HOW TO DEAL WITH THE DIFFICULT ADVERSARY WHO IS A "PAIN IN THE STERN"

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I.

Introduction

"If John Brown Says The Ship Can Sail, The Ship Can Sail."

The late Judge Thomas M. Kennerly of the Southern District of Texas reportedly wrote the above note to his deputy clerk when young lawyer (and later eminent Admiralty practitioner and jurist) John R. Brown told the clerk that his client had arranged security with opposing counsel to allow an arrested vessel to sail. It is said that this confidence in his integrity was one of Judge Brown's most cherished memories.[1] We ponder whether a judge would have similar confidence in a maritime lawyer today.

Litigation by definition is an adversarial process that generates intense competition in expensive and time consuming proceedings which unfortunately sometimes generate into acrimonious win-at-all cost "holy wars" between counsel. Some believe the law practice has evolved from a noble profession to a competitive business where the "morals of the marketplace" have replaced the high ethical and professional standards to which the bar once adhered.[2] Judge Gerald B. Tjoflat of the Eleventh Circuit has written that "the profession's moral and ethical

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[1] Gus A. Schill, Jr., Old Wine Into New Bottles And Old Wine Into New Bottles Revisited, 18 Hous. J. Int'l. L. 817 (Spring , 1996).

[2] Delos E. Flint, Jr., Dealing Professionally With Unprofessional Adversaries (SOP's For SOB's), Southeastern Admiralty Law Institute (SEALI) Seminar Materials, June, 2000, p. 2.

standards, its civility and manners, are being watered down from generation to generation. We tolerate today what was intolerable yesterday." [3]

In this author's view, there does seem to have developed over the years a definite trend toward unprofessional and uncivil conduct among some lawyers. Everything must be confirmed in writing, personal inflammatory attacks in pleadings and letters are commonplace, discovery requests are stonewalled, telephone calls are not returned, and there is wide acceptance of the principle that victory in litigation justifies any conduct.[4] Judge Tjoflat queries what ethical standards, if any, are guiding the bar: "With our inability to speak in principle, our desire to let everyone do his or her own thing, our fear of offending anyone, I am sometimes at a loss to know exactly what we stand for." [5]

This paper will discuss the unprofessional conduct the author has observed among some members of the bar and offer suggestions as to how to deal with this type of behavior.

II.

Is the professionalism and civility of the Admiralty bar now as high as it once was?

The author's father used to say maritime law in Savannah is practiced "By Consent." The maritime bar was once thought of as a cut above the "common law practitioners" with respect to professionalism and courtesy. Why was/is this the case? It has been pointed out that the traditions of the maritime bar are different from the landside bar. Historically, cases were not

[3] Hon. Gerald Bard Tjoflat, Professionalism, Southeastern Admiralty Law Institute (SEALI) Seminar Materials, June, 2007, p.6.

[4] Schill, *supra*, note 1, p. 818.

[5] Tjoflat, Id.

tried to juries in the principal maritime powers including England and the United States.[6] The practitioners were international and international principles were accepted. Litigation arose on an international level which placed maritime lawyers in a different milieu where they were more able to speak the same principles with each other, they trusted each other, and there was greater premium on candor, collegiality, and mutual respect, all based on international custom and practices.[7] In more modern times this candor and civility continued, largely it seems, because the maritime bar is smaller, more specialized, and more international.[8] The lack of a jury in many Admiralty cases likely plays a part along with the practical problems encountered in the maritime practice which require cooperation among counsel. Additionally, it is arguable that the typical charter party or bill of lading dispute simply does not bring forth the same blood lust in counsel as in the usual criminal matter or matrimonial case.[9]

Some see an unfortunate trend among Admiralty lawyers which mirrors the lack of civility and mutual respect among some members of the landside bar. Why is this? Admiralty practioner/professor Gus A. Schill of the Houston bar sees a number of reasons for this direction: [10]

1. Demands by clients for a particular result tempt lawyers to adopt a win-at-all-cost mentality in order to retain the representation in a shrinking and increasingly competitive maritime market.

