CHAPTER 1

PROFESSIONAL LIABILITY FUND OVERVIEW

Megan I. Livermore
Professional Liability Fund
Chief Executive Officer

OSB Professional Liability Fund

Welcome to

Learning The Ropes

presented by the Professional Liability Fund

November 8-10, 2022

OSB Professional Liability Fund

PLF Overview

Megan Livermore
Chief Executive Officer

Professional Liability Fund

OSB Professional Liability Fund

WHAT IS THE PLF?

- Mandatory malpractice provider for Oregon State Bar members in private practice whose principal office is in Oregon
- Created in 1977 by the Oregon State Bar Board of Governors, Began operations in 1978
- PLF Board—7 attorneys and 2 public members, appointed by BOG
- Unique in the U.S.

OSB Professional Liability Fund

WHAT DO WE DO FOR YOU?

- Practice Management Assistance Program (PMAP)
- Oregon Attorney Assistance Program (OAAP)
- Claims: Defense; Repair; Deposition defense (discretionary)

OSB Professional Liability Fund

PRIMARY COVERAGE: HOW MUCH?

- Liability & Expense Limits
  - $300,000 for indemnity
  - $75,000 claims expense (starting 2022)
  - One claim limit per year
- Assessment: $3,300 per year
  - Discounts for 1st year: 40% ($1,980)
  - Discounts for 2nd and 3rd years: 20% ($2,640)

OSB Professional Liability Fund

PRIMARY COVERAGE: WHO IS COVERED?

- Covered:
  - OSB Member
  - Private Practice
  - Principal office in Oregon
- Not Covered:
  - Law Clerks (supervised attorney)
  - Employed exclusively as in-house counsel, government lawyer, in a non law-related field, employed by Legal Aid and other non-profit entities who have alternative insurance
  - Unemployed

OSB Professional Liability Fund

PRIMARY COVERAGE: WHAT'S IN IT FOR ME?

- No deductible
- No underwriting
- No individual rate increases for claims
- Coverage cannot be canceled

OSB Professional Liability Fund

PRIMARY COVERAGE: ARE THERE EXCLUSIONS?

- Wrongful conduct
- Punitive Damages, sanctions and certain fee awards
- Business transactions with clients
- Losses arising out of the business side of practice of law
  - Lost or stolen client funds or documents/property
  - Mishandling of client funds
- Defense of ethics complaints

OSB Professional Liability Fund

PLF EXCESS COVERAGE: WHY?

- Primary Plan provides only a minimum amount of money for each lawyer's mistakes
- Primary Plan **not** designed to cover a significant loss or many claims against one lawyer or a number of lawyers

OSB Professional Liability Fund

PLF EXCESS COVERAGE: WHAT IS IT?

- Independent from Primary Program and totally self-supporting
- Largest Excess carrier in Oregon
- Covers approximately 700 firms/2000 attorneys
- Limits from $700,000 to $9,700,000
- Cyber Liability coverage
  - Excluded at Primary

OSB Professional Liability Fund

CONTACTING US: IS THERE A DOWNSIDE?

- Short answer: No
- Communications with the PLF are confidential
- The PLF cannot discipline and does not report lawyers to the Bar
- We are here to help

OSB Professional Liability Fund

WHAT IS THE TAKE AWAY?

- You are in good company—eventually, almost everyone who practices law in Oregon will touch the PLF in some way
- Call us! We've got your back.
  - OAAP
  - PMAP
  - Claims

CHAPTER 2

Introduction to PLF Claims and Risk Management

Matthew A. Borrillo
Professional Liability Fund Director of Claims
Hong Dao
Professional Liability Fund Director of Practice Management Assistance Program

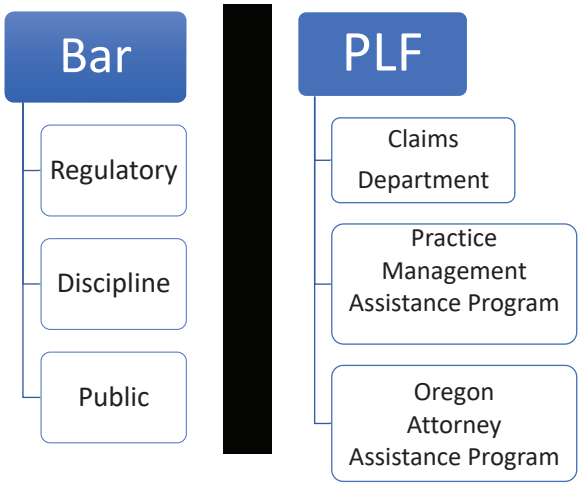
Introduction to PLF Claims and Risk Management

Matt Borrillo
Director of Claims

Hong Dao
Director of Practice Management Assistance Program (PMAP)

OSB Professional Liability Fund

Confidentiality Protected By Statute

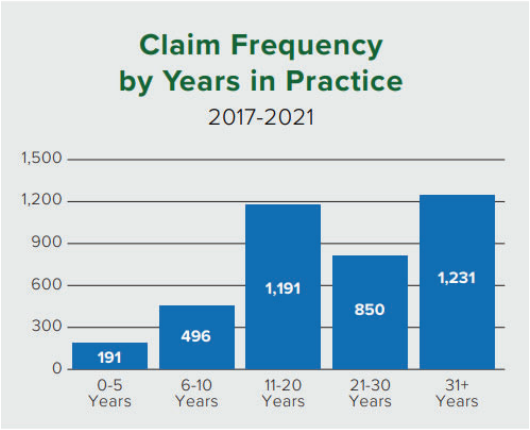


ORS 9.080, 9.568; OSB Bylaw 24; PLF Policies 6.150 - 6.300; ORPC 8.3

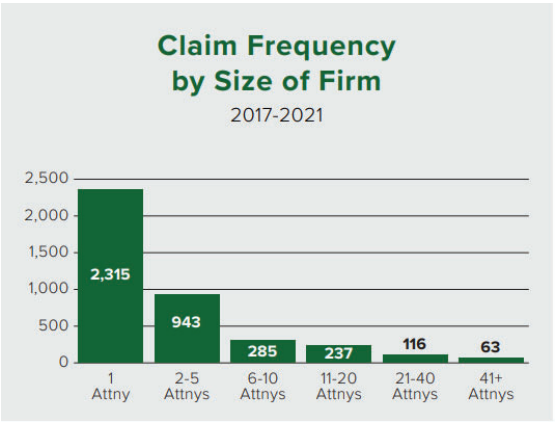
Likelihood of Claim

- 7,192 Lawyers Covered by the PLF
- Between 850 – 950 Claims Per Year
- Chances are roughly 1 in 7 (about 15%)
- 10 yrs (75%) - 15 yrs (81%) – 20 yrs (85%)

Rate of claims



New v. experienced attorneys



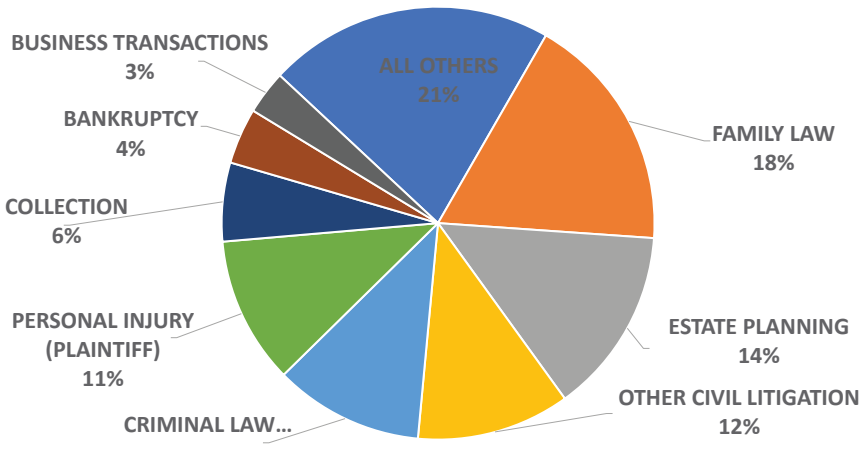
Solo/small firms v. big firms

Factors that lead to malpractice claims

- Inadequate office systems
- Inadequate experience in the law
- Failure to follow through
- Inadequate preparation
- Document drafting errors
- Failure to file/record documents
- Failure to meet deadline
- Trial errors
- Poor client relations

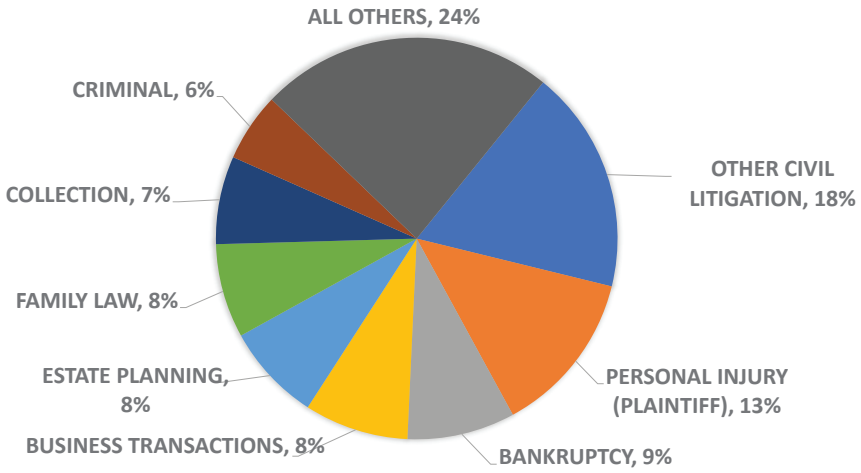
Number of Claims by Area of Law

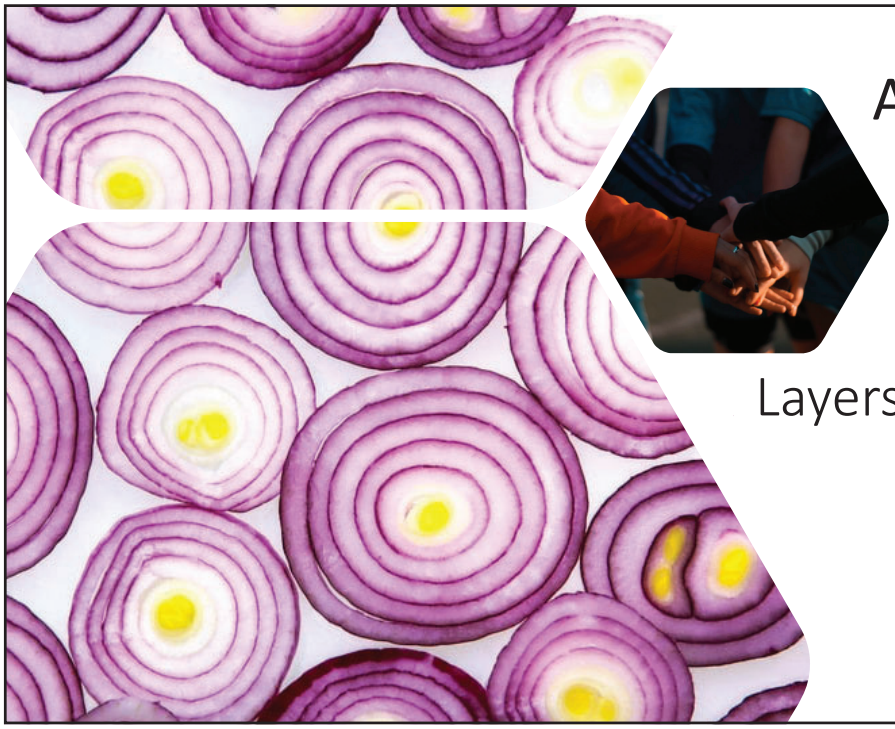
PLF Claims Closed in 2021 (646 claims)



Indemnity and Expense Paid

PLF Claims Closed in 2021 ($15.8m)



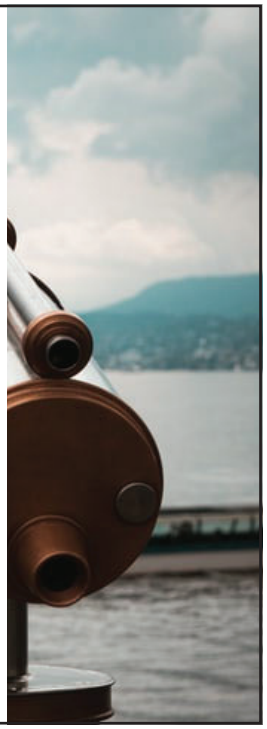


Anatomy of a Malpractice Claim

Layers of Causes – A Teamwork Approach

Client Does Not Know There May Be An Issue

- Gather Information
- Contact PLF
- Contact Excess Carrier
- Consider “repairs” so we can discuss them
- Consider ethics issues
- Inform the client



Informing the Client Potential/Actual Issue

- Call the PLF First
- Facts Only
- No Opinions
- Recommend Independent Legal Advice
- Discuss Ethical Issues
- Send Confirming Letter

Let the Professionals Help You

- Accept your role as a client/covered Party
- Talk to PLF before you talk to anyone

OSB Professional Liability Fund

https://osbplf.org
503-639-6911 | 800-452-1639

- Claims Attorneys
- Practice Management Attorneys
- Practice aids ■ Books ■ CLEs
- *InPractice* Blog ■ *InBrief* Newletter

oaap Oregon Attorney Assistance Program

https://oaap.org
503-226-1057 | 800-321-6227

- Short-term individual counseling
- Referral to other resources
- Support groups ■ Workshops


THANK
YOU

CHAPTER 3

REGULATION OF LAWYER CONDUCT IN OREGON

Linn Davis
Oregon State Bar Assistant General Counsel and Client Assistance Office Manager

THE REGULATION OF LAWYER CONDUCT IN OREGON

Learning the Ropes November 2022

Linn Davis Asst General Counsel/CAO

WHO WE ARE

WHO WE ARE

OREGON RULES OF PROFESSIONAL CONDUCT (RPC) 8.5

HTTPS://WWW.OSBAR.ORG/RULESREGS

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

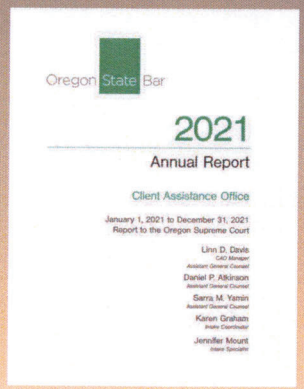
(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

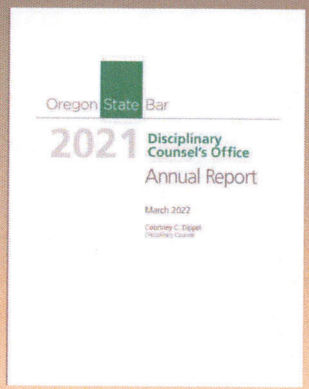
(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

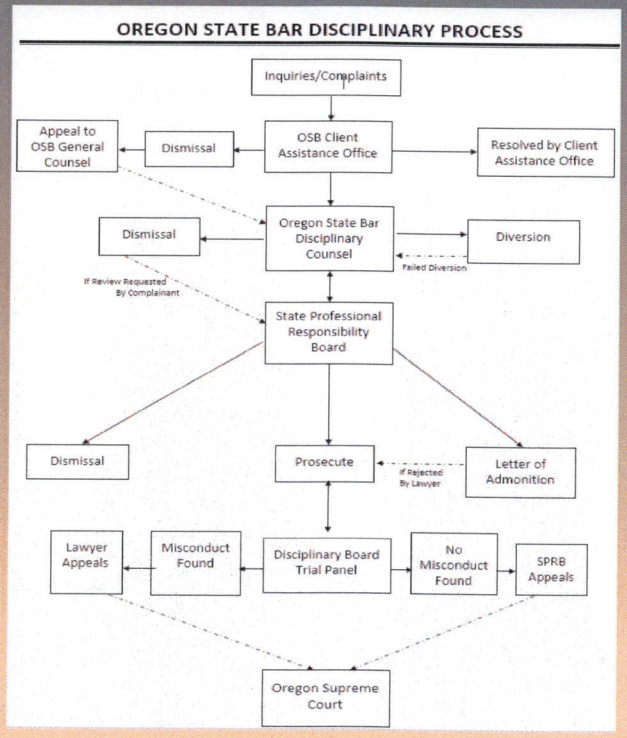
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ANNUAL REPORTS

HTTPS://WWW.OSBAR.ORG/SURVEYS_RESEARCH/SNRTOC.HTML







CLIENT ASSISTANCE OFFICE (CAO)

OSB Rules of Procedure (BR) Rule 2.5 Intake and Review of Inquiries and Complaints by CAO

(a) Client Assistance Office. The Bar shall maintain a Client Assistance Office, separate from that of Disciplinary Counsel. The Client Assistance Office shall, to the extent possible and resources permitting, receive, review, and respond to all inquiries from the public concerning the conduct of attorneys and may refer inquirers to other resources. The Client Assistance Office will consider inquiries submitted in person, by telephone or by e-mail, but may require the complainant to submit the matter in writing before taking any action. The Client Assistance Office will determine the manner and extent of review required for the appropriate disposition of any inquiry.

