conduct and respect the law and preserve the decorum and integrity of the judicial process.

2. **(3)** I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.

3. **(4)** I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.

4. **(9)** I will not mislead or make any misrepresentation to the court.

D. **Power of the Court to Sanction**

1. **28 U.S.C. § 1927**

a. "To justify an award of sanctions pursuant to section 1927, an attorney must engage in unreasonable and vexatious conduct ...." Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th Cir. 2003). Bad faith is required, which is more than mere negligence or lack of merit. Id.

b. Amlong v. Amlong, P.A. v. Denny's Inc., 457 F.3d 1180 (11th Cir. 2006). Bad faith is measured not on the attorney's subjective intent, but the objective conduct. Id. at 1190. "An attorney's knowledge and intent at each step in the drama may be relevant to the ultimate legal determination that the conduct is objectively reckless, or that bad faith is evident." Id. at 1192 n.1.

III. Professionalism - What we should strive for

A. **Follow the local rules-** example: Rule 3.01(g), Local Rules, M.D. Fla. Requires parties to certified that they have conferred with opposing counsel and have tried to resolve this matter prior to filing the motion, and to notify the court if opposing counsel has an objection to the motion.

B. Resolution prior to trial - as many conflicts or issues as possible should be resolved before trial.

C. **Lost art of accommodation**

1. Extensions of time

2. Avista Management v. Wausau Underwriters Insurance Co., No. 6:05-cv-1430-0rl-31JGG, 2006 U.S. Dist. LEXIS 38526 (M.D. Fla. June 6, 2006) (the rock, paper, scissors case).

D. **Respect all involved**

1. ABA Model Rule 4.4- Respect For Rights ofThird Persons

2. **Rule 611(a), Federal Rules of Evidence-** Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and

presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

IV. Problems in Professionalism Today

A. Past - Civility

1. **ABA Cannons of Professional Ethics of 1908 (last amended in 1963)** - Original rules of conduct were more general and did not address specific conduct as much as the present model rules. This was probably due to previous generations believing that some modes of conduct were so obviously unethical that rules against them were unnecessary.

2. Over time, lawyers behavior has changed, and the rules of professional conduct have changed as well, becoming more specific. Thus there can be an attitude of"what the rule does not prohibit, it permits." The rules inform lawyers how far they can push the envelope, and encourages the same behavior from their adversaries.

B. Present- Problems with clients, professionalism vs. representation

1. Mark D. Nozette & Robert A Creamer, Professionalism: The Next Level, 79 Tul. L. Rev. 1536 (2005). Today's emphasis seems to be on the lawyer's duty to "zealously" represent his client. Lawyers cannot disregard their duty to the legal system and their peers in the name of representation.

C. Issues Facing Maritime Attorneys

1. **Dealing with non-maritime attorneys-** because of the specialized

practice of maritime law, admiralty lawyers may find themselves in the position to take advantage of non admiralty lawyers.

2. **When to get local counsel?** Maritime attorneys may often find themselves involved in litigation in districts and states other than their own. The place of the litigation may have a close knit legal community, so when is it appropriate, and when will it help, to hire local counsel?

3. **New Electronic Discovery Rules-** Amendments to the Federal Rules of Civil Procedure, which took effect in December 2006, recognize electronically stored information and set specific rules governing discovery. Fed. R. Civ. P. 26. New rules recognize a party's right to obtain e-discovery, but with it comes the risk of inadvertent disclosure of confidential or privilege information. How can attorneys guard against inadvertent disclosure, and how should they handle possible inadvertent disclosures of privileged information?

4. **Electronic Communications-** With the explosion of technology, there are many more ways to contact and communicate among attorneys. With devices such as the Blackberry and webcams, now an attorney is almost never unreachable. How do attorneys use these modes of communication effectively and ethically? *See* Judge Karen Cole, Fourth Judicial Circuit of the State of Florida, "Fostering Communication: Technology and Technique" (Sept. 10, 2007).

Guidelines for Professional Conduct

FOREWORD

In 1993 the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines for professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from both Florida and around the country. the professionalism committee determined that, with minor modifications. the guidelines which had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore. In 1994, at the request of the professionalism committee. the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines For Professional Conduct. The Trial Lawyers Section sought the endorsement of the Guidelines from the Florida Conference of Circuit Judges. and at its meeting held In September 1995, the Conference approved the Guidelines. In so doing. the Conference wishes to make clear that the Guidelines do not have the force oflaw and that trial judges will still have the right and obligation to consider issues raised by the Guidelines on a case by case basis. Nevertheless. both the Trial Lawyers Section and the Florida Conference of Circuit Judges hope that publication and widespread dissemination of these Guidelines will give direction to both lawyers and judges as to how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section is also Intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines will simply reflect their current practice. However, it is hoped that the widespread dissemination and implementation of these Guidelines wlll result in an overail increase in the level of professionalism in trial practice in Florida.