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[6] Hon. Charles H. Brient, Professionalism, Civility, and the Maritime Bar: A View from the Bench, Journal of Maritime Law and Commerce, Vol. 28, No.4, October, 1997, p. 551-552.

[7] Brieant, *supra*, note 6, p. 552.

[8] Id.

[9] Id.

[10] Schill, *supra*, note 1, 818-820.

2. A lack of mentoring between older and younger lawyers which could pass along professional conduct and values. Many older lawyers simply do not have or take the time to properly guide their young associates.

3. The pressure which law firms apply to associates and partners alike to maximize hourly and monetary figures, the "tyranny of the billable hour." [11] Coupled with a reduced maritime client base, there is temptation among some practioners to fudge or expand on billable hours in order to impress the firm's compensation committee.

4. There are fewer legal controversies due in part to the 1972 amendments to the Longshore Act, improved navigational safety measures, the use of containerized cargo, and the appointment of marine surveyors to conduct investigations and handle other tasks formerly carried out by maritime lawyers.

It is believed a major factor contributing to incivility and unprofessional conduct among members of both the maritime and landside bars is the belief that zealous representation of the client is the paramount objective. This belief creates a lawyer who is simply a "hired gun" who does not exercise independent judgment on tactics or goals.[12] The idea is that a lawyer's moral compass can be checked at the courthouse door in favor of the morals of marketplace. In effect, the efforts of the client rather than counsel end up setting the standard.[13] However our primary responsibility as officers of the court is not to the client but to the legal system itself.

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[11] Coined by Patrick E. O'Keefe of the New Orleans Maritime Bar in his article Ourselves Alone- Reflections on the Profession, Southeastern Admiralty Law Institute (SEALI) Seminar Materials, June, 2002, p. 5.

[12] Timothy P. Terrell & James H. Wildman, Rethinking "Professionalism", 41 Emory L.J. 403, 414 -15 (1992).

[13] Hon. Jack T. Camp, Thoughts on Professionalism in the 21st Century. Southeastern Admiralty Law Institute (SEALI) Seminar Materials, June, 2005.

> "All attorneys, as 'officers of the court', owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." [14]

Simply put, we ought not use our "duty" to the client in an effort to justify unprofessional and uncivil behavior.

III.

Typical unprofessional conduct and some practical suggestions on how to deal with it

Most every young litigator will be faced with an adversary whose conduct is below the standard of an officer of the court. What is the lawyer on the receiving end to do?

The first rule is don't take the bait and turn the litigation into a reciprocal slug fest. Resist the invitation to fight fire with fire. Remember the pig rule: "Never wrestle with a pig. You'll both get dirty, but the pig likes it."[15] This is not to suggest the receiving lawyer should roll over or surrender to inappropriate tactics or otherwise provide meek representation. What is suggested is that all lawyers should be capable of suppressing their basic instincts and keeping their focus on the case when it is in the client's best interest to do so.[16]

So what are the typical unprofessional behaviors among some practicing members of the bar?

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[14] Malautea v. Suzuki Motor Co., LTD, 987 F. 2d 1536, 1546 (11th Cir. 1993) (Judge Fay).; Camp, *supra* note 13, p. 12.

[15] Angleine Lindley Bain & Kathryn Lanigan Wieser, How to deal with the Difficult Lawyer, Dallas Bar Association, February 2005, quoting from Why Lawyers (and the rest off us) Lie, by Mark Perlmuther, (1998), quoting U.T. Law Professor Jack Ratliff.

[16] Frederick Alimonti, Dealing with the Difficult Adversary, Litigation Magazine, American Bar Assn., Vol. 35, No. 1 Fall, 2008, p. 37.