(b) Disposition by Client Assistance Office.

(1) If the Client Assistance Office determines that, even if true, an inquiry does not allege misconduct, it shall dismiss the inquiry with written notice to the complainant and to the attorney named in the inquiry.

(2) If the Client Assistance Office determines, after reviewing the inquiry and any other information deemed relevant, that there is sufficient evidence to support a reasonable belief that misconduct may have occurred, the inquiry shall be referred to Disciplinary Counsel as a grievance. Otherwise, the inquiry shall be dismissed with written notice to the complainant and the attorney.

(3) The Client Assistance Office may, at the request of the complainant, contact the attorney and attempt to assist the parties in resolving the complainant's concerns, but the provision of such assistance does not preclude a referral to Disciplinary Counsel of any matter brought to the attention of the Client Assistance Office.

(c) Review by General Counsel. Any inquiry dismissed by the Client Assistance Office may be reviewed by General Counsel upon written request of the complainant. General Counsel may request additional information from the complainant or the attorney and, after review, shall either affirm the Client Assistance Office dismissal or refer the inquiry to Disciplinary Counsel as a grievance. General Counsel may affirm the dismissal by adopting the reasoning of the Client Assistance Office without addition discussion. The decision of General Counsel is final.

DISCIPLINARY COUNSEL'S OFFICE (DCO)

Rule 2.6 Investigations (excerpt)

(a) Review of Grievance by Disciplinary Counsel.

(1) For grievances referred to Disciplinary Counsel by the Client Assistance Office pursuant to BR 2.5(a)(2), Disciplinary Counsel shall, within 14 days after receipt of the grievance, mail a copy of the grievance to the attorney, if the Client Assistance Office has not already done so, and notify the attorney that he or she must respond to the grievance in writing to Disciplinary Counsel within 21 days of the date Disciplinary Counsel requests such a response. Disciplinary Counsel may grant an extension of time to respond for good cause shown upon the written request of the attorney. An attorney need not respond to the grievance if he or she provided a response to the Client Assistance Office and is notified by Disciplinary Counsel that further information from the attorney is not necessary.

(2) If the attorney fails to respond to Disciplinary Counsel or to provide records requested by Disciplinary Counsel within the time allowed, Disciplinary Counsel may file a petition with the Disciplinary Board to suspend the attorney from the practice of law, pursuant to the procedure set forth in BR 7.1. Notwithstanding the filing of a petition under this rule, Disciplinary Counsel may investigate the grievance.

(3) Disciplinary Counsel may, if appropriate, offer to enter into a diversion agreement with the attorney pursuant to BR 2.10. If Disciplinary Counsel chooses not to offer a diversion agreement to the attorney pursuant to BR 2.10 and does not dismiss the grievance pursuant to BR 2.6(b), Disciplinary Counsel shall refer the grievance to the SPRB at a scheduled meeting.

(b) Dismissal of Grievance by Disciplinary Counsel. If, after considering a grievance, the response of the attorney, and any additional information deemed relevant, Disciplinary Counsel determines that probable cause does not exist to believe misconduct has occurred, Disciplinary Counsel shall dismiss the grievance. Disciplinary Counsel shall notify the complainant and the attorney of the dismissal in writing. A complainant may contest in writing the action taken by Disciplinary Counsel in dismissing his or her grievance, in which case Disciplinary Counsel shall submit a report on the grievance to the SPRB at a scheduled meeting. The SPRB shall thereafter take such action as it deems appropriate.

DISCIPLINARY COUNSEL'S OFFICE (DCO)

RPC 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS (excerpt)

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

BR 7.1 Suspension for Failure to Respond to a Subpoena (excerpt)

(a) Petition for Suspension. When an attorney fails without good cause to timely respond to a request from Disciplinary Counsel for information or records, or fails to respond to a subpoena issued pursuant to BR 2.2(b)(2), Disciplinary Counsel may petition the Disciplinary Board for an order immediately suspending the attorney until such time as the attorney responds to the request or complies with the subpoena. A petition under this rule shall allege that the attorney has not responded to requests for information or records or has not complied with a subpoena, and has not asserted a good-faith objection to responding or complying. The petition shall be supported by a declaration setting forth the efforts undertaken by Disciplinary Counsel to obtain the attorney's response or compliance.

(b) Procedure. Disciplinary Counsel shall file a petition under this rule with the Disciplinary Board Clerk. The Adjudicator shall have the authority to act on the matter for the Disciplinary Board. A copy of the petition and declaration shall be served on the attorney as set forth in BR 1.8(a).

(c) Response. Within 7 business days after service of the petition, the attorney may file a response with the Disciplinary Board Clerk, setting forth facts showing that the attorney has responded to the requests or complied with the subpoena, or the reasons why the attorney has not responded or complied. The attorney shall serve a copy of the response upon Disciplinary Counsel pursuant to BR 1.8(b). Disciplinary Counsel may file a reply to any response with the Disciplinary Board Clerk within 2 business days after being served with a copy of the attorney's response and shall serve a copy of the reply on the attorney.

(d) Review by the Disciplinary Board. Upon review, the Adjudicator shall issue an order that either denies the petition or immediately suspends the attorney from the practice of law for an indefinite period. The Adjudicator shall file the order with the Disciplinary Board Clerk, who shall promptly send copies to Disciplinary Counsel and the attorney.

NEITHER SILENCE NOR "BOOM SHAKALAKA" ARE VALID RESPONSES

[Bar Counsel charged that] "respondent failed without good cause "to respond to requests for information by Bar Counsel or the [board of bar overseers] made in the course of the processing of a complaint."[...]

The respondent alleged that he "DID COMPLY, and DID PROVIDE AN ANSWER, and my answer was provided in a form of SILENCE. (BOOM SHAKALAKA)." He also stated that, to the extent an answer was required, he "formally den[ied], and demand[ed] a Jury Trial."

By failing without good cause to cooperate with bar counsel's investigation of a complaint of misconduct, the respondent violated S.J.C. Rule 4:01, § 3 (1)."

In re Liviz (Mass. 2020)

DISCIPLINARY COUNSEL'S OFFICE (DCO)

Rule 2.6 Investigation (excerpt)

(c) Review of Grievance by SPRB.

(1) The SPRB shall evaluate a grievance based on the report of Disciplinary Counsel to determine whether probable cause exists to believe misconduct has occurred. The SPRB shall either dismiss the grievance, admonish the attorney, direct Disciplinary Counsel to file a formal complaint by the Bar against the attorney, or take action within the discretion granted to the SPRB by these rules.

- (A) If the SPRB determines that probable cause does not exist to believe misconduct has occurred, the SPRB shall dismiss the grievance and Disciplinary Counsel shall notify the complainant and the attorney of the dismissal in writing.
- (B) If the SPRB determines that the attorney should be admonished, Disciplinary Counsel shall so notify the attorney within 14 days of the SPRB's meeting. If an attorney refuses to accept the admonition within the time specified by Disciplinary Counsel, Disciplinary Counsel shall file a formal complaint against the attorney on behalf of the bar. Disciplinary Counsel shall notify the complainant in writing of the admonition of the attorney.
- (C) If the SPRB determines that the complaint should be investigated further, Disciplinary Counsel shall conduct the investigation and notify the complainant and the attorney in writing of such action.

DISCIPLINARY COUNSEL'S OFFICE (DCO)

Rule 6.1 Sanctions.

(a) Disciplinary Proceedings. The dispositions or sanctions in disciplinary proceedings or matters brought pursuant to BR 3.4 or 3.5 are

(1) dismissal of any charge or all charges;

(2) public reprimand;

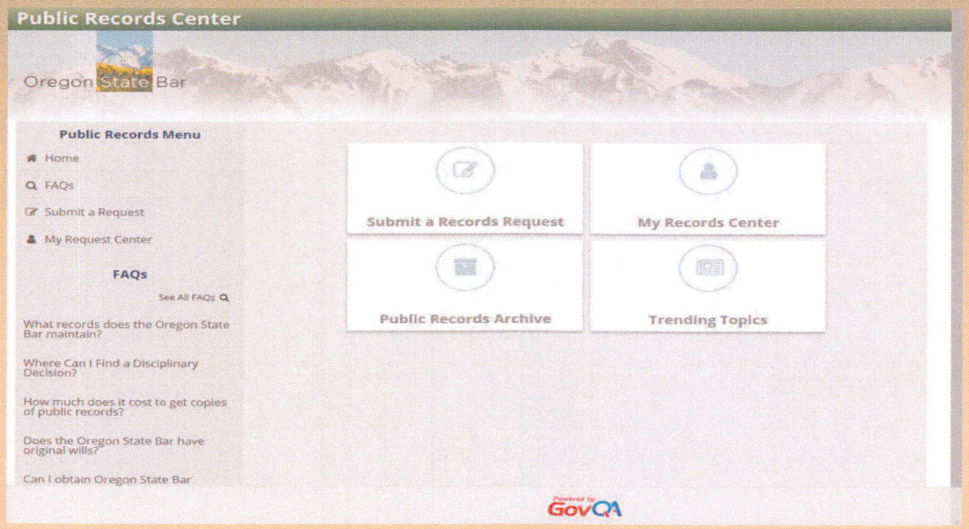
(3) suspension for periods from 30 days to five years;

(4) a suspension for any period designated in BR 6.1(a)(3) which may be stayed in whole or in part on the condition that designated probationary terms are met; or

(5) disbarment.

In conjunction with a disposition or sanction referred to in this rule, a respondent may be required to make restitution of some or all of the money, property, or fees received by the respondent in the representation of a client, or reimbursement to the Client Security Fund.

IN OREGON, LAWYER REGULATION IS PUBLIC



OUR ETHICAL DUTIES AS LAWYERS

- Loyalty
- Competence
- Integrity

LOYALTY - CONFLICTS

We have a duty to avoid current and former client conflicts of interest.

Know who your clients are. Avoid having clients you don't intend.

Reasonable expectations of the client test:

"to establish that the lawyer-client relationship exists based on reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent; by evidence placing the lawyer on notice that the putative client had that intent; by evidence that the lawyer shared the client's subjective intention to form the relationship; or by evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice. The evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client, as the lawyer" *In re Weidner*, 310 Or 757, 770 (1990).

LOYALTY - CONFLICTS

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

LOYALTY - CONFLICTS

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

LOYALTY - CONFLICTS

Rule 1.0(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Rule 1.0(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

LOYALTY – FORMER CLIENT CONFLICTS

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

LOYALTY – FORMER CLIENT CONFLICTS

RULE 1.9 DUTIES TO FORMER CLIENTS

(d) For purposes of this rule, matters are "substantially related" if

the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or

(2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

OTHER ASPECTS OF LOYALTY – COMMUNICATION

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

OTHER ASPECTS OF LOYALTY – COMMUNICATION

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

OTHER ASPECTS OF LOYALTY – CONFIDENTIALITY

RULE 1.6 CONFIDENTIALITY OF INFORMATION

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RULE 1.0(f) "Information relating to the representation of a client"

denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

COMPETENT REPRESENTATION REQUIRES

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMPETENT REPRESENTATION ALSO REQUIRES

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Pattern of failing to take action when action is needed = neglect of a legal matter.

INTEGRITY

Rule 1.2(b) – Don't assist a client in fraud or illegal conduct

Rule 3.1 – Don't pursue claims or contentions that you know are lacking in factual or legal merit.

Rule 4.1 Truthfulness - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting in an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

INTEGRITY

Rules 3.3 Candor Toward 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 opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

INTEGRITY

Rules 3.3 Candor Toward Tribunal continued

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

INTEGRITY

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL (excerpt)

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or (3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

INTEGRITY

RULE 8.4 MISCONDUCT (excerpt)

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice;

INTEGRITY

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

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

INTEGRITY

Rule 8.4(a) It is professional misconduct for a lawyer to:

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

REPORTING DUTIES

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or apply to lawyers who obtain such knowledge or evidence while: (1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee; (2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or (3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.

(d) This rule does not require disclosure of mediation communications otherwise protected by ORS 36.220.

REPORTING DUTIES

Rule 8.1 Bar Admission and Disciplinary Matters

(b) A lawyer admitted to practice in this state shall, within 30 days after receiving notice thereof, report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.

REPORTING DUTIES

Rule 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATIONS

(l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.

REPORTING DUTIES

OSB Rules of Procedure Rule 1.11 Designation of Contact Information.

(a) All attorneys must designate, on a form approved by the Bar, a current business address and telephone number, or in the absence thereof, a current residence address and telephone number. A post office address designation must be accompanied by a street address.

(b) All attorneys must also designate an e-mail address for receipt of bar notices and correspondence except (i) attorneys whose status is retired and (ii) attorneys for whom reasonable accommodation is required by applicable law.

(c) An attorney seeking an exemption from the e-mail address requirement in paragraph (b)(ii) must submit a written request to the Chief Executive Officer, whose decision on the request will be final.

(d) It is the duty of all attorneys promptly to notify the Bar in writing of any change in his or her contact information. A new designation is not effective until actually received by the Bar.

PROFESSIONALISM?

March 8, 2017

Two Rivers Correctional Institute
82911 Beach Access Road
Umatilla, OR 97882

Re: Consultation Fee of $125

Dear Mr.

Given that you are a convicted sex offender, pervert and miscreant, it is difficult to see how you could conceivably have any moral or intellectual high ground upon which to accuse anybody of anything. Maybe that is why you are spending a substantial part of the rest of your life in prison.

First, and foremost, you are an idiot. For what it is worth, I spent over a half an hour with your mother discussing your legal problem. I normally bill at $250 an hour. So I earned my money. Nevertheless, I felt absolutely terrible for your elderly mother having such an abysmal failure and a despicable moral idiot for a son. For the $125 I charged her, you are simply not worth dealing with. I communicated this response to the Oregon State Bar after you made a frivolous ethical complaint. On January 9, 2017, I had already refunded your mother $125, simply because you and your case where not worth my time to deal with. Again, I felt absolutely terrible for your mother having to put up with trash like you for offspring.

Enjoy your time in prison.

PROFESSIONALISM?

Re: Doobie Brothers *Listen to the Music*

Dear Mr. Murray:

We're writing on behalf of our clients, the Doobie Brothers. The Doobie Brothers perform and recorded the song *Listen to the Music*, which Tom Johnston of the Doobie Brothers wrote. It's a fine song. I know you agree because you keep using it in ads for your Zero Hucks Given golf shirts. However, given that you haven't paid to use it, maybe you should change the company name to "Zero Bucks Given."