PREAMBLE

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks. few of which are easy. most of which are exacting. In the final analysis. a lawyer's duty Is always to the client. But In striving to fulfill that duty. a lawyer must be ever conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary. a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however. is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, in recognition that they must be applied in a manner consistent with the interests of one's client and the Rules of Professional Conduct, and in keeping with the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar, the following Guidelines for Professional Conduct are hereby adopted. Although we do not expect every lawyer will agree with every guideline. these standards reflect our best effort at encouraging decency and courtesy in our professional lives without Intruding unreasonably on each lawyer's choice of style or tactics.

A. SCHEDULING. CONTINUANCES, AND EXTENSIONS OF TIME.

Scheduling and Continuances

1. Attorneys are encouraged to communicate with opposing counsel prior to scheduling depositions. hearings and other proceedings, in order to schedule them at times that are mutually convenient for all interested persons. Alternatively, if an attorney does not communicate with opposIng counsel prior to scheduling a deposition or hearing, the attorney should be willing to reschedule that deposition or hearing if the time selected is inconvenient for opposing counsel.

2. Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding. a lawyer should promptly agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.

3. A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal. as soon as they become apparent to the lawyer.

4. Attorneys should cooperate with each other when conOicts and calendar changes are necessary and requested.

5. Counsel should never request a calendar change or misrepresent a conflict in order to obtain an advantage or delay. However, in the practice of law. emergencies affecting our families or our professional commitments will arise which create conflicts and make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes. and should make such request of other counsel only when absolutely necessary.

6. Attorneys should endeavor to provide opposing counsel. parties. witnesses. and other affected persons, sufficient notice of depositions, hearings and other proceedings. except upon agreement of counsel. in an emergency. or in other circumstances compelling more expedited scheduling.

7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

EXTENSIONS

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling. cancellations. extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.

9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted between counsel as a matter of courtesy unless time is of the essence.

10. After a frrst extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions. the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

11. A lawyer should advise clients against the strategy of granting no time extensions for the· sake of appearing "tough."

12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.

13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving the right to seek reciprocal scheduling concessions. However, a lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

B. SERVICE OF PAPERS.

1. The timing and manner of service should not be used to the disadvantage of the party receiving the papers.

2. Papers and memoranda of law should not be served at court appearances without advance notice to opposing counsel and should not be served so close to a court appearance so as to inhibit the abil·ity of opposing counsel to prepare for that appearance or to respond to the papers.

3. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

4. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service by mail, even

when allowed, will prejudice the opposing party.

C. WRITTEN SUBMISSIONS TO A COURT. INCLUDING BRIEFS, MEMORANDA. AFFIDAVITS AND DECLARATIONS.

1. Written briefs or memoranda of points of authorities should not rely on facts that are not properly part of the record. A litigant may. however. present historical, economic or sociological data if such data appear in or are derived from generally available sources but only if these would be subject to judicial notice and if sufficient backup data and its sources are presented contemporaneously.

2. Neither written submissions nor oral presentations should disparage the intelligence. ethics, morals, Integrity or personal behavior of one's adversaries. unless such things are directly and necessarily in issue.

D. COMMUNICATION WITH ADVERSARIES.

1. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

2. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

3. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

4. Unless specifically permitted or invited by the court. letters between counsel should not be sent to judges.

5. A lawyer should adhere strictly to all express promises to and agreements with opposing counsel. whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.

6. During the course of representing a client, a lawyer should not communicate on the subject of the representation with a party known to be represented by a lawyer in that matter without the prior consent of the lawyer representing such other party unless authorized by law to do so.

E. DEPOSITIONS.

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

2. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

3. In scheduling depositions upon oral examination. a lawyer should allow enough time to permit the conclusion of the deposition. including examination by all parties, without adjournment.

4. When a deposition is noticed by another party in the reasonably near future. counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

5. Counsel should not attempt to delay. a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

6. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

7. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice or by appearing angry at the witness.

8. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Rules of Civil Procedure or applicable case law. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question. counsel should simply state "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should by stated succinctly and only what is necessary to state the grounds should be stated.

9. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so. the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others.

10. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged Information.

11. Counsel for all parties should refrain from self-serving speeches during depositions.

12. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

F. DOCUMENT DEMANDS.

1. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

2. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case. **If** a document request Is objectionable only In part. the documents responsive to the unobjectionable portion should be produced in a timely manner.

3. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

4. Documents should be withheld on the grounds of privilege only where appropriate. Where documents are withheld, the withholding party should immediately provide a list of the privileged documents showing the date, author and general description and a statement of the basis for withholding the document.

5. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

6. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

G. INTERROGATORIES.

1. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.

2. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.

3. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

4. A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or caus-Ing the adversary to Incur unnecessary expense.

H. MOTION PRACTICE.

1. Before setting a motion for hearing, counsel should make a reasonable effort to resolve the issue.

2. A lawyer should not force his or her adversary to make a motion and then not oppose it.

3. Following a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should immediately be submitted to the court. Attorneys should promptly provide, either orally or in writing. proposed orders to opposing counsel for approval prior to submitting them to the court. Opposing counsel should then promptly communicate any objections and at that time, the drafting attorney should immediately submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel. The order must fairly and adequately represent the ruling of the court.

I. DEALING WITH NON-PARTY WITNESSES.

1. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hear-Ing, trial or deposition or to obtain necessary documents in the possession of a non-party witness.

2. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.

3. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available as soon as possible to the adversary at his or her expense even if the deposl-

tion is cancelled or adjourned.

J. EX PARTE COMMUNICATIONS WITH THE COURT AND OTHERS.

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom such case is pending.

2. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application. A lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced if the application or communication is made on regular notice.

3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Counsel should always notify opposing counsel of dates and times obtained from the court for future hearings on the same day that the hearing date is obtained from the court. Copies of any submissions to the court (such as correspondence, memoranda of law, case law, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at the same time a copy should be hand-delivered or faxed to opposing counsel. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel at the time the material is submitted to the court.

4. A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual informality to a judge, uncalled for by their personal relations. A judge should be referred to by surname in court. A lawyer should avoid ;3nything calculated to gain, or having the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

1. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

3. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

L. PRE-TRIAL CONFERENCE.

1. A lawyer should carefully read the order setting trial and complete the pre-trial conference statement in full to the extent it can be agreed to by the parties.

2. A lawyer should be familiar with the evidence in the case.

3. A lawyer should be sure discovery is completed or address the need for additional discovery with opposing counsel well in advance of the pre-trial conference. All counsel should use due diligence in preparing the case for trial and should file a motion for continuance of the pre-trial conference or of the trial only If counsel has been unable to complete preparations in spite of diligent efforts.

4. A lawyer should evaluate the case and have a figure in mind at which the case could reasonably settle with authorization from the client to do so.

5. A lawyer should determine if the court needs to, and agrees to, hear any motions at the pre-trial.

6. The attorney who will try the case must appear at the pre-trial conference, unless excused by the court.

7. A lawyer should not ask for a continuance unless the client agrees and signs the motion.

M. TRIAL CONDUCT AND COURT-ROOM DECORUM.

1. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court.

2. Be punctual and prepared for any court appearance.

3. Stand as court is opened, recessed or adjourned; when the jury enters or retires from the courtroom: and when addressing, or being addressed by, the court.

4. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and during interrogation should avoid blocking opposing counsel's view of the witness.

5. Counsel should address all public remarks to the court, not to opposing counsel.

6. A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.

7. Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.

8. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.

9. Counsel should request permission before approaching the bench. Any documents counsel wish to have the court examine should be handed to the clerk.

10. Have the clerk pre-mark the potential exhibits.

11. Any paper or exhibit not previously marked for Identification should first be handed to the clerk to be marked before it is tendered to a witness for examination. Any exhibit offered in evidence should, at the time of such offer. be handed to opposing counsel.

12. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the court.

13. Generally, in examining a witness, counsel shall not repeat or echo the answer given by the witness.

14. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury, unless the offeror knows or has reason to believe the opposing lawyer will accept it.

15. In opening statements and in arguments to the jury. counsel shall not express personal knowledge or opinion concerning any matter in issue.

16. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

17. During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.

18. A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of court.

19. A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.

20. A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.

21. A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case.

22. A lawyer should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. A lawyer, however, may advance, guarantee or acquiesce in the payment of:

(a) expenses reasonably incurred by a witness in attending or testifying;

(b) reasonable compensation to a witness for his lost time in attending or testifying;

(c) a reasonable fee for the professional services of an expert witness.

23. In appearing in his or her professional capacity before a tribunal. a lawyer should not:

(a) state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

(b) ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to

degrade a witness or other person;

(c) assert one's personal knowledge of the facts in issue, except when testifying as a witness;

(d) assert one's personal opinion as to the justness of a cause. as to the credibil-Ity of a witness. as to the culpability of a civil litigant. or as to the guilt or innocence of an accused; but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

24. A question should not be interrupted by an objection unless the question is patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

25. A lawyer should address objections, requests and observations to the court and not engage in undignified or discourteous conduct which is degrading to court procedure.