1. **Yelling over the telephone or at depositions ("Telephonically persona non grata"[17])**

   Some attorneys try to intimidate young lawyers by screaming over the telephone or at depositions. If on the receiving end, the best approach is don't respond in like manner. The calmer you remain, the more frustrated the screamer will become. Simply tell counsel that if he/she cannot act in a civil, professional manner, you will hang up. You may also wish to advise counsel to direct all future communications to you in writing.[18] If at a deposition, try to stay focused on what you need to accomplish with the testimony. If you expect trouble with opposing counsel in an upcoming deposition, consider using a videographer. Knowing their conduct will be immortalized on video will go a long way to keeping everyone on their best behavior. [19]

Our Maritime Law Association Code of Professional Conduct speaks to the matter of discourteous and uncivil conduct:

> "3. I will be civil and courteous to all colleagues, parties, witnesses and the courts, recognizing that effective representation is undermined by antagonistic behavior." [20]

The behavior of opposing counsel as well as parties can impact the cost of litigation. If you believe counsel's conduct likely will increase litigation costs by way of refusal to produce

[17] Charles L. Woody and Kevin L. Carr, How to Deal with Difficult Opposing Counsel, http://www.abanet.org/litigation/mo/premium-it/articles/products/1006 woody.html.

[18] Jasmine K. Mehta, Tips for Young Lawyers- Dealing with Difficult Opposing Counsel, ABA-website- Journal Pretrial Practice and Discovery.

[19] Id.

[20] www.mlaus.org/bylaws.htm.

documents or make witnesses available for deposition, etc, advise the client early that additional motion practice (and attorney's fees) may be required. [21]

2. **Sending letters "If I don't hear from you by tomorrow, I will presume you have no objection."** Civility among lawyers is nothing more or less than common courtesy and decency.[22] The more professional approach would be to write opposing counsel and say "please let me know by [date at least 2-3 days away if possible] whether you object."

3. **Personal attacks in letters** A good rule of thumb is never put anything in a letter to opposing counsel that you would be embarrassed for the court to see.[23] If you treat every communication during the litigation as if it were before the judge, you will not lower yourself to the unprofessional tactics of your adversary. This is really all you need to know. Remember, if you have to file a motion to compel production or a motion for a protective order, that correspondence with your opposing counsel may be an exhibit to the motion.[24] So be careful what you put in letters and e-mails to counsel.

4. **Unprofessional personal attacks in briefs** Perhaps it is only a matter of style, but this author avoids phrases in briefs such as "opposing counsel's argument is absurd (or ridiculous, laughable, preposterous, disingenuous, etc.)". It is believed such language does not impress the court and serves only to create illwill with counsel. Why not simply use less inflammatory language such as "opposing counsel's argument is without merit."

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[21] Ky Fullerton, Dealing with Difficult Opposing Counsel Before Trial, ABA Young Lawyers Division. The 201 Practice Series: Beyond the Basics, (2007). http://www.abanet.org/yd/101.

[22] Flint, *supra*, note 2, p.3

[23] Woody and Carr, *supra*, note 17.

[24] Mehta, *supra*, note 18.

5. **Misrepresentations to the court** Lawyers who are less than completely candid with the court are in big trouble. Judges know which lawyers cannot be trusted. Reputations still count.[25] A lawyer's word is his bond.[26] A good reputation can be difficult to build but easy to lose.[27] A court's respect for a lawyer and his/her credibility are priceless. In times past in this author's experience when an Admiralty lawyer put a proposed order under the nose of a federal judge, the judge would sign it without hesitation. Is the same true today?

The ABA Model Rules of Professional Conduct address the issue of candor toward the Court:

> "Rule 3.3 CANDOR TOWARD THE TRIBUNAL
>
> (a) A lawyer shall not knowingly
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) 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 the opposing counsel."

When a lawyer misrepresents to a judge, he not only cooks his goose with the court but also undermines the integrity of the judicial process. [28] Additionally, if counsel is a member of the MLA, he or she may be in violation of the MLA's Code of Professional Conduct:

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[25] Hon Ursula Ungaro-Benages, Professionalism in the Courts, from remarks made by Judge Ungaro-Benages at a symposium (Race, Gender, Power and the Public Interest: Perspectives on Professionalism) 8 St. Thomas L. Rev. 175, 178 (Fall, 1995).)

[26] Flint, ***supra***, note 2, p. 5.

[27] Schill, ***supra***, note 1, p.828

[28] Ungaro-Benages, ***supra***, note 25, p. 176.