We understand that you're running other ads using music from other of our clients. It seems like the only person who uses our clients' music without permission more than you do is Donald Trump.

This is the part where I'm supposed to cite the United States Copyright Act, excoriate you for not complying with some subparagraph that I'm too lazy to look up and threaten you with eternal damnation for doing so. But you already earned that with those Garfield movies. And you already know you can't use music in ads without paying for it.

Bill Murray
September 23, 2020
Page 2

We'd almost be OK with it if the shirts weren't so damn ugly. But it is what it is. So in the immortal words of Jean Paul Sartre, "Au revoir Golfer. Et payez!"

Sincerely,

Peter T. Paterno

Peter T. Paterno
of King, Holmes, Paterno & Soriano, LLP

PROFESSIONALISM

Oregon State Bar

Statement of Professionalism

Adopted by the Oregon State Bar House of Delegates and Approved by the Supreme Court of Oregon effective September 16, 2019

As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is consistent conduct that includes compliance with all ethical rules promulgated by the Oregon Supreme Court, courageous representation of clients, striving for the public good and complying with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts and all others:

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client's goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.

Oregon State Bar • 16037 SW Upper Boones Ferry Rd • PO Box 231935 • Tigard, OR 97281-1935
503.620.0222 or toll-free in Oregon 800.452.8260

Legal Ethics Helpline

503-431-6475

Oregon lawyers should use this line for personal ethics assistance from OSB counsel. Members of the public should call the Client Assistance Office at 503 620-0222.

OTHER HELPFUL RESOURCES

Oregon Formal Ethics Opinions Online: https://www.osbar.org/ethics/toc.html

OSB Bar Bulletin Bar Counsel Archive: https://www.osbar.org/ethics/bulletinbarcounsel.html (also valuable are the Managing Your Practice columns)

The Ethical Oregon Lawyer (OSB Legal Pubs 2015) available at BarBooks online or in print.

OSB Professional Liability Fund www.osbplf.org

Oregon Law Practice Management blog http://oregonlawpracticemanagement.com/

Oregon Attorney Assistance Program www.oaap.org 503 226-1057 800 321-6227 (OAAP)

OSB Fee Dispute Resolution Program https://www.osbar.org/feedisputeresolution

CHAPTER 4

PROFESSIONALISM: BE THE PERSON YOUR DOG THINKS YOU ARE

The Honorable John V. Acosta
United States Magistrate Judge
The Honorable Eric L. Dahlin
Multnomah County Circuit Court Judge

OSB PLF Learning The Ropes Program
"Professionalism: Be the Person Your Dog Thinks You Are"
Tuesday, November 8, 2022 @ 11:15 a.m. to 12:15 p.m.

The Honorable John V. Acosta, United States Magistrate Judge
The Honorable Eric L. Dahlin, Multnomah County Circuit Court Judge

RESOURCES:

Professionalism statements:

OSB Professionalism Statement
United States District Court, Oregon, Professionalism Statement

Cases:

Ahanchian v. Xenon Pictures, Inc., 624 F. 3d 1253 (9th Cir. 2010)
Art Ask Agency v. The Individuals, et al., Case No. 20-cv-1666 (N.D. Ill.) (March 6, 2020 Order).
La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC, Case No.: 17-CV-1124-MMA(WVG), 2019 WL 4141237 (S.D. Ca. Aug. 30, 2019)
Sahyers v. Prugh, Holliday & Karatinos, *P.L.*, 560 F.3d 1241 (11th Cir. 2009)
Smith v. City of Medford, Case No. 1:17-cv-00931-CL (April 13, 2020 Order)
Thomsen v. Naphcare, Inc., Case No. 3:19-00969-AC (April 6, 2020 Order)
"Why Kill All the Lawyers," *OSB Bulletin* (Jan. 1999)
Wisner v. Laney, 984 N.E. 2d 1201 (Ind. 2012)

Articles:

"Civility," *ABA Journal* (January 2013)
"Ivory Tower Interventions: Responding to Professionalism Dilemmas with Judges," *OSB Bulletin* (July 2020)
"Professionalism for Litigation and Courtroom Practice," *OSB Bulletin* (August 2007)

Examples:

George H.W. Bush letter to Bill Clinton, January 20, 1993.

I. Professionalism Is Not Ethics.

A. Ethics (Rules of Professional Responsibility):

1. A set of written rules that tell you what you must do and must refrain from doing

2. Being ethical can be "the passing grade"; the minimum required.

B. Professionalism.

1. A set of aspirational goals – "What we should – and should not – do."

2. Think of it as the "What if my mother was watching?" standard.

a. Or, think of it as the "What would I think of myself" standard.

b. Better still, would you still be that person your dog thinks you are?

II. What Does "Professionalism" Mean?

A. Keep your word.

B. Agree to disagree – agreeably.

C. Extend professional courtesies.

D. Be courteous to and respectful of everyone.

E. Don't let the other lawyer control your behavior.

F. Don't do something just because you can.

G. Don't take unfair advantage of opposing counsel.

III. Why Professionalism? Quality of Life

A. You're staring a career that likely will last for 40 years.

B. Do you want to live the next 40 years as a cage fighter?

C. Beware the "adversary creep" into your personal life.

1. Will you be able to be the person your dog thinks you are if you spend 8, 10, or 12 hours a day, week, after month, after year behaving like a cage fighter?

2. "Dad, when you yell at me . . . ."

IV. Why Professionalism? Career Satisfaction

A. Professionalism avoids ethical problems.

1. Being late to hearings and meetings, missing deadlines, and last-minute efforts to meet deadlines = an increased risk of error = malpractice claims.

2. Personal lack of attention to detail.

a. *Example*: issuing a garnishment on a debtor who is not in default.

3. Failing to communicate, or to communicate effectively, with clients.

a. *Example*: every month the OSB Bulletin's disciplinary notices contained examples of Oregon lawyers who were disciplined in whole or in part because they didn't communicate with clients.

4. Substance abuse.

a. *Example*: DUIs b'c of alcohol abuse.

B. What kind of clients do you want to have?

1. What kind of lawyers do good clients want to have?

2. "junk-yard dogs" usually attract junk-yard clients.

3. Most clients, particularly institutional, corporate, and organizational clients, don't want to be represented by a lawyer who will damage their public image, will diminish the appeal of their product or service, will act in ways that are inconsistent with the entity's culture, or will detrimentally affect the court's perception of them in future cases.

C. Do you want to encourage malpractice claims, bar complaints, and billing disputes?

1. The importance of a legal "bedside manner."

D. You never know who you will encounter in your career 10, 15, or 20 years later.

1. What a different path . . . . All those I encountered over the years (judgeship, partnership, bar committees, community service, law school teaching) who could have damaged by career path had I not been professional during my encounters with them.

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<u>V. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Jurors.</u>

A. Jurors: they notice when lawyers are professional and exhibit good manners – and when they aren't professional and are poorly behaved. Examples:

1. "I had to go home and remind myself that it was not about the lawyer but was about the [party]. It was distracting from the merits."

2. Found for party "in spite of" that party's lawyer.

3. Did not like the lawyer's condescending; contemptuous, harsh tone.

4. Dislike of lawyers' "drama" (one referred to it as "BS") in the courtroom.

B. Jurors: want lawyers to use trial time efficiently and effectively. Observations about poor use of time include:

1. Lawyers need to be more concise; questions should be to the point, clear, short.

2. Lawyer talked too much; kept talking; didn't get to the point.

a. "80% of what the lawyers talked about was irrelevant."

b. "We're pretty smart – the lawyers didn't need to ask the same thing over and over."

C. Jurors want lawyers to be organized and well prepared. Juror observations include:

1. Inability to use electronic evidence equipment made lawyer look "bumbling and unprofessional."

2. "I think it's important to be prepared . . . it seems like lawyers are very patient with each other about this, which means it must be pretty typical to be digging around for documents in the middle of testimony, but I find it to be a waste of time and therefore frustrating."

3. Pauses between questions were frustrating because they dragged out the trial when the trial already was long; made the lawyer look disorganized.

VI. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Judges.

A. Judges and their staffs notice when professionalism is present and also when it's absent.

B. Judges can publicize unprofessional behavior if the unprofessional behavior is egregious enough:

1. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253 (9th Cir. 2010):

Illustrates the danger of sharp tactics and the use of a technical and narrow reading of rules.

Court criticized district court for not exercising its discretion to enforce the dictates of FRCP 1 to defendant's counsel's unprofessional conduct.

Opinion excerpt: Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. . . . Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. . . .

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. . . . Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries.

2. *La Jolla Spa Md, Inc. v. Avidas Pharmaceuticals, LLC*, 2019 WL 4141237 (S.D. Ca. Aug. 8, 2019):

Illustrates the financial consequences of unprofessional behavior: the court wrote a 23-page opinion to impose sanctions in the amount of $28,502.03 on plaintiff's lawyer.

Opinion excerpt: "Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes's atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it. [Plaintiff's lawyers'] frivolous, willful, vexatious conduct greatly expanded the Gardner

deposition far beyond what the proceedings would have lasted without her unending unjustified interruptions and harassment of [defense counsel]."

The court ordered plaintiff's counsel to self-report the opinion to the Pennsylvania bar along with all the exhibits (including the sanctions hearing transcript) and ordered her to attach the opinion to any pro hac vice application to the S.D. Ca., and further ordered that "This requirement shall have no expiration date and shall remain in effect *in perpetuity*."

3. *Sayers* v. *Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. 2009):

Illustrates the danger of following a client's instructions without fulfilling the role of adviser to your client and officer of the court.

Court found plaintiff to be the prevailing party but denied award of attorney fees because the "reasonable fee is no fee."

Opinion excerpt: The district court's inherent powers support its decision here. . . . [T]he lawyer for Plaintiff made absolutely no effort – no phone call; no email; no letter – to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and – without a word to Defendants in advance – just sued his fellow lawyers. FN7 As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court. The district court refused to reward – and thereby to encourage – uncivil conduct by awarding Plaintiff attorney's fees or costs.

> FN7: This explanation counts for little: a lawyer's duties as a member of the bar – an officer of the court – are generally greater than a lawyer's duties to the client. *See Malautea v. Suzuki Motor Co.,* 987 F.2d 1536, 1546 (11th Cir. 1993) ("An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.").

4. *Wisner v. Laney*, 984 N.E.2d 1201 (Ind. 2012):

Illustrates: judges' frustration with lawyers' constant bickering and the consequences of being drawn into opposing counsel's bad behavior and responding in kind.

Opinion excerpt: "Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and

civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it."

"A jury trial is not a free-for-all. It is a civil forum in which advocates represent their clients before a panel of citizens, in front of a judicial officer who is responsible for enforcing the rules of procedure and rules of evidence and assuring the proper behavior of everyone in the courtroom. . . . It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession."

5. *In re Starr*, 330 Or. 385, 394 (2000) (stating that "persistent, even reckless, lack of professionalism" is a trait or mindset relevant to reinstatement to the bar, equivalent in importance to "failure to acknowledge prior wrongdoing".

VII. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Public Confidence in the Justice System.

A. "What would Atticus Do?"

B. Atticus Finch and Top 100 Heroes in American Film.

C. A word about lawyer jokes:

1. I stopped telling them a few years ago.

2. "Jokes about socially unacceptable things aren't just "jokes." They serve a function of normalizing that unacceptable thing, of telling the people who agree with you that, yes, this is an okay thing to talk about."

VIII. Professionalism in Writing.

A. Almost always, your written work product is the first impression and is the basis for your credibility with the court and other lawyers.

1. "Half of what we say is that we are the ones saying it."

2. When the judge sees your name on the docket or a brief, will the reaction be relief or dread.

B. Guidelines.

1. Don't make it personal.

2. Don't convert your client's case into a tug-of-war between the lawyers.

3. Content:

a. Avoid invectives and personal attacks against opposing counsel.

b. Avoid hyperbole, sarcasm, inflammatory adjectives, snide or condescending remarks

C. Examples of unprofessional writing:

1. "Plaintiff's counsel has over-litigated this case, starting with [the] largely frivolous . . . complaint."

2. "[Plaintiff] attempted to reach for the brass ring yet again." (Appearing in the fact summary.)

3. "At its core, this case is nothing more than an international forum shopping expedition that should not be countenanced by the court." (Appearing in the introduction.)

4. "This Declaration is a feeble attempt to question [witness's] analysis. However, it is a red herring at best."

5. "**I. Preliminary Statement - Criticism of the Response**

"[Defendant's] Response is one attempt at misdirection after another and, in fact, sounds like the cries of a guilty child being scolded by a parent for hitting a sibling: it was not my fault, it's their fault."

6. "**A. [Defendant] Wants to Take *Our* Ball and Make *Us* Go Home.**

> "Many a child on the playground has uttered the oft-quoted refrain, "I'm taking my ball and going home." [Defendant], acting the part of the playground bully, has taken this one step further. [Defendant] seeks to take *our* ball (*i.e.* the [Plaintiff's] insurance policy) and make *us* go home. The recess monitor, in this case the court, should not allow this result."

IX. Professionalism and Other Lawyers.

A. More experienced opponents.

1. The litigation process contemplates a skill and experience disparity between lawyers.

2. But be aware that some lawyers will deliberately try to take advantage of less skilled or experienced lawyers.

3. It will happen.

B. Guidelines for less experienced lawyers.

1. Don't retaliate.

1. Know the rules: rules of procedure, local rules, the "unwritten" rules, such as the "ask-first/take-first" deposition custom.

2. Generally, you aren't required to agree to something proposed by opposing counsel, and certainly not required to agree in immediate response to the suggestion being made.

3. Find an experienced lawyer you can consult as a resource.

4. For misstatements and accusations, protect your record by responding to accusations on the record or in writing.

5. If a lawyer engages in obstructionist behavior, always have ready the phone number of the assigned judge and/or presiding judge, and if it's likely to occur in deposition, consider videotaping the deposition.

C. Sanctions motions

1. Serious matter because it is a charge against an officer of the court that s/he has violated an ethics standard.

2. Some lawyers will threaten to file a sanctions motion as an intimidation tactic.

a. Make sure your conduct was appropriate, consider consulting with a more experienced lawyer.

b. If your conduct is proper, tell the other lawyer they should file the motion if they believe it necessary.

c. Generally, judges don't like sanctions motions because they are often filed as a tactic or without supporting evidence.

d. An ill-considered sanctions motion from opposing counsel likely will cause that lawyer to lose credibility with the court.

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Oregon State Bar

Statement of Professionalism

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- I will protect and improve the image of the legal profession in the eyes of the public.
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- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.

Professionalism for Litigation and Courtroom Practice

Conduct Counts

By Hon. Daniel L. Harris and John V. Acosta

Gettyimages

Ensuring the quality of our professional lives and improving the public's perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing.

Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience — and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation, arbitration and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues — many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don't always know what is and isn't right. They aren't familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side's life miserable. Some clients also might not appreciate that you and your opponent are professional colleagues and very likely will have cases against one another in the years to come, and they might not take into account that your relationship with a judge is important to your ability to represent them in the current case and other clients in future cases.

Adopting a "scorched-earth" or "take-no-prisoners" approach to litigation will not serve your client's interests and ultimately will work to your client's disadvantage in resolving the dispute. A lawyer should defuse emotions that might interfere with the effective handling of litigation and which could complicate or preclude resolution of a dispute in a way that best serves the client's interests. If a client requests or insists upon a course of action that is contrary to local custom or would be counterproductive to the client's interests, tell the client so and explain why. Some clients might take longer to understand this notion than will others, but you can't represent your client's interests by taking an action you know will ultimately harm those interests.

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can't do or agree to something, then say you can't do or agree to it. You'll find that a little candor goes a long way.

4. Don't fudge.

Credibility is everything. Some lawyers gain a reputation for being fudg-

ers. They overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer's ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don't always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn't devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can't be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don't take it as a personal affront.