26. Where a judge has already made a ruling in regard to the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although he is at liberty to make a record for later proceedings of his ground for urging the admissibility of the evidence *in* question. This does not preclude the evidence being properly admitted through other means.

27. A lawyer should not attempt to get before the jury evidence which is improper.

28. A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror. by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like.

29. A lawyer should never attempt to place before a tribunal, or jury, evidence known to be clearly inadmissible. nor make any remarks or statements which are intended to improperly influence the outcome of any case.

30. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

31. ·Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence.

Further, if this occurs unintentionally and is later discovered, it should immediately be disclosed or otherwise corrected.

Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit

My word is my bond.

Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

. "I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

MARITIME LAW ASSOCIATION CODE OF PROFESSIONAL CONDUCT

This Code of Professional Conduct was prepared by the Committee on Professional Relations chaired by Ben L. Reynolds of Houston, and approved by the Board of Directors at its meeting on May 1, 1997. It was approved by the Membership at the October 31, 1997 meeting. Maritime lawyers generally enjoy a good reputation for professional conduct, and this Code should help us maintain the high standards to which we all aspire.

1. I will provide the highest level of competency and efficiency in the performance of all legal services.

2. I will comply with all rules and codes of professional conduct, and respect the law and preserve the decorum and integrity of the judicial process.

3. I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior.

4. I will keep my word in the conduct of my legal practice and treat my colleagues, parties, witnesses and the courts with respect and dignity.

5. I will maintain the trust of my clients by keeping them well-informed and actively involved in making decisions affecting them.

6. I will resolve all disputes expeditiously and not engage in any course of conduct which unnecessarily increases cost or delays litigation.

7. I will engage in the discovery process, seeking an expeditious result for my client's legitimate interest, while avoiding abuse and harassment of witnesses and parties.

8. I will contribute time and resources to pro bono activities.

9. I will not mislead or make any misrepresentation to the court.

10. I will exemplify and instill in others the tenets of this Code of Professional Conduct.

LAWYERS' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

1) Not Being on Time

-Not returning another lawyer's call promptly.

-Not responding promptly to a lawyer's correspondence.

-Untimely responses to discovery requests (e.g., Interrog. & Requests for Production).

2) Not Being Accommodati!lg

- Cancelling depositions or scheduling them at the last minute.

- Being difficult in scheduling.

- Refusing to cancel matters when opposing counsel has a family crisis (e.g., when counsel was called suddenly to his dying mother's bedside out of town).

3) Lack of Manners

- Failing to introduce yourself to opposing counsel.

- Incivility and lack of respect for fellow counsel.

- Being rude to opposing counsel or counsel's office staff.

4) Inadequate Communication

- Sending a fax at night to opposing counsel on a matter coming before the court the morning after. Also, keeping a firm's fax machine turned off and requiring "permission" to send a fax, which includes having to explain what the fax is about.

-Ending letters with, "I remain, very truly yours."

-Failing to put fax numbers and e-mail addresses on pleadings and correspondence.

5) Discovery Matters - Evidence Withheld or Disorganized

- Denying possession of evidence when in fact they are withholding it improperly.

-Not producing documents in response to a request for production in a timely, organized, and orderly manner.

- Producing duplicate copies of documents, making the production appear larger.

6) Inadequate Consequences - Lack of Sanctions

- When opposing counsel blatantly violates court orders and repeatedly delays discovery, and the judge fails to sanction such conduct.

LAWYERS' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

cant 'd

7) Inadequate Motions & Pleadings

- Lack of brevity in briefs.

- Filing memoranda of law on significant motions and then showing up at the hearing only to argue case law not in the brief as the crux of their argument.

-Creating "strawman" arguments and advocating "red herring" issues.

- Failing to cite authority forming the basis for a motion.

8) Unfair Hearing Practices

- Bringing case law to a hearing either without copies for opposing counsel, or with highlighted copies for the judge, but not opposing counsel.

> [".if *I were a judge, I would have procedures for my division that prevented this and if a lawyer did not have appropriate copies, I would not consider the case law submitted."]*

9) Judges shouting

10) Mischaracterization

Mischaracterizing opposing counsel's oral statements in a responsive written correspondence.

JUDGES' TOP 10 PET PEEVES

2007 Judicial Professionalism Symposium, 4th Circuit

1) Not Being on Time

When lawyers are late to court or unprepared. It "delays the train schedule."