" 9. I will not mislead or make any misrepresentation to the court." [29]

6. **Unprofessional/boorish antics at depositions** Many of us have been exposed to lawyers who engage in unprofessional histrionics at depositions such as rolling his or her eyes, sighing, slamming down pens, and similar antics.[30] Some years ago, an opposing lawyer was deposing a low-level employee of this author's corporate defendant client. Throughout the deposition, whenever opposing counsel felt that a point favorable to his claim had come out in the testimony he would snap his fingers and sort of chuckle. However this author had the last laugh (or chuckle) when the court granted the author's motion for summary judgment in the case. The best approach when faced with this type of obnoxious behavior is simply to ignore it and concentrate on the deposition itself.

7. **The motion-happy lawyer** Some lawyers do not know how to pick up the telephone, much less write a letter. Rather than call or write you to request an extension or to seek your agreement to a stipulation, the motion-happy lawyer subjects you to an endless stream of motions over things that should be handled informally.[31] This practice is not only unfair to the client who must pay for the extra work but is a poor use of judicial resources. Judges expect lawyers to work out these matters informally without the court's intervention.

Difficulty in scheduling depositions Professional courtesy dictates that counsel confer before noticing a deposition. However, oftentimes a request to schedule a deposition is met with silence

[29] www.mlaus.org/bylaws.htm

[30] Woody and Carr ***supra***, note 17.

[31] Alimonti, ***supra*****,** note 16, pp. 38-39.

from opposing counsel. If you run into this problem, the best approach may be to send counsel a notice to take the deposition along with a cover letter recapping your efforts to confer and asking counsel to provide alternative dates if the date in the notice is inconvenient.[32] This usually works because most lawyers will not risk a dismissal or sanctions for failing to appear at a properly noticed deposition.[33]

IV.

Overall Suggestions

The following overall suggestions are offered for dealing with the difficult or unprofessional adversary:

1. Keep your standards high and resist the temptation to respond in kind. Most judges are aware of the lawyers who lack professionalism and respect for court rules. Maintaining high standards in spite of opposing counsel's unprofessional conduct will keep you in good stead with the court and pay dividends for your clients.[34] However, this does not mean to provide meek representation. If worst comes to worst, you always have available the formal approaches of Federal Rules 11 and 37 (d) as well as 28 U.S.C.§ 1927 (attorney's fees awardable against counsel who multiplies federal proceedings unreasonably and vexatiously).

[32] Fullorton, *supra*, note 21.

[33] Id.

[34] Id.

2. Keep your focus on the long term goals in the litigation, stay on track, and try to follow your overall plan and strategy in the case.[35] If you lose focus and allow yourself to get distracted by your opponents' antics, opposing counsel is rewarded and your client will be the loser.

3. Choose your battles carefully. Don't go to the mat on your opponents' every transgression or misconduct.[36] Although there are myriad battles into which you can be drawn, only fight the ones which matter in the litigation. Let the others go.

4. Even if opposing counsel deserves to be slammed, avoid saying anything in a letter or on the telephone which you would be embarrassed for the judge to see or know.[37]

V.

Final Thoughts

In their professional lives lawyers cannot adhere to society's norms or the morals of the marketplace. We expect lawyers to follow a higher standard as officers of the court and as representatives of the profession.[38] As Judge Camp addressed SEALI,

> "In the final analysis, professionalism is the sum of the collective character and integrity of the individual members of the bar. If the individual character and integrity is there, the professionalism will be there also." [39]

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[35] Alimonti, *supra*, note 16, p. 39

[36] Alimonti, *supra*, note 16, p. 42.

[37] Woody & Carr, *supra*, note 17, p. 2.

[38] Tjoflat, *supra*, note 3, p.1.

[39] *Supra*, note 13, p. 15.

The author respectfully submits that all lawyers, maritime and landside, should adhere to a high degree of courtesy as the term is defined in the Virginia Bar Association's creed:[40]

> "Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationship with their fellow lawyers and their own well-being."

[40] Preamble to the Virginia Bar Association Creed, http://www.vba.org/aboutus.htm