6. Extend professional courtesies.

"Live by the sword, die by the sword." It's a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won't prejudice your client, there's usually no legitimate reason not to agree to an opponent's request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can't demonstrate prejudice to your client or unreasonableness by your opponent, think about how you'll look to the judge. The time will come when you'll need an extension, reset or rescheduling of a deadline or event. When that time comes, don't expect your opponent to be reasonable toward you if you've refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing it for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as: conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can't be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can't belittle or mistreat courthouse staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into

better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don't agree with — especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don't agree with in the courtroom. This tends to undermine a lawyer's effectiveness and credibility in the courtroom. The advice of one judge is to "not take a judge's ruling or decision personally."

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don't object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say "objection," and in a summary fashion state the basis for the objection, such as "relevance" or "hearsay." If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate "speaking objections," where the attorney ends up giving information to the jury that can't be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them.

Don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks.

Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don't overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you're creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer's office two or more days later.

15. Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or inexperience, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client — and make you look foolish in the process.

16. Don't do something just because you can.

Justice Potter Stewart once said, "There is a big difference between what you have a right to do and what is right to do." No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don't require that lawyers be cordial to one another. On the other hand, think about how you'd like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don't behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren't different just because the judge isn't present to watch your every move. If you wouldn't engage in the behavior in front of a judge, then don't do so when the judge isn't around.

18. Don't let your opponent control your behavior.

Some lawyers behave unreasonably or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to "getting back" at them. They know that if they can get you to focus on them, then you'll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client's case, they've won. So

keep your balance. Your client deserves an objective, diligent advocate — not a hothead bent on vengeance against another lawyer.

19. Don't take yourself too seriously.

A wise practitioner once said, "Take what you do seriously, but not yourself." Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

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Judges and Lawyers in Partnership

The Practical Rationale for Professionalism

By the Hon. John V. Acosta and Richard J. Vangelisti

The role of lawyers and judges is to help people in our legal system simultaneously exercise their rights and reach the common good under a rule of law. Our mandate of professionalism emphasizes the roles that judges and lawyers alike have in maintaining the integrity of the judicial process, protecting the public and ensuring the future of our profession.

Why Professionalism?

Justice Sandra Day O'Connor explained: "Lawyers possess the keys to justice under a rule of law, the keys that open the courtroom door. Those keys are not held for lawyers' own private purposes; they are held in trust for those who would seek justice, rich and poor alike."[1] Professionalism can be defined as the continuous affirmation in our day-to-day actions that we are striving for the higher ideal of justice for our clients and ultimately for the public good. When we step into the federal courthouse in Portland, lawyers are reminded of their solemn commitment to professionalism: "The First Duty of Society is Justice." It's difficult to convince clients, other lawyers and the court that you are fulfilling that duty if you are behaving as though you are ready to engage in a cage fight.

Professionalism and ethics are not synonymous. Ethics rules mandate minimum behavioral requirements, which if not met, usually result in some form of discipline from the state bar association, the regulatory body that oversees all lawyers. Professional-

ism embodies aspirational goals that lawyers, as practitioners of a distinguished profession, should strive to meet when dealing with each other, the court and clients. Conducting oneself professionally helps ensure public trust and confidence in the integrity of the justice system.

Professionalism also demonstrates the lawyer's integrity and respect for the judicial process, which in turn engenders credibility. In our profession, credibility is the currency of the realm. No lawyer gets much accomplished for a client, whether in the courtroom or in the conference room, unless he or she has built a foundation of credibility upon which to conduct the client's business. This enhanced credibility of the lawyer in the eyes of opposing counsel, the court and the jury inevitably helps a lawyer advocate towards an efficient and fair resolution of a dispute. Acting professionally helps to better focus opposing counsel, the court or the jury on the issues for decision rather than on the conduct of the lawyers, avoiding a scenario that often leads to a written and oral record clouded with personal attacks and other boorish noise.

Professionalism and effective advocacy go hand-in-hand. Professionalism begets trust, and cooperation is sure to follow closely behind. This trust and cooperation translates to lower costs of litigation and a higher probability of an early and fair resolution.

Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer's good reputation — the legacy that remains beyond one's life — will be the better for having acted with professionalism.

Finally, professionalism is necessary to maintain the integrity of the judicial process and the public's confidence in the judicial system. Professionalism increases public confidence in individual lawyers and judges as well as the judicial system. The public has a greater respect for the judicial process and the results of that process if the lawyers and judges exhibit professionalism while working through a dispute. If judges and lawyers do not act to ensure professionalism, through legislative action the public may seek changes to the judicial branch or alter the exclusive privilege of lawyers to represent clients before the courts or in legal matters.

Causes of Unprofessional Conduct

Unprofessional conduct is the result of a number of factors. First, unprofessional conduct may result from a belief that a lawyer is effective only if he or she acts like a "Rambo litigator," "hired gun," "junkyard dog," "hard fighter" or "bulldog." Some lawyers who labor under this belief are often compensating for a lack of experience, skill or confidence.

Second, client perceptions — that their lawyer must be obnoxious to achieve successful results or outcomes — are sometimes a factor in unprofessional behavior. Some clients are convinced that litigation should be conducted like armed combat against an enemy, and such clients may shop around until they find a lawyer or firm they perceive to have a "Rambo litigator" style. When we encounter prospective clients who subscribe to this philosophy, we should stop to consider whether we want to represent such clients. Often, they are the clients who criticize your judgment, find ways to dispute your fees and never seem to be happy with any result you obtain for them.

Third, the adversarial nature of the litigation process or a tense business transaction can be a factor. But while the legal process is adversarial it need not be acrimonious. We should strive to agree to disagree and not resort to personal attacks, condescending comments and threats of sanctions motions, whether orally, in briefs or in letters or e-mails, in an effort to get our way or to simply harass our opponent.

Fourth, the adversary system is inherently stressful. Practicing law is difficult enough without artificially ramping up the stress level. Be mindful too that at any given time an opponent might be coping with stress, perhaps significant, because of workload, events in his or her personal life or other factors.

Fifth, the business of practicing law can be a factor — the bottom line of the law firm or law office environment. Billable hours, high case volumes, insufficient support staff, administrative chores, client expectations, marketing and other obligations and duties can result in a "piling on" feeling of despair. The sheer weight of these responsibilities can make it difficult for us to be civil to one another, and that's when professionalism suffers.

Sixth, and finally, are size and technology. As the bar's membership grows, there is less opportunity for its members to know each other. You're less likely to be rude and harsh toward a lawyer you've known for some period of time and will deal with again, than you are toward a lawyer you've never met and likely won't encounter again. Technology hampers collegiality because it allows us to insulate ourselves from direct, real-time contact with one another. Meetings and phone calls to discuss a new case, confer over a motion or discuss trial exhibits and jury instructions are more likely to foster professionalism between lawyers than sending e-mails, texting messages or faxing letters back and forth.

Costs of Unprofessional Conduct

For starters, the costs of unprofessional conduct include a diminished quality of professional and personal life. We aren't hockey players. Do we want to spend eight, 10 or 12 hours a day engaging in the verbal and written equivalent of body-checking each other into the boards each time we interact with one another? We don't, and common sense tells us why: we can't behave badly day after day, for weeks, months and years of practicing law without becoming that personality in all aspects of our lives. Ultimately, the pernicious effect on one's family, friends and colleagues over the course of a 30- or 40-year career should be obvious.

Without professionalism lawyers are simply pieces in a game of survival of the fittest. In such a model, brute force dominates and what is right and just is often relegated to secondary importance or completely overlooked. In effect, lawyers devolve into mere agents of their respective clients' interests without regard to the broader picture of public good.

Unprofessional conduct also distorts the judicial process and "Equal Justice Under Law;" increases financial, business and personal costs to parties; inflicts personal stress on clients, lawyers and judges; causes personal and professional relationships to deteriorate; erodes personal physical and mental health; damages or destroys your reputation among colleagues and the public at large; and diminishes your ability to attract desirable clients.

The Relationship Among the Rules and Professionalism

Oregon's Rules of Professional Conduct (RPC or ethics) and

the various state and federal rules of procedure and evidence are mandatory rules. Professionalism, however, is a standard to which lawyers should aspire. Professionalism picks up where the ethics rules leave off. Professionalism means following the spirit of the rule, not just the letter of it, and the willingness to go beyond what is required to extend courtesies and accommodations to colleagues, including opponents, where doing so imposes no detriment on your client.

The Oregon State Bar's current "Statement of Professionalism," was adopted by the OSB House of Delegates and approved by the Oregon Supreme Court, effective Nov. 16, 2006. A "Statement of Professionalism" also has been adopted by the United States District Court for the District of Oregon. Other standards may apply in Oregon as well, as many professional organizations have adopted Professionalism goals. See, for example, the Multnomah Bar Association's "Commitment to Professionalism," adopted June 1, 2004. These documents may be found on the Oregon State Bar's Professionalism web page, *www.osbar.org/onld/professionalism.html.*

Whether it's a court or an organization that has adopted a statement of professionalism, the fact that it has embraced those ideals demonstrates the expectation that a standard of conduct higher than the floor created by the ethics rules applies. Simply put, a statement of professionalism sends a message that it is not enough for lawyers to comply only with the ethics rules or rules of procedure.

Moreover, as a self-regulating profession, lawyers have the primary responsibility of ensuring professionalism. While a wide range of options are available to a lawyer to effectively deal with the unprofessional conduct of another lawyer, instances exist when a lawyer must at some point present the issue to the court for resolution.

When to Bring Unprofessional Conduct to the Court's Attention

Unprofessional conduct should be brought to the attention of the court only as a last resort when a party's rights are prejudiced or there is a real threat of prejudice. Lawyers — the persons charged with resolving differences — are in the best position to resolve professionalism issues. A lawyer may take a number of steps to obviate the need for court intervention. If those efforts are unsuccessful or futile, then the matter should be presented to the court after the appropriate conferral. Consider these three steps when confronting what you perceive to be a lack of civility.

First, before making a judgment about whether a lawyer has acted unprofessionally, determine the facts. A lawyer's conduct is often caused by circumstances outside his or her control. For example, if a lawyer is not producing responsive documents in a timely manner, the delay may be caused by the actions of the client rather than the lawyer. Similarly, a delay in responding to requests for scheduling or conferral may be caused by another professional commitment or even a personal issue. Effective communication can often reveal whether there is an issue of professionalism. A telephone call or e-mail to the lawyer, co-counsel or an assistant can often clear up the matter. The bottom line is to get your facts straight before operating on the assumption that a lawyer is acting unprofessionally. With a full picture of the facts, you can effectively respond.

Second, when faced with unprofessional conduct, the first strategy may be to ignore it. The conduct may not be worth acknowledging, and at times a decision to not respond to unprofessional conduct will send the signal to the offending lawyer that unprofessional conduct will be ineffective. Some lawyers, often those who are more experienced, use unprofessional conduct as a tool to throw their opponent off balance. The offending lawyer, however, may abandon the costly approach of unprofessionalism if it proves ineffective. Sometimes ignoring unprofessional behavior requires patience, even a lot of it, and it should never be ignored if there is a real threat of prejudice to the client. Mostly, however, demonstrating that the behavior won't work and focusing on the merits of the case often is the best way to put an end to such tactics.

Third, after exercising judgment as to whether to respond to the unprofessional conduct, directly informing your opponent of the unprofessional conduct can be effective. Even those who act unprofessionally do not like to think of themselves as having acted in such a way. They might think of themselves as fighting hard or being zealous for their client. Reminding the other lawyer of basic principles of courteous or fairness or referring to the applicable standards of conduct promulgated by the court, however, can cause the other lawyer to moderate or stop the behavior.

If informal efforts are not successful, an issue of unprofessional conduct should be presented to the court if the conduct is interfering with a party's rights or the "just, speedy and inexpensive

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determination" of an action. FRCP 1; ORCP 1 B. Unprofessional conduct between lawyers that is merely rude, bothersome or petty should not be brought to the attention of the court unless it begins to interfere with discovery or the case's overall progress. A good guideline is that unprofessionalism should be brought to the attention of the court either when an ethics or court rule is clearly implicated or when a history of sufficiently documented unprofessional conduct demonstrates a threat to the rights of a party.

Obviously, considerations of time and cost are at play, but these considerations must be weighed against the potential benefit of a favorable ruling and more generally addressing the unprofessional conduct.

How to Bring Unprofessional Conduct to the Attention of the Court

The nature of the conduct determines how the conduct should be brought to the court's attention. If the unprofessional conduct occurs during trial or hearing, the court usually will address it without the need for a lawyer to call attention to it by objection or request for a side bar. If the conduct occurs outside the presence of the court, a request for a pretrial conference may be appropriate to address the issue. If an issue arises during a deposition, judges often are available by telephone to immediately address the problem. Other instances will require a formal motion.

Before a motion can be filed, however, the lawyer must have a personal or telephone conference with opposing counsel on issues or disputes. Oregon's conferral rules, Local Rule 7.1 (federal) and UTCR 5.010 (state), require a "good faith" effort to confer.

These conferral rules require that the lawyers actually talk or explain in a certificate why conferral did not occur, and these rules are often strictly enforced.[2]

The conferral rules address the situation in which a lawyer may be obstructive or dilatory in the conferral process. If a lawyer refuses to confer, simply include that in the certification. A clear refusal to confer, however, does not happen frequently. The problems most often arise when a lawyer chooses not to provide sufficient information for a meaningful conferral. For example, some lawyers choose not investigate whether there may be responsive documents and simply "stand" on their objections. The failure of a lawyer to determine if requested documents actually exist can lead to the parties briefing and courts ruling on the discoverability of documents that do not exist. This scenario is costly to the parties and the court when it ends up ruling on hypotheticals.

Lack of Experience Can Play a Role

Often times, unprofessional conduct is the product of a lack of experience or a desire to compensate for inexperience. In some instances, inexperienced lawyers neither fully understand that they are expected to be professional, nor understand that a professional approach is the most effective, nor do they understand what is or is not professional. In yet other instances, an inexperienced lawyer may attempt to make up for lack of experience by engaging in short-sighted and obnoxious strategies to gain an advantage, however short-lived. Sometimes, inexperienced lawyers are told or "taught" that being subjected to sharp practices is just a right of passage — part of the hazing process. This "tradition" perpetuates unprofessionalism.

Responsible mentorship of younger lawyers is a key to instilling professionalism. Oregon law schools are answering the call to teach future lawyers that professionalism is expected and effective in law practice. The New Lawyers Division of the Oregon State Bar and various bar associations have mentorship programs. In addition to these formal programs, judges and lawyers at every opportunity should reach out to fellow lawyers — in words and deed — to spread the message of professionalism.

Conclusion

Professionalism is consistent with that shared value to do good that led us to law school. The citizens of Oregon and members of the bench and bar who each hold the privilege to serve the public expect and deserve professionalism in our judicial system. We must constantly renew our sense of commitment to our court system and the public good. The judges and lawyers of Oregon are in partnership to support one another to live the ideal of professionalism.

Whatever a lawyer may gain by unprofessional conduct is frequently short-lived. Unprofessional conduct is subject to the law of karma or that proverbial boomerang that returns to hit its thrower between the eyes. In our Oregon legal community, conduct unbecoming of our profession is noticed by other lawyers and eventually within the circle of judges. A lawyer can labor for years to build a good reputation, but a single act of unprofessionalism can cause that reputation to evaporate.

We should avoid engaging in unprofessional behavior even if the other side is doing so. We also should refrain in argument and written submissions from personal attacks or criticisms of opposing counsel. Model professional behavior when dealing with all others encountered in your daily practice, especially younger lawyers. These acts will reward the lawyer, the client and the public we serve. B

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Endnote

1 Speech, "Professionalism," Associate Justice Sandra Day O'Connor, 78 Oregon Law Review 385, 390 (Summer 1999).

2 See, for example, Section 4(A)(3) of the Multnomah County Civil Motion Panel Statement of Consensus: "[The certificate] must either state that the lawyers actually talked or state facts showing good cause why they did not."