2) Failing to Identify Yourself

- Beginning your argument in court without first identifying yourself, who you are representing, and the motion under consideration. Even a judge's best friend should go through the ritual.

3) Forgetting to Inform the Judge or JA

- Faxing or electronically filing a motion to opposing counsel the night before an early morning hearing without providing the judge with a courtesy copy.

- Failing to provide the judge with a courtesy copy of an "emer ency motion" in state court (because it is likely that the motion will not be seen as qmckly as necessary since all motions are sent up from the clerk's office in a stack of files that all look alike).

- Failing to notify the judge's JA that a case has been resolved, especially when it affects the court's calendar, so that someone else can be given that time.

4) Providing Incomplete Information

-Sending or dropping offaproposed order with no cover letter, no identification ofthe hearing that it relates to and/or failing to mention whether the proposed order was run by opposing counsel prior to submitting it to the court.

5) Improper and Unprofessional Manners at Court Appearances

- Speaking over each other or over the court.

-Continuing to argue after a ruling is made.

- Reacting emotionally to a ruling, as if an adverse ruling were a personal affront. It is not. "If, for some reason, the case is indeed personal to you, you are too close to the issue to be the attorney for the client."

- Using sarcasm in arguments and comments to each other or to the court.

- Directing your arguments to each other rather than to the court.

- Making improper or distracting gestures (e.g., holding up a hand while opposing counsel is arguing a motion, huffing and puffing, rolling your eyes, etc.).

- When litigants, witnesses or lawyers in chambers and courtrooms:
  - -chew gum;
  - - dress inappropriately (wearing flip-flops, tank tops, shorts, etc.);
  - - dress informally or disheveled;
  - - fail to tum off their cell phones; and
  - -set a drink/cup on the podium in court.

JUDGES' TOP 10 PET PEEVES
2007 Judicial Professionalism Symposium, 4th Circuit

cont'd

6) Ineffective Presentation of Argument

- Failing to answer the question posed by the judge. "Oftentimes, a lawyer is so busy thinking about what he is going to say next, he forgets to listen to the question being asked."

- Making arguments irrelevant to the analytical framework at issue.

-Poorly drafting motions. "They tend to suffer."

7) Disparaging Another Lawyer Before the Judge

- Sending the judge copies of letters about their complaints toward each other and, likewise, airing personal arguments about each other in front of the judge. A lawyer must not disparage another lawyer in front of a judge.

8) Failing to Confer or Agree with Opposing Counsel

-Failing to "confer" with opposing counsel regarding attempts to resolve discovery matters prior to setting a hearing on a motion to compel. It 1s inappropriate to send letters to the judge indicating that counsel has conferred when, in fact, it is evident that no attempt was made to confer as required (i.e., in person or on the phone).

- Agreeing to an amount of attorneys' fees at a hearing, but later sending a proposed order reflecting a different amount, with a cover letter claiming that a copy was sent to opposing counsel. This is not proper notice.

-When jurisdiction is reserved in a QUADRO and a lawyer appears *ex parte*, it is impro.J?er to request the judge to enter an order prior to the parties' agreement and without their signatures confirming that they have agreed.

9) Failing to Limit Discovery in Accordance with the Rules

-Failing to limit discovery requests more precisely as to time, scope, and the appropriate number of questions. A lawyer should avoid being over-broad or vague.

- Only ask for what you are entitled to, and only object to things that you ,are not required to provide.

10) Using Improper Verbiage in a Proposed Order

- Submitting a proposed order on a matter that did not require a hearing, yet reciting in the proposed order that the matter "came on to be heard" when it actually never did.

Member Services

Ethics Opinions

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2
(September 15, 2006)

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC: 4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)
Opinions: 93-3, New York Opinion 749, New York Opinion 782
Case: *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empi.Prac.Cas. (BNA) 1775 (2005)
Mise: David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001,* Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as "information describing the history, tracking, or management of an electronic document."_!_

Metadata can contain information about the author of a document, and

can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed}-

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The Comment to Rule 4-1.6 further provides:

> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

> A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment to rule 4-4.4 provides additional guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to

promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

(1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

(2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. See, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.}

(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the

lawyer must "promptly notify the sender." *Id.*

The foregoing obligations may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

> To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

[1]*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at http://www.thesedonaconference.org. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

[2]Further references regarding metadata and eliminating metadata from documents may be found on Microsoft's user support websites at b.ll.Q_;_L/support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/. See *also,* Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001* http://techrepublic.com.com/5100-1035_11-5034376.html. The court's discussion of metadata in *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empi.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

[3]The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states, The New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously "mine" documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential

Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also,* Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

[Updated: 10-31-2006]