Professionalism: A Judge's Perspective

By the Hon. John V. Acosta

Judges and lawyers are partners in ensuring professionalism. Each has a role to play in preventing and addressing unprofessional conduct that erodes the civility of practice and the quality of our professional lives. If judges and lawyers do not effectively respond to unprofessional conduct, or if they condone it by inaction, they effectively reward the actor to the detriment of the judicial process and the public's perception of our profession as a whole. Oregon lawyers and judges share a long and demonstrated commitment to ensuring that professionalism is always a foremost consideration. With all of this in mind, here is one judge's perspective on fulfilling the judicial role in addressing unprofessional conduct.

Court Authority to Address Issues of Professionalism

Yes. The court always may use its contempt power to address egregious behavior that occurs in its presence, but less severe behavior also can be — and is — the subject of court regulation. Best known are the obligations imposed on lawyers and parties under the civil rules' discovery provisions. Both the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure permit the court to impose sanctions for violations of the rules and for disregarding court orders. But the rules also permit the court to impose sanctions for conduct that undermines the purpose of the discovery rules even if the conduct is not willful. For example, FRCP 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," and subsection (a)(5)(A) of the rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. See, e.g., *Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc.*, 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, prolonged procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. See *Bilyeu v. City of Portland*, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

In addition, FRCP 83(a)(1) expressly authorizes district courts to "make and amend rules governing its practice," a source of authority that the District of Oregon has invoked to establish two rules that govern professional standards of conduct in the district. The first is LR 83-7, "Standards of Professional Conduct," providing that attorneys practicing in the District of Oregon must, among other things, be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this court's Statement of Professionalism.

The second local rule is LR 83-8, "Cooperation Among Counsel," which proscribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to "accommodate the legitimate requests of opposing counsel." Here, a reasonableness standard is applied to conduct occurring outside the judge's presence.

Finally, professionalism also is embodied in mandatory conferral requirements adopted by both the U.S. District Court and the Oregon Circuit Courts. See LR 7-1(a)(1)(A), requiring the parties to certify that before filing a motion, they "made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so"; and Oregon Circuit Court Uniform Trial Court Rule 5.010, requiring lawyers to certify that they have conferred on motions as a precondition to their filing.

These rules convey the message that judges expect lawyers to talk and attempt to resolve disputes that could lead to motions, and they apply to virtually every motion. Failure to comply with these rules will incur risk of having the motion denied outright. Ultimately, conferral requirements force lawyers to meaningfully discuss a motion and resolve the issues that lead to the filing of motions. When that occurs, parties are spared unnecessary time and expense, the case moves forward more quickly, and the lawyers might establish a foundation for resolving other disagreements without court involvement.

When Should the Court Review an Issue of Professionalism?

Judges can review an issue of professionalism when a potentially unprofessional act occurs in the judge's presence or when the issue is brought to the court's attention.

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The extent of the court's review will depend on the unique circumstances of each case. Keep in mind, however, that the court can on its own initiative inquire into conduct occurring outside the courtroom that appears to be unprofessional. For example, a constant flow of discovery or pretrial motions, especially when the motions are permeated with claims of unprofessional conduct, could result in the court ordering the attorneys to attend a hearing to explain their conduct. Judges do monitor their cases, and they will not look well upon conduct that clearly does not advance the merits of the case but instead could lead to unnecessary motions, delays in completing discovery, or unnecessarily prolonging the case. In federal court, a judge can shift to the parties the expense created by uncooperativeness by appointing a special master to preside over the parties' discovery activities, see FRCP 53(a)(1) (C), and requiring the parties to bear cost of the special master. See FRCP 53(a)(3).

How Should the Court Respond to an Issue of Professionalism?

This depends on the circumstances of the unprofessional conduct. First, the easy situation is when the conduct occurs in the judge's presence; the judge can often address it with an appropriate admonition. Remember that both state and federal courts in Oregon have established written expectations for professional behavior by lawyers, and the judge can give a pointed reminder of those expectations to the lawyer or lawyers. This could occur in the jury's presence, and while judges might try to avoid admonishing an attorney in the jury's presence, the attorney can always avoid such embarrassment by refraining from the behavior in the first place. Ultimately, the court must preserve the dignity of the court in the eyes of the jury and public in general, and doing that could require taking appropriate actions in front the jury or on the record.

Second, the court can address unprofessional content in lawyers' written submissions, either in the court's written decision or at hearing. Judges can remind counsel — on or off the record — that such language in a brief is neither helpful to the court nor professional.

Third, if a motion presents substantive violations of ethics, statutes or rules of procedure or evidence that also happen to be instances of unprofessional conduct, then the court can rely on those standards in imposing a commensurate sanction. See, for example, 28 U.S.C. § 1927 (sanctions for unreasonable or vexatious litigation conduct); FRCP 11(c) (sanctions); ORCP 17 D (same); FRCP 37 (expenses, sanctions, and expenses on failure to admit); ORCP 46 (same); UTCR 1.090(2) (sanctions for failure to comply with UTCR or SLR); UTCR 19 (contempt).

Fourth, if the judge anticipates issues of professionalism may arise in a case, there are always pretrial management procedures and rules for asserting greater control over the lawyers and their clients. See, for example, FRCP 16 (pretrial and scheduling conference); UTCR 6.010 (conferences in civil proceedings); Multnomah County SLR 6.014 (pre-trial case management conferences in civil actions).

Why is it a Challenge for Judges to Address Issues of Professionalism?

Most incidents of unprofessional conduct occur outside the presence of the judge. As an example, a discovery motion often involves accusations and counter-accusations, such that by the time it reaches the judge it's usually impossible to determine who, if anyone, is at fault.

Also, a potential incident of unprofessional conduct often has a limited factual record from which a judge may make determinations and, if there is a factual record, it may be dense with detail. It's difficult, sometimes impossible, and always time-consuming, for judges to try to determine who "started it." Thus, keep in mind that if you file a discovery motion that involves such conduct as a component of the dispute, you may well be disappointed in the outcome. Simply put, time constraints often force judges to move past such allegations and focus on promptly resolving the discovery dispute so that the parties can get on with discovery and the case will continue to move forward.

Further, the claimed conduct may be a culmination of discrete actions rather than a distinct and overt incident, making particularly difficult the determination of whether there was any unprofessional conduct at all. Judges don't live with a case the way lawyers do; they don't regularly interact with the lawyers on all matters pertaining to the case, and thus, they don't share the accusing lawyer's sense of frustration or even anger over the relationship with opposing counsel. What might look like unprofessional conduct to the accusing lawyer with many months of personal experience might look different to the judge reading the motion.

Finally, keep in mind that the source of the unprofessional conduct may become unclear if the accusing lawyer responds in similarly unprofessional fashion. Before you file a motion that involves allegations of unprofessional conduct by the other lawyer, and especially if you are seeking sanctions, first make sure that the other lawyer will not be able to say the same of you in his or her response. If she can, then don't be surprised when the judge denies your motion or admonishes both sides for unprofessional conduct.

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View From The Bench

Senior Judge Dan Harris

Enduring values

By Hon. Dan Harris
Senior Judge

I tried one of the most significant cases of my career in 1991. It involved a wrongful death action arising out of a crash on the Siskiyou Pass. The stakes were high. The competition between attorneys was intense. It wasn't the ultimate verdict that made it significant for me, it was the experience I had with the other jurists. The judge and the three other attorneys involved in this case all graduated from law school in the 1940s and 1950s. What I observed from this experience gave me a better understanding of what our profession was like a generation ago and how it has changed.

In this case I observed a judge and lawyers who showed great respect for each other. They were courteous at all time to all involved in the process. They were all well prepared and expected everyone else to be prepared. The lawyers freely extended professional courtesies and relied on verbal agreements with each other through out the process. They always kept their word. They played by the rules. There was no fudging or corner cutting. They maintained a steady and professional demeanor and appearance — even in the most intense situations — and exercised great restraint and control when it came to what they said, how they said it and what they objected to. The lawyers regularly conferred when issues would arise and only came to the judge when they couldn't fashion a solution themselves.

Now I understand, more than 25 years ago, I was witnessing practices and traditions that characterized our profession a generation ago, when the practice of law was viewed more as an "esteemed profession" and a "calling."[1] We have witnessed our profession become more of a business and a career. I have observed this change accelerate since I entered the profession in the early 1980s, especially from my perspective on the bench where I have had the opportunity to regularly observe the performance of lawyers.

Trying to go back to reclaim our profession's place in society, or recapture some of the traditions of generations past, is not realistic. We have to look forward and work at preserving those practices and values that have always worked for lawyers: credibility, competence, restraint and loyalty.

Credibility

A lawyer's credibility is everything in this profession. Credibility is earned from hard work, ethical practice and a believable and accurate advocacy. Some lawyers, in the heat of competition, are tempted to fudge with the facts or the law. Some lawyers will insert provisions into proposed judgments that go beyond the court's directive. Some lawyers cannot avoid the temptation to pass on information to a judge's staff that constitutes an *ex parte* contact. All of these practices undermine a lawyer's reputation. Once a reputation sets in for fudging, it is thereafter difficult to regain credibility with attorneys and judges. As stated by Justice John Paul Stevens: "An advocate who does not command the confidence of the judge bears a much heavier burden of persuasion than one who never misstates either the facts or the law."[2]

A lawyer's professional reputation is the currency of our profession. Work diligently at building it up and guard it at all costs. Then spend it frugally and wisely. And should you make a mistake that might diminish your reputation, do whatever you have to do to make amends, including the simple act of offering an apology.

Let your legal communications stand on their own legal footing without resorting to expressions of opinion or overstatement. Too often, attorneys use useless words, like "outrageous" or "ludicrous," to argue their point. This hurts rather than helps their arguments and takes away from the respect the court has for the analysis. Keep it objective and to the point.

Competence

The competent lawyer is first and foremost prepared. The process of pre-

paring for trial is usually much more than the trial itself. Devoting the necessary time to preparation will not only improve your chances of success but, more importantly, will establish a credibility and reputation that will serve you well in the long run. An important part of preparation should include the practice of stipulating with opposing counsel on as many aspects of the trial as possible. Anticipate evidentiary issues and attempt to work out agreements in advance. In many cases you can stipulate in advance to most of the exhibits, to the order of witnesses, to the appropriate resolution of evidentiary issues and to the jury instructions.

Develop a reputation for knowing the rules of procedure and evidence, and the basic skills used in court. Too many lawyers "wing it" too often. This will undermine your effectiveness as an advocate. Know and practice the fundamental procedures followed in trial: from jury selection to opening statements, to offering exhibits into the record to effective cross examination to making the closing argument.

In the end, you want the judge to say in his or her mind: I know this person. This lawyer is always well prepared, anticipates and tries to resolve in advance issues at trial, has talked with opposing counsel about stipulations, tries an efficient and effect case, and doesn't test the patience of the judge or jury.

Restraint

You can enhance your reputation and effectiveness as an advocate with the appropriate exercise of patience and restraint. Here are a few examples:

- *Don't respond immediately to that sharply worded email or letter from opposing counsel.* Produce a draft response if you must but wait for a day or two before you actually respond. Your response will be more professional, objective and effective if you have the patience to delay your response. This is a difficult task in today's world of instant communication, but it will produce significant dividends.
- *Don't do something just because you can.* We all remember what Justice Potter Stewart once said: "Sometimes there is a big difference between what you have a right to do and what is right to do." Before you decide to deny a good faith request for an extension or take advantage of opposing counsel for a missed deadline, consider how your actions will impact your reputation or future relationship with the other attorney. "Live by the sword, die by the sword," is a maxim that applies to our profession. You will most certainly be in a position someday where you are counting on a fellow lawyer to show restraint by extending to you a professional courtesy.
- *Don't let your opponent control your behavior.* We've all been there, in the heat of the contest, where we want to respond in kind to the way opposing counsel is characterizing you or our client. Don't let your opponent take you away from your game plan. Your client deserves an objective, diligent advocate — not a hothead bent on getting even with the other lawyer.
- *Learn to disagree, agreeably.* Disagreements are inherent in our profession but they don't have to devolve into a war of strong words, accusations and overstatements. Keep your discussion over disagreements cordial and objective — you will be a more effective advocate. Shakespeare reminded us of the more desirable practice in The Taming of the Shrew. Adversaries in law, he wrote, "strive mightily, but eat and drink as friends."

Loyalty

We have an ethical duty of loyalty to represent clients with competence and diligence, while maintaining confidences and avoiding conflicts of interest. This duty should be taken very seriously. The duty to loyalty does not, however, require you to be a puppet to your client's wishes. In the interest of preserving your credibility and reputation, you must insist at all time on being a counselor who balances a client's interests with your professional goals. Too many lawyers will "perform" for their clients by saying or writing things that aren't effective or credible. This may please a client in the short run but it almost always harms the client's interests, and the attorney's reputation, in the long run. Frankly, your reputation and credibility will rise or fall based on your ability to manage a client's expectations and demands.

Our duty to loyalty also includes an obligation to advise clients of the most efficient way to resolve the dispute. This should include apprising clients of the availability of mediation and other methods for resolving issues outside the courtroom. Clients should be informed of the effect litigation will have on them and the benefits — financial and otherwise — that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost.

Our approach to the practice of law has rapidly transitioned from a time exemplified by Atticus Finch into the 21st Century. Our profession is now very different in many ways, but fundamental values endure. They endure because employing these values will improve your effectiveness as an advocate while increasing the personal satisfaction you derive from your work.

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[1] The place of lawyers in American society has been recognized as holding a unique position of moral leadership since the founding of this Country. Alexis de Tocqueville in his famous study of American law and customs referred to lawyers as the Country's natural aristocracy.

[2] John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting. 12 St. John's J. L. Comm. 21 (1996).

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H

United States Court of Appeals,
Ninth Circuit.
Amir Cyrus AHANCHIAN, an individual, Plaintiff-Appellant,
v.
XENON PICTURES, INC., a Delaware corporation; CKrush, Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.
Amir Cyrus Ahanchian, an individual, Plaintiff-Appellant,
v.
Xenon Pictures, Inc., a California corporation; CKrush Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.

Nos. 08-56667, 08-56906.
Argued and Submitted Feb. 2, 2010.
Filed Nov. 3, 2010.

Background: Writer brought copyright infringement action against movie's distributor, production company, director, and screenwriter, alleging defendants used in the movie several skits he authored without his permission. The United States District Court for the Central District of California, John F. Walter, J., denied writer's motion for extension of time to file opposition to defendants' summary judgment motion and motion to accept late-filed opposition, and subsequently granted defendants' motions for summary judgment and attorneys' fees. Writer appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:
(1) writer demonstrated good cause for filing late opposition to defendants' summary judgment motion, and thus grant of extension of time to file opposition was warranted, and
(2) writer's delay in filing opposition to defendants' summary judgment motion was result of excusable neglect, and thus grant of motion to allow late-filed opposition was warranted.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B 813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Federal Courts 170B 829

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, vacation, or relief from judgment. Most Cited Cases

The district court's denial of an extension of time is reviewed for abuse of discretion, as is a court's denial of a motion for relief from judgment. Fed.Rules Civ.Proc.Rules 6(b), 60(b), 28 U.S.C.A.

[2] Federal Courts 170B 812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of discretion. Most Cited Cases

Under abuse of discretion standard of review, Court of Appeals reverses where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record.

[3] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak923 k. Time for filing. Most Cited Cases

Rule governing enlargement of time, like all the Federal Rules of Civil Procedure, is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak923 k. Time for filing. Most Cited Cases

Requests for extensions of time made before the applicable deadline has passed should normally be granted in the absence of bad faith or prejudice to the adverse party. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[5] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

Writer moving for one-week extension of time to file opposition to defendants' dispositive motion for summary judgment demonstrated good cause for filing late opposition, and thus grant of extension of time to file opposition was warranted in copyright infringement action, absent any showing of bad faith or prejudice to defendants; deadline for filing opposition was exceptionally constrained due to peculiar dictates of local rules, deadline followed immediately upon Labor Day weekend and writer had only five business days to respond to defendants' motion, and writer's counsel was out-of-state in fulfillment of previously-scheduled political commitment from day defendants chose to file their motion through day opposition was due. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

[6] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

District court, in considering writer's motion to allow late-filed opposition to defendant's dispositive motion for summary judgment in copyright infringement action, was required to apply four-factor equitable test to determine whether writer's failure to meet filing deadline constituted "excusable neglect." Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[7] Federal Courts 170B 611

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk611 k. Necessity of presentation in general. Most Cited Cases

General rule that a party will be deemed to have waived any issue or argument not raised before the district court does not apply where the district court nevertheless addressed the merits of the issue not explicitly raised by the party.

[8] Federal Civil Procedure 170A 923

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General

170Ak923 k. Time for filing. Most Cited Cases

To determine whether a party's failure to meet a deadline constitutes "excusable neglect," courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[9] Copyrights and Intellectual Property 99 89(2)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k72 Actions for Infringement
99k89 Judgment
99k89(2) k. Summary judgment. Most Cited Cases

Writer's delay in filing his opposition to defendant's dispositive motion for summary judgment was result of excusable neglect, and thus grant of motion to allow late-filed opposition was warranted in action alleging copyright infringement, even though calendaring mistake, which was partial cause of late filing, was weak justification for delay, since defendants were not prejudiced by late filing, length of delay was mere three days and would not have adversely affected either the summary judgment hearing date or trial date, and there was no indication that writer's failure to file opposition on time was result of bad faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

***1254** Jeffery J. Daar, Daar & Newman, PC, Los Angeles, CA, for the plaintiff-appellant, Amir Cyrus Ahanchian.

Leonard S. Machtinger, Kenoff & Machtinger, LLP, Los Angeles, CA; Richard L. Charnley, Terry Anastassiou and Ernest E. Price, Ropers, Majeski, Kohn, & Bentley, Los Angeles, CA, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding. D.C. No. 2:07-cv-06295-JFW-E.

Before: ANDREW J. KLEINFELD, KIM McLANE WARDLAW and CONSUELO M. CALLAHAN, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

Procedure "is a means to an end, not an end in itself-the 'handmaid rather than ***1255** the mistress' of justice." Charles E. Clark, *History, Systems and Functions of Pleading,* 11 Va. L.Rev. 517, 542 (1925). While district courts enjoy a wide latitude of discretion in case management, this discretion is circumscribed by the courts' overriding obligation to construe and administer the procedural rules so as "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. These consolidated appeals arise from a district court's refusal to exercise discretion consistent with the dictates of Rule 1.

Amir Cyrus Ahanchian's counsel moved for a one-week extension of time to file his opposition to defendants' summary judgment motion, citing as good cause: (1) the extremely short eight day response deadline (with three of those days falling over a federal holiday weekend) created by the combination of an unusual local rule and defendants' litigation tactics; (2) his preplanned absence, beginning the day defendants filed the motions, in fulfillment of an out-of-state commitment; and (3) the large number of supporting exhibits attached to defendants' motion. Defense counsel, without regard to the previous professional courtesies extended to him by Ahanchian's counsel, vigorously opposed the extension. Despite the presence of what most reasonable jurists would regard as good cause and the absence of prejudice to anyone, the district court denied the motion. Even so, Ahanchian's counsel managed to file the opposition, albeit three days late, due to a calendaring mistake and com-

puter problems, along with a motion asking that the district court accept the late-filed opposition. Five days later, the district court construed that motion as one for reconsideration under Rule 60(b), and, applying an incorrect legal standard, denied it. That same day, having plaintiff's opposition in hand, but refusing to consider it, the district court granted defendants' motion for summary judgment, failing to provide any legal reasoning or citation to law or facts.[FN1] To add injury to insult, the district court awarded defense counsel $247,171.32 in attorneys' fees. We conclude that the district court abused its discretion in denying both the request for an extension of time and the motion to accept the late-filed opposition, and erred in granting defendants' motion for summary judgment and in awarding attorneys' fees to defense counsel.

FN1. Ahanchian does not argue that we should reverse the district court for its failure to provide any reasoning in its order granting summary judgment. However, we have held this alone is reversible error, because it precludes us from conducting a meaningful review of the district court's order. *See Gov't Employees Ins. Co. v. Dizol,* 133 F.3d 1220, 1225 (9th Cir.1998) (en banc) (noting that remand is appropriate where the district court fails to "make a sufficient record of its reasoning to enable appellate review"). Nonetheless, we have reviewed the district court record in its entirety and reverse in part and affirm in part the award of summary judgment in the memorandum disposition filed concurrently with this opinion. We also vacate the award of attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

These appeals arise from the creation of the movie National Lampoon's TV: *The Movie,* theatrically released in November 2006. Unlike traditional films, this movie eschews plot or character development, instead lampooning several high profile television programs in a series of independent comedic skits. This lawsuit involves the disputed authorship of a number of these skits. Ahanchian claims that ten skits he authored (and subsequently copyrighted) either appear verbatim in the movie or serve as the basis for skits included in the final version of the movie.

***1256** Ahanchian filed a complaint on September 17, 2007 against Sam Maccarone (director and writer of the film), Preston Lacy (writer and actor), Xenon Pictures, Inc. (distributor), and CKrush, Inc. (producer) asserting causes of action for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. Apparently, Maccarone and Lacy were difficult to locate. Defense counsel for Xenon Pictures, who had been appointed by the district court to represent Maccarone and Lacy, sought additional time to answer Ahanchian's complaint on their behalf. Exhibiting the professional courtesy expected of officers of the court, Ahanchian's counsel stipulated to an extension of time-which stipulation the district court then rejected.

On January 7, 2008, the district court issued its scheduling order establishing, among other deadlines: November 18, 2008, as the date for the commencement of trial; September 2, 2008, as the discovery cut-off date; and September 15, 2008, as the last day for hearing motions. Maccarone and Lacy did not file their answer to the complaint until June 30, 2008. Because of Maccarone and Lacy's late entrance into the litigation, the parties entered into a joint stipulation on July 9, 2008, seeking to extend by twelve weeks all the deadlines established by the scheduling order to allow more time for discovery. The district court again denied the stipulated extension of time, finding that the parties had failed to demonstrate good cause as to why discovery could not be completed by September 2, 2008.

Because the district court's scheduling order set September 15, 2008, as the last day for hearing motions, the local rules in force at the time made August 25, 2008, the last date to file any motion for

summary judgment. *See* C.D. Cal. Local R. 6-1 (2008) (requiring that any motion be filed within twenty-one days before the hearing date). Though there is no indication in the record that they did so, the defendants assert that they informed Ahanchian's counsel on August 6, 2008, that they would be filing a motion for summary judgment. On August 25, 2008, the last possible day for filing, the defendants moved for summary judgment seeking dismissal of all of Ahanchian's claims and for terminating sanctions resulting from a discovery dispute. These motions were accompanied by roughly 1,000 pages of supporting exhibits and declarations. Because the defendants chose to wait until the last day to file their motions, the local rules operated to set a deadline of September 2, 2008-the day after Labor Day-for Ahanchian to review these materials and to prepare and file his oppositions. Ahanchian, therefore, was left with a mere eight days, three over the Labor Day weekend, to draft his oppositions to the motions. *See* C.D. Cal. Local R. 7-9 (2008) (requiring any opposition to be filed no later than fourteen days before the hearing date); Fed.R.Civ.P. 6(a)(1)(C) (extending deadlines by an additional day where a deadline would otherwise fall on a holiday). Also, Ahanchian's lead counsel was scheduled to travel out of state on August 25 to fulfil a previously-scheduled commitment.[FN2]

FN2. On appeal, Ahanchian's counsel revealed that his trip was required because he was serving as a duly-elected California state delegate to a major political party's national convention. *See* Cal. Elec.Code § 6201.

Given the already unreasonably strained deadlines, within which fell an out-of-state commitment and Labor Day weekend, on August 28, 2008, Ahanchian asked defense counsel to stipulate to a one-week continuance of the hearing date for defendants' motions, along with corresponding one-week extensions of the deadlines for Ahanchian to file oppositions and for defendants***1257** to reply. Defense counsel refused to so stipulate. The very next day, on August 29, 2008, Ahanchian filed an ex parte application pursuant to Local Rule 7-19 seeking a one-week extension. Ahanchian recited as good cause for the requested extension of time that: (1) defendants had waited until the last day to file their motions, choosing to file four days before the Labor Day weekend, and with knowledge of pending depositions; (2) the accompanying motions and exhibits amounted to 1,000 pages of materials; (3) Ahanchian's lead counsel had left the state on August 25 on a prescheduled trip and would not be returning until September 2; and (4) Ahanchian, who was needed to respond to the motion, was also out of town over Labor Day weekend. Ahanchian noted that "[n]o party will suffer any prejudice" should the court grant the continuance.

Defendants opposed the motion, arguing that Ahanchian had failed to demonstrate "good cause." Specifically, they argued that Ahanchian's counsel "knew (or should have known) that the motions would be filed *no later than August 25*-and yet, for reasons unexplained, this is precisely the date plaintiff's counsel decided to travel 'out of state.' Why? No reason is offered." In a footnote, the defendants posed some hypothetical possibilities: "A family emergency? A conflicting work-related priority? Or a vacation to Mexico? The point is, it is not explained. Absence [*sic*] explanation, good cause cannot be discerned." As for prejudice, defendants made the weak and false arguments that the requested continuance would give Ahanchian "several weeks to prepare an Opposition," and yet defendants would have only one week to file their reply. They also asserted that they would have "less time to prepare for trial." In point of fact, Ahanchian had requested extensions of time to file both his opposition and for the defendants' replies. Had Ahanchian's request been granted, defendants would have had the full time allowed by the local rules to reply. Moreover, the trial was not scheduled to commence for another three months.

Ahanchian ultimately filed his opposition to the summary judgment motion three days late, on

September 5, 2008,[FN3] at which time he also filed an ex parte application seeking permission to make the late filing.[FN4] On September 8, 2008, defendants responded by reiterating their opposition to any extension of time, and urging the district court to "ignore" the late opposition. They further suggested that Ahanchian's counsel's representation that he believed the deadline was September 4 was disingenuous, and that Ahanchian had failed to adequately explain the technical computer problems that had resulted in the one-day delay.

> FN3. Ahanchian's opposition to the Motion for Terminating Sanctions was filed two days earlier, on September 3.

> FN4. In this application, Ahanchian's counsel explained that his office had made a calendaring error, and thus he erroneously believed that the oppositions were not due until September 4, 2008. The truth of this statement is supported by counsel's earlier application seeking an extension of the deadlines, which represented that "Plaintiff's opposition papers are currently due on September 4, 2008." Neither defense counsel nor the court chose to alert counsel that he had misstated the deadline, adding two days. Counsel also explained he attempted to meet that erroneously-calculated deadline but "due to technical computer circumstances beyond control," he could not file until September 5.

On September 10, 2008, in a three-paragraph order, the district court granted defendants' summary judgment motion in full. It simultaneously denied Ahanchian's ex parte motion, concluding, without citing any record support, that Ahanchian, "apparently***1258** not pleased with the court's ruling," had simply failed to file timely oppositions. The court construed Ahanchian's September 5, 2008, ex parte application as a Federal Rule of Civil Procedure 60(b) motion for reconsideration of its denial of Ahanchian's August 29, 2008, request for a one-week extension. The court then denied the motion, citing three authorities: (1) a Fifth Circuit decision concluding that the "inadvertent mistake" of counsel was not a sufficient ground to excuse missing a filing deadline; (2) a Sixth Circuit decision rejecting "calendaring errors" as justification for reconsideration; and (3), finally, an inapposite Ninth Circuit decision that suggests a party should sue its lawyer for malpractice rather than bring a Rule 60(b)(1) motion when it comes to regret an action based on erroneous legal advice.

Meanwhile, in its summary judgment order, the court correctly observed that Ninth Circuit precedent bars district courts from granting summary judgment simply because a party fails to file an opposition or violates a local rule, and also correctly cited its obligation to analyze the record to determine whether any disputed material fact was present. It then effectively flouted both legal principles,[FN5] stating that it had reviewed only the defense evidence, even though it knew the opposition papers were already filed, having ruled upon the accompanying motion for a late filing. Unsurprisingly, based on only defendants' version of the facts, the court concluded that defendants were not liable on any claim and granted judgment in their favor.

> FN5. For example, even without considering the late-filed opposition papers, the record then before the district court included the certificates of copyright registration, which are prima facie evidence of ownership and which should have precluded an award of summary judgment on Ahanchian's copyright claims.

Ahanchian timely appeals the district court's procedural rulings, the grant of summary judgment, and the award of attorneys' fees.

II. STANDARD OF REVIEW

[1][2] The district court's denial of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) is reviewed for abuse of discretion, *see Kyle v. Campbell Soup Co.,* 28 F.3d 928, 930 (9th Cir.1994), as is a court's denial of a Rule 60(b) mo-

tion, *see United States v. Asarco Inc.,* 430 F.3d 972, 978 (9th Cir.2005). Accordingly, we reverse where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record. *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir.2009) (en banc).

III. DISCUSSION

Ahanchian argues that the district court abused its discretion first in denying his request for a one-week extension of time to file his opposition to defendants' summary judgment motion and then in denying his application to file that opposition late. We agree.

A.

[3][4] Federal Rule of Civil Procedure 6(b)(1) provides:

> (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed.R.Civ.P. 6(b)(1). This rule, like all the Federal Rules of Civil Procedure, "[is] to ***1259** be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Rodgers v. Watt,* 722 F.2d 456, 459 (9th Cir.1983) (quoting *Staren v. American Nat'l Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1263 (7th Cir.1976)); *see also* Fed.R.Civ.P. 1 ("[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Consequently, requests for extensions of time made before the applicable deadline has passed should "normally ... be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2004).

[5] The circumstances of Ahanchian's predicament clearly demonstrate the "good cause" required by Rule 6(b)(1). "Good cause" is a non-rigorous standard that has been construed broadly across procedural and statutory contexts. *See, e.g., Venegas-Hernandez v. Sonolux Records,* 370 F.3d 183, 187 (1st Cir.2004); *Thomas v. Brennan,* 961 F.2d 612, 619 (7th Cir.1992); *Lolatchy v. Arthur Murray, Inc.,* 816 F.2d 951, 954 (4th Cir.1987). To begin with, Ahanchian faced an exceptionally constrained deadline resulting from the peculiar dictates of the local rules for the Central District of California. [FN6] Compounding the problem, this deadline followed immediately upon Labor Day weekend-during which even the federal courts are closed. By taking advantage of the unusual local rules, defendants cut Ahanchian's time to respond to two dispositive motions to five business days and three days over the holiday weekend. *See* Fed.R.Civ.P. 6(a)(1)(C). As was certainly neither unreasonable nor unexpected, both Ahanchian and his attorney were out of town over Labor Day weekend, and, moreover, as he informed the district court, Ahanchian's lead counsel was out-of-state in fulfillment of a previously-scheduled commitment from the day defendants chose to file their motions through the day the responses were due. [FN7]

> FN6. Like the rules in several districts in this circuit, the Central District Local Rules establish deadlines for filing motions and oppositions by counting backwards from an established hearing date. In 2008, Central District of California Local Rule 6-1 provided that any motion had to be filed "not later than twenty-one (21) days before the date set for hearing." C.D. Cal. Local R. 6-1 (2008). Similarly, Central District Local Rule 7-9 governed the filing

of oppositions and provided that any opposition had to be filed "not later than fourteen (14) days before the date designated for the hearing of the motion." C.D. Cal. Local R. 7-9 (2008). As a result, where the movant chose to file a motion twenty-one days before the hearing-the last day allowed by local rules-the nonmovant has a mere seven days to file an opposition. This abbreviated timeline is unusual; every other district in this circuit guarantees nonmovants at least fourteen days to file an opposition to a motion. *See* D. Ariz. Local R. 56.1(d); D. Alaska Local R. 7.1(e); E.D. Cal. Local R. 78-230(b); N.D. Cal. Local R. 7-2(a), 7-3(a); S.D. Cal. Local R. 7.1(e)(1), (2); D. Guam Local R. 7.1(d); D. Hawaii Local R. 7.2(a), 7.4; D. Idaho Local R. 7.1(c); D. Mont. Local R. 7.1(d)(1)(B); D. Nevada Local R. 7.2(b); D.N. Mariana Islands Local R. 7.1(c)(2); D. Oregon Local R. 7.1(f); E.D. Wash. Local R. 7.1(c); W.D. Wash. Local R. 7(d)(3).

FN7. Even without the revelation that Ahanchian's lead counsel's absence was due to his position as an elected delegate to a major political party's national convention, his lack of availability due to a previously planned trip is a reasonable basis for seeking an extension of time. As Supreme Court Justice David Brewer once recognized, attorneys have an obligation as professionals to assume positions of important social responsibility. *See* David J. Brewer, *The Ideal Lawyer,* Atlantic Monthly, November 1906, at 587, 598 ("[T]he true lawyer never forgets the obligations which he as a lawyer owes to the republic, ... he always remembers that he is a citizen."). Moreover, attorneys, like everyone else, have critical personal and familial obligations that are particularly acute during holidays. It is important to the health of the legal profession that attorneys strike a balance between these competing demands on their time. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,* 52 Vand. L.Rev. 871, 889-90 (1999).

***1260** Critically, the record is devoid of any indication either that Ahanchian's counsel acted in bad faith or that an extension of time would prejudice defendants. To the contrary, the record reflects that Ahanchian's counsel acted conscientiously throughout the litigation, promptly seeking extensions of time when necessary and stipulating to defendants' earlier request for an extension of time to file their answer and to the twelve-week extension due to two defendants' late appearances. Moreover, defendants' argument that they would be prejudiced by only having a week to reply while Ahanchian would have had several weeks to draft an opposition is unpersuasive and neglects the fact that in the overwhelming majority of districts, more time is given for drafting oppositions than for drafting replies. *See, e.g.,* N.D. Cal. Local R. 7-3(a), (c); S.D. Cal. Local R. 7.1(e)(1), (2). Had the district court had any doubts about the veracity or good faith of Ahanchian's counsel, or been worried about prospective prejudice, it could have held an evidentiary hearing or sought more information; instead, without support in the record, it summarily denied Ahanchian's request.

The record shows that Ahanchian's requested relief was reasonable, justified, and would not result in prejudice to any party. The district court nevertheless denied Ahanchian's motion, thus effectively dooming Ahanchian's case on the impermissible ground that he had violated a local rule. Because Ahanchian clearly demonstrated the "good cause" required by Rule 6, and because there was no reason to believe that Ahanchian was acting in bad faith or was misrepresenting his reasons for asking for the extension, the district court abused its discretion in denying Ahanchian's timely mo-

tion.

B.

[6][7] We next turn to the district court's denial of Ahanchian's September 5, 2008, ex parte application to allow his late-filed opposition, which the court construed as a Rule 60(b) motion for reconsideration of its denial of Ahanchian's Rule 6 motion for an extension. Rule 60(b) provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" on the basis of "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b). The court denied Ahanchian's application after concluding that Ahanchian had not demonstrated "excusable neglect." In so doing, however, the district court failed to cite the correct legal standard, applying an incorrect legal standard for deciding Rule 60(b) motions.[FN8]

FN8. Defendants assert that Ahanchian waived this argument because he did not state in his application that he was relying on the "excusable neglect" standard or cite Rule 60(b). Defendants are correct that a party will be deemed to have waived any issue or argument not raised before the district court. *Ritchie v. United States,* 451 F.3d 1019, 1026 n. 12 (9th Cir.2006). However, this general rule "does not apply where the district court nevertheless addressed the merits of the issue" not explicitly raised by the party. *Blackmon-Malloy v. U.S. Capitol Police Bd.,* 575 F.3d 699, 707 (D.C.Cir.2009); *see also Citizens United v. F.E.C.,* --- U.S. ----, 130 S.Ct. 876, 888, --- L.Ed.2d ---- (2010). Here, despite Ahanchian's understandable failure to explicitly reference the excusable neglect standard in what he thought was a motion for late filing, and not a Rule 60(b) motion, the district court chose to construe his application as one brought pursuant to Rule 60 and purported to apply the excusable neglect standard. Ahanchian did not waive his argument that the district court abused its discretion in its application of Rule 60.

***1261** [8] To determine whether a party's failure to meet a deadline constitutes "excusable neglect," courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *Briones v. Riviera Hotel & Casino,* 116 F.3d 379, 381 (9th Cir.1997) (adopting this test for consideration of Rule 60(b) motions). Through other decisions, including *Bateman v. U.S. Postal Serv.,* 231 F.3d 1220 (9th Cir.2000), and *Pincay v. Andrews,* 389 F.3d 853 (9th Cir.2004) (en banc), we have further clarified how courts should apply this test.

In *Bateman,* we concluded that when considering a Rule 60(b) motion a district court abuses its discretion by failing to engage in the four-factor *Pioneer/ Briones* equitable balancing test. *Bateman,* 231 F.3d at 1223-24. Bateman's counsel had left the country before filing an opposition to the Postal Service's summary judgment motion, allowed the deadline to pass while abroad, failed to file any motions for extensions of time, and failed to contact the district court for sixteen days after he returned because of "jet lag and the time it took to sort through the mail." *Id.* at 1223. Because the district court had already awarded summary judgment to the Postal Service, Bateman moved to set aside the judgment pursuant to Rule 60(b). *Id.* The district court, without mentioning the *Pioneer/ Briones* test, denied the motion after considering only facts relating to the reason for Bateman's delay-the third *Pioneer/ Briones* factor. *Id.* at 1224. We concluded that the district court had failed to engage in the equitable analysis mandated by *Pioneer* and *Briones,* and, by ignoring three of the four *Pioneer/ Briones* factors, had abused its discretion in denying Bateman's Rule 60(b) motion. *Id.; see also*

Lemoge v. United States, 587 F.3d 1188, 1192 (9th Cir.2009) ("We conclude that the district court did not identify the *Pioneer*- *Briones* standard or correctly conduct the *Pioneer*- *Briones* analysis and that this was an abuse of discretion.").

In *Pincay,* we held that courts engaged in balancing the *Pioneer/ Briones* factors may not apply per se rules. *Pincay,* 389 F.3d at 855 ("We now hold that per se rules are not consistent with *Pioneer*."). Defendants, who had filed their notice of appeal twenty-four days late, asserted that their tardy filing resulted from a calendaring mistake caused by attorneys and paralegals misapplying a clear legal rule. *See id.* Applying the same four-factor balancing test as required under Federal Rule of Civil Procedure 60(b), the district court found that defendants' neglect was excusable under Federal Rule of Appellate Procedure 4(a)(5). *See id.* Sitting en banc, we rejected the plaintiffs' contention that the district court had abused its discretion in ruling for defendants. We concluded that, while the calendaring mistake was not a "compelling excuse," because of the "nature of the contextual analysis and the balancing of the factors adopted in *Pioneer*," courts applying the *Pioneer/ Briones* test cannot create or apply any "rigid legal rule against late filings attributable to any particular type of negligence." *Id.* at 860.

The district court's failure to apply Ninth Circuit precedent, particularly the rules set forth in *Bateman* and *Pincay,* to Ahanchian's Rule 60(b) motion was error. Just like the district court in *Bateman,* the district court here neither cited nor applied the *Pioneer/ Briones* test, but instead based its decision solely on whether the reason for the delay-the third *Pioneer/ Briones* factor-could establish excusable neglect. By ignoring the other three factors, the district court abused its ***1262** discretion. *See Bateman,* 231 F.3d at 1224. The district court then compounded its legal error by concluding that "a calendaring mistake is the type of 'inadvertent mistake' that is not entitled to relief pursuant to Rule 60(b)(1)," impermissibly adopting a per se rule in applying the *Pioneer/ Briones* balancing test. *See Pincay,* 389 F.3d at 859-60.

[9] The district court's errors are particularly troublesome because our application of the correct equitable analysis convinces us that Ahanchian's delay was the result of excusable neglect. *See Bateman,* 231 F.3d at 1224 & n. 3. We start by recognizing that "Rule 60(b) is 'remedial in nature and ... must be liberally applied.' " *TCI Group Life Ins. v. Knoebber,* 244 F.3d 691, 696 (9th Cir.2001) (quoting *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir.1984)). With this standard in mind, we conclude that all four *Pioneer/ Briones* factors favor Ahanchian. First, the defendants would not have been prejudiced by a week's delay in the filing of the opposition and a concomitant week extension to file a reply. At most, they would have won a quick but unmerited victory, the loss of which we do not consider prejudicial. *Cf. Bateman,* 231 F.3d at 1225 (finding insufficient prejudice where defendants "would have lost a quick victory and, should it ultimately have lost the summary judgment motion ... would have to reschedule the trial date"). Second, the length of the delay was a mere three days; filing the opposition then would not have adversely affected either the summary judgment hearing date, which was ten days away, or the trial, which was two and a half months away. *Compare id.* (finding a delay of over a month "not long enough to justify denying relief"). Third, while a calendaring mistake caused by the failure to apply a clear local rule may be a weak justification for an attorney's delay, we have previously found the identical mistake to be excusable neglect. *See, e.g., Pincay,* 389 F.3d at 860. In fact, in *Bateman,* the attorney's reasons for his nearly month-long delay, the need to recover from jet lag and to review mail, were far less persuasive. Yet, we concluded that excusable neglect was established. *Bateman,* 231 F.3d at 1225. Fourth, there is no indication that Ahanchian's failure to file the opposition on time was the result of bad faith. Ahanchian's counsel displayed his (mistaken) belief that the oppositions were due on September 4, 2008, in his initial request for an ex-

tension of time. Thus, his reliance on the calendaring mistake was not a bad-faith, post-hoc rationalization concocted to secure additional time. Ahanchian's counsel had no history of missing deadlines or disobeying the district court's orders; in fact, he demonstrated a sensitivity to the court's orders and deadlines by promptly seeking extensions of time where necessary. We have found good faith in situations where attorneys acted far less diligently and conscientiously. *See id.* ("[Counsel] showed a lack of regard for his client's interests and the court's docket. But there is no evidence that he acted with anything less than good faith.").

By failing to apply the *Pioneer/ Briones* equitable balancing test and instead adopting an impermissible *per se* rule, the district court abused its discretion. *See Lemoge,* 587 F.3d at 1193 (citing *Hinkson,* 585 F.3d at 1261). Applying the correct legal standard, we conclude that Ahanchian's counsel sufficiently established that his failure to timely file the opposition to summary judgment was the result of excusable neglect, and that the motion to allow the late opposition should have been granted.

C.

Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel***1263** disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. *See Indep. Towers of Wash. v. Washington,* 350 F.3d 925, 929 (9th Cir.2003); *Iva Ikuko Toguri D'Aquino v. United States,* 192 F.2d 338, 367 (9th Cir.1951). Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. *See* Cal. Attorney Guidelines of Civility & Professionalism § 1 ("The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice."); *see also Marcangelo v. Boardwalk Regency,* 47 F.3d 88, 90 (3d Cir.1995) ("We do not approve of the 'hardball' tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.").

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. *See Bateman,* 231 F.3d at 1223 n. 2 ("[A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values."); *Peterson v. BMI Refractories,* 124 F.3d 1386, 1396 (11th Cir.1997) ("There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated."). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. *See* Cal. Attorney Guidelines of Civility & Prof. § 6.

CONCLUSION

The district court abused its discretion in denying Ahanchian's request for a one-week extension to file his opposition and erred in denying Ahanchian's motion to allow a three-day late-filed opposition it construed as a Rule 60(b) motion.[FN9] Ac-

cordingly, we **REVERSE** the district court's grant of summary judgment, vacate the district court's award of attorneys' fees, and **REMAND** this case for further proceedings.

> FN9. The district court also stated in a footnote that the denial was, in the alternative, based on a lack of good cause. This conclusion was also an abuse of discretion, as the above discussion demonstrates.

C.A.9 (Cal.),2010.
Ahanchian v. Xenon Pictures, Inc.
624 F.3d 1253, 2010 Copr.L.Dec. P 29,994, 77 Fed.R.Serv.3d 1253, 10 Cal. Daily Op. Serv. 13,936

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United States District Court, S.D. California.

LA JOLLA SPA MD, INC., Plaintiff,
v.
AVIDAS PHARMACEUTICALS, LLC, Defendant.

Case No.: 17-CV-1124-MMA(WVG)
|
Signed 08/30/2019

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ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

Hon. William V. Gallo, United States Magistrate Judge

***1** Incivility is a scourge upon the once-venerable legal profession and has unfortunately become increasingly more rampant in the profession in recent years. *See generally Lasalle v. Vogel*, 36 Cal. App. 5th 127 (Cal. Ct. App. 2019) (lamenting the state of the modern legal profession and discussing its degradation through the years). In today's combative, battle-minded society, the lay perception of a "good" attorney is someone who engages in the obstreperous, scorched-earth tactics seen on television and makes litigation for the opposing side as painful as possible at every turn. However, outside the fictional absurdities of television drama, attorneys in the real world—presumably educated in the law and presumably committed to upholding the honor of the profession–should know and behave much more honorably.

When unchecked, incivility further erodes the fabric of the legal profession. Judges rightfully expect and demand more of officers of the court, and rules exist to ensure that lack of civility does not hinder litigation and does not go unpunished. Thus, Courts are equipped to address incivility under appropriate circumstances. This case sadly presents the Court with such an opportunity—to address the atrociously uncivil and unprofessional conduct of an attorney whose behavior wantonly and unnecessarily multiplied proceedings and aggressively harassed opposing counsel far beyond any sensible measure of what could be considered reasonably zealous advocacy for a client. Such behavior before this Court will not be chalked up to being simply "just part of the game." As explained below, this Court GRANTS Plaintiff's motion for sanctions in the amount of $28,502.03.

I. BACKGROUND

Once the parties finally settled upon their current counsel earlier this year after a total of five sets of attorneys between them, the stage was set for the sanctions motion now pending before the Court. On January 9, 2019, the Court held a second Case Management Conference in which defense counsel Julie Chovanes participated the day after the Court approved her request to appear pro hac vice. (Doc. Nos. 52-53; 55 (Transcript of CMC).) Although the Court had allowed prior counsel to conduct discovery, they apparently had failed to take much discovery, and new Plaintiff's counsel, James Ryan, requested additional time to do so. Accordingly, this Court granted Plaintiff's motion to amend the original Scheduling Order and allowed the parties to take fact discovery until April 8, 2019 and take expert discovery until June 17, 2019. (Doc. No. 54 ¶ 7.)

A short few weeks later, the parties called this Court to mediate a discovery dispute. (Doc. Nos. 57-60.) However, the disputes did not end there, and the Court held additional discovery conferences on February 26, 2019 (Doc. Nos. 67-68); March 22, 2019 (Doc. Nos. 74-75); [1] April 1, 2019 (Doc. Nos. 78-80); April 10, 2019 (Doc. Nos. 81-82); May 3, 2019 (Doc. No. 88); and May 10, 2019 (Doc. No. 89). In all, this Court held seven discovery conferences in a short four-month period.

***2** As a result of these numerous disputes, the Court spent hours on teleconferences with Chovanes and Ryan, hearing arguments, and generally observing the demeanor and tenor of both attorneys. Because the Court was able to observe the attorneys' behavior on these conferences, the Court can now confirm that both of their demeanors and behavior during the deposition at the heart of the pending sanctions motion was consistent with how they conducted themselves during the discovery conferences. The Court

observed Plaintiff's attorney Ryan as consistently even-keeled and respectful—though at times frustrated—as he argued in favor of his client. He did not raise his voice, engage in any attacks against the other side or opposing counsel, and dispassionately argued his positions. Defense counsel Chovanes, however, displayed a wholly different demeanor. The Court witnessed Chovanes repeatedly raise her voice at Ryan and even the Court, continuously interrupt Ryan and this Court, and characterize Plaintiff's case as a "garbage case" on multiple occasions. Outside the presence of this Court, Chovanes repeatedly failed to meet and confer about discovery disputes, often stating she would respond at a later date but then failing to respond despite multiple efforts to follow up by Ryan. At times, Chovanes also simply ignored Ryan's meet and confer communications. Chovanes's general demeanor during teleconferences with the Court was consistently flippant, overly-aggressive, truculent, and quick to confrontation.

One aspect of the fact discovery process that led to a dispute was the deposition of Margaret Gardner, the founder and designated Rule 30(b)(6) witness for Defendant. Leading up to Gardner's deposition and the May 10, 2019 Mandatory Settlement Conference, Defendant sought to limit her deposition due to her health concerns. After receiving a physician's note, the Court ordered that the deposition take place in Philadelphia for seven hours and that it proceed in two-hour increments with 30-minute breaks. (Doc. No. 82.) Also at that discovery conference on April 10, 2019, Chovanes indicated she wished to seek a protective order to limit the scope and length of Gardner's deposition given Chovanes's belief that the deposition should not take "more than a few hours." The Court provided Chovanes the opportunity to file a motion for a protective order and set an April 15, 2019 deadline to do so. (Doc. No. 82 ¶ 2.) However, although Chovanes referenced filing a motion for a protective order several times, the motion was never filed and so a protective order never issued.

The deposition of Margaret Gardner took place on May 3, 2019 in Philadelphia, and Chovanes quickly set the tone for the day.[2] As Ryan opened the deposition by providing standard instructions ordinarily given in depositions—such as for Gardner and Ryan to speak in turn to avoid speaking over each other—Chovanes stated: "Objection to that preamble. No need to lecture my client." (Doc. No. 93-6 at 11.)[3] When Ryan shortly thereafter benignly advised Gardner that he would clarify any questions that she did not understand if she so requested, Chovanes stated: "Objection to the lecture." (*Id.* at 12.) And so began a protracted day of Ryan attempting to take Gardner's deposition while Chovanes continuously interrupted, lodged frivolous objections, improperly instructed Gardner to not answer questions, and extensively argued with Ryan. Chovanes's continuous, relentless interrupting Ryan's questioning also included an outburst by Chovanes, where she and Gardner left the room after Chovanes falsely and bizarrely accused Ryan of threatening Gardner.[4]

***3** Approximately two hours into the deposition, the parties successfully contacted this Court for a discovery conference regarding Chovanes's objections and instructions to Gardner. (Doc. No. 93-6 at 120:7-128:7.) Up to that point, Chovanes had repeatedly objected to Ryan's questions on relevance grounds, objected that his questions exceeded the scope of the Rule 30(b)(6) deposition notice, and objected that some of the questions were outside the scope of discovery. Based on these objections, Chovanes had repeatedly instructed Gardner to not answer Ryan's questions. The Court instructed the parties to continue the deposition, preserve objections, and told the parties that objections based on scope and relevance were not proper bases to instruct Gardner to not answer questions. The deposition thus continued, and the parties did not contact the Court again that day.

After the discovery conference with the Court, Chovanes stopped instructing Gardner to not answer questions but continued to interrupt and make objections of various kinds. She also continued to relentlessly argue with Ryan, constantly trying to hurry up his questioning, making frivolous objections, making objections that made no sense in the context of a deposition, and instructing Ryan how he should ask questions and conduct the deposition.

The deposition was recorded by a videographer and a stenographer. As part of its sanctions motion, Plaintiff submitted video clips and the entire transcript of the deposition. Plaintiff divided the interruptions into six categories and provided 128 video clips encompassing 133 examples of behavior that Plaintiff contends cumulatively warrant sanctions.[5] (Doc. No. 93-2.) Defendant filed an opposition to the sanctions motion, but despite the opportunity, provided no video clips in rebuttal.

After the deposition, Ryan sought and was granted leave to file a motion for sanctions after his attempts to meet and confer with Chovanes about sanctions failed. Ryan now seeks $28,502.03 in sanctions pursuant to Federal Rule of Civil

Procedure 30(d)(2), 28 U.S.C. § 1927, and the court's inherent power to sanction.

In response, Defendant contends sanctions are not warranted because Ryan was able to ask questions and concluded the deposition by confirming he had no further questions. Defendant argues Chovanes's conduct did not result in prejudice to Plaintiff. Continuing Chovanes's personal attacks on Ryan at the deposition, Defendant's opposition papers contend that Ryan was unprepared near the end of the deposition because of the pauses between his questions, he was "wasting time," and contends it was proper for Chovanes to note these things for the record to protect Gardner from "further abuse." (Doc. No. 94 at 4-5.) With respect to the amount of sanctions Plaintiff seeks, Defendant does not address any specific components of the sanctions amount, instead asserting that there's a lack of documentary evidence to support the entire amount. Defendant also notes a discrepancy with respect to the date on which Ryan travelled to Philadelphia, though there is no dispute that he did in fact travel there for the deposition.

The Court held a hearing on the sanctions motion on August 16, 2019 and heard argument from Chovanes and Ryan. Chovanes continued to deny any impropriety, did not present any new evidence, and did not challenge any specific monetary component of the amount of sanctions Plaintiff seeks. She did not defend her conduct. She did not show any remorse. And she again characterized Plaintiff's case a "garbage case." This Order follows.

II. LEGAL STANDARD

A. Sanctions Under Federal Rule of Civil Procedure 30(d)(2)

***4** Under Rule 30(d)(2), a court may "impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30's advisory committee notes make clear that the sanction may be imposed on parties and attorneys alike. District courts within the Ninth Circuit have held that Rule 30(d)(2) sanctions do not require a finding of bad faith. *See, e.g.*, *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, No. 08CV1086-AWI-SMS, 2009 U.S. Dist. LEXIS 111569, at *9 (E.D. Cal. Nov. 17, 2009); *Robinson v. Chefs' Warehouse*, No. 15CV5421-RS(KAW), 2017 U.S. Dist. LEXIS 40824, at *7 (N.D. Cal. Mar. 21, 2017), on reconsideration, 2017 U.S. Dist. LEXIS 93339 (N.D. Cal. June 16, 2017).

B. Sanctions Under 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority "to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings." *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004).

Section 1927 indicates that actions that multiply the proceedings must be both unreasonable and vexatious, and the Ninth Circuit has also stated that recklessness alone will not suffice; what is required is recklessness plus something more —for example, knowledge, intent to harass, or frivolousness. *See Thomas v. Girardi*, 611 F.3d 1027, 1061 (9th Cir. 2010) (reckless plus intentionally misleading); *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1221-22 (9th Cir. 2010) (cumulative acts over five years evidenced a pattern of recklessness and bad faith warranting sanctions); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (recklessness plus knowledge); *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (recklessness plus frivolousness, harassment, or improper purpose). "Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989) (internal citations omitted). Indeed, "[e]ven if an attorney's arguments are meritorious, his conduct may be sanctionable if in bad faith." *Id.* (citation omitted).

C. "Inherent Powers" Sanctions

The Supreme Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), delivered the definitive summary of the bases on which a federal court may levy sanctions under its inherent power. The Court confirmed that federal courts have the inherent power to levy sanctions, including attorneys' fees, for "willful disobedience of a court order ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons...." 447 U.S. at 766 (internal quotation marks and citations omitted). The Court also noted that a court "certainly may assess [sanctions] against counsel who willfully abuse judicial processes." *Id.* The Court later reaffirmed the *Roadway* principles in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), emphasizing the continuing need for

resort to the court's inherent power because it is "both broader and narrower than other means of imposing sanctions." 501 U.S. at 46. On the one hand, the inherent power "extends to a full range of litigation abuses." *Id.* On the other, the litigant must have "engaged in bad faith or willful disobedience of a court's order." *Id.* at 46-47. In *Chambers*, the Supreme Court left no question that a court may levy fee-based sanctions when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose. *Id.* at 45-46 & n.10.

***5** As is relevant here, "[b]efore awarding sanctions under its inherent powers ... the court must make an explicit finding that counsel's conduct constituted or was tantamount to bad faith." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (internal quotations and citation omitted). The Ninth Circuit has extensively explained what constitutes bad faith in the context of "inherent powers" sanctioning authority:

> Under both *Roadway* and *Chambers*, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct. For example, in *In re Itel Sec. Litig. v. Itel*, 791 F.2d 672 (9th Cir. 1986), counsel filed objections to exact fee concessions in an action pending before another court. The objections were not frivolous, nor were they submitted with any knowledge that they were meritless. But counsel's goal was to gain an advantage in the other case, which we concluded was "sufficient to support a finding of bad faith." *Id.* at 675. "For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney's fees.' " *Id.* (quoting *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (per curiam)).
>
> *Itel* teaches that sanctions are justified when a party acts for an improper purpose -- even if the act consists of making a truthful statement or a non-frivolous argument or objection. In *Itel*, the improper purpose was the attempt to gain tactical advantage in another case. 791 F.2d at 675 (discussing improper motivation). This approach is in harmony with *Roadway*, where the Supreme Court made clear that courts possess inherent power to impose sanctions for "willful abuse of judicial processes." 447 U.S. at 766.
>
> In reviewing sanctions under the court's inherent power, our cases have consistently focused on bad faith. For example, in *United States v. Stoneberger*, 805 F.2d 1391 (9th Cir. 1986), the district court imposed sanctions on a chronically late attorney. Reversing the imposition of sanctions, we held that mere tardiness does not demonstrate the improper purpose or intent required for inherent power sanctions. *Id.* at 1393. Rather, "[a] specific finding of bad faith ... must 'precede any sanction under the court's inherent powers.' " *Id.* (quoting *Roadway*, 447 U.S. at 767).
>
> We again reversed sanctions due to a lack of intent in *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989). In that case, the plaintiff's counsel negligently failed to comply with local court rules that required admission to the district court bar. We vacated the sanctions, holding that the district court may not sanction mere "inadvertent" conduct. *Id.* at 1485; *see also id.* at 1483 ("Nothing in the record indicates that their failure to request admission to the district bar was anything more than an oversight or ordinary negligence on their part."); *id.* at 1484 ("Willful or reckless disregard of court rules justifies punitive action."). Similarly, in *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993), we vacated the imposition of sanctions where there was no evidence that the attorney had "acted in bad faith or intended to mislead the court."

***6** *Fink v. Gomez*, 239 F.3d 989, 992-94 (9th Cir. 2001).

III. DISCUSSION

The Court first sets forth Chovanes's specific unprofessional, obstructive, harassing, frivolous, and willful conduct. The Court thereafter concludes Chovanes acted in bad faith and that sanctions are warranted based on the totality of her conduct.

A. Chovanes's Conduct

1. Instances of Chovanes Instructing Gardner to Not Answer Based on Impermissible Grounds

Under Rule 30, an attorney may instruct a client not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)" to terminate or limit the deposition on grounds of bad faith, oppression, and the like. Fed. R. Civ. P. 30(c)(2), (d)(3). If none of the enumerated objection grounds exists, the

objection may be noted on the record, "but the examination still proceeds; the testimony is taken subject to any objection." *Id.* at 30(c)(2).

1. As Plaintiff argues, on at least approximately 39 occasions, Chovanes did not adhere to Rule 30's limits on instructing a deponent to not answer or adhere to its procedures for addressing possible bad faith questioning. Instead, Chovanes cited impermissible grounds and did not allow Gardner to answer various basic questions despite preserving the objections on the record. The vast majority of these instances occurred before the parties' discovery conference with this Court and included instances where no reasonable attorney would object or instruct a witness to not answer a question. For example, Chovanes instructed Gardner to not answer the following benign foundational questions that any competent attorney would ask in the early stages of a deposition:

- Are you an officer of Avidas Pharmaceuticals? (Doc. No. 93-6 at 14:14-17.)
- Are you a member of Avidas Pharmaceuticals? (*Id.* at 14:19-22.)
- Are you a managing member of Avidas? (*Id.* at 15:7-8.)
- When was Avidas Pharmaceuticals formed? (*Id.* at 18:9-11.)
- Are there any current employees of Avidas Pharmaceuticals? (*Id.* at 29:2-5.)
- Where has Avidas been located since 2008? (*Id.* at 29:7-9.)
- Is Dan McCall a member of Avidas Pharmaceuticals, LLC? (*Id.* at 29:16-30:3.)
- Is Michael Warne ... a member of Avidas Pharmaceuticals, LLC? (*Id.* at 30:5-8.)

2. In addition to these simple background questions, Chovanes instructed Gardner to not answer several questions based on her erroneous assertion that they were beyond the scope of the Rule 30(b)(6) deposition notice and thus not subject to proper questioning. At the beginning of the deposition, Chovanes demanded that Ryan produce the deposition notice and proclaimed that deposition questioning would be limited to the topics in the notice. (Doc. No. 93-6 at 13:5-8 ("I would suggest ... you get the 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that."); 14:2-4 ("But right now let's stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.")) Chovanes even ludicrously contended Ryan could not ask basic foundational background questions because the deposition notice did not include such a category:

> ***7** What -- there's nothing on ... your 30(b)(6) notice, that says "foundational information."
>
> So you're beyond the scope of the 30(b)(6) notice too. So that makes no sense, foundational information. You're just making that up, sir.
>
> Let's proceed to what's on the 30(b)(6) notice, which is why we're here.

(*Id.* at 23:24-24:7.) The deposition transcript contains several other instances where Gardner was instructed to not answer based on "scope" objections, all of which were based on Chovanes's contention that any question not specifically tethered to one of the categories in the deposition notice was beyond the scope of the notice and thus beyond the scope of the deposition. (*See, e.g.*, *id.* at 28:5-10 (question about how to spell a product Gardner had mentioned in testimony); 31:3-8 (question about other products Defendant may have sold); 46:22-48:15 (Chovanes attempting to prevent questions related to inventory topic that *was* listed in the deposition notice); 51:14-22.)

Chovanes's objections here were baseless, of course, because Rule 30(b)(6) deposition notices *do not* limit the examiner to the topics listed in the notice. Although a party noticing a deposition pursuant to Rule 30(b)(6) "must describe with reasonable particularity the matters on which the examination is requested, ... the 'reasonable particularity' requirement of Rule 30(b)(6) *cannot be used to limit what is asked of the designated witness at a deposition.*" *ChriMar Systems Inc. v. Cisco Systems Inc.*, 312 F.R.D. 560, 563 (N.D. Cal. 2016) (emphasis added); *see also Moriarty v. Am. Gen. Life. Ins. Co.*, No. 17CV1709-BTM(WVG), 2019 US. Dist. LEXIS 62041, at *8 (S.D. Cal. Apr. 10, 2019) (Gallo, J.). "The 30(b)(6) notice *establishes the minimum* about which the witness must be prepared to testify, *not the maximum.*" *ChriMar Systems Inc.*, 312 F.R.D. at 563 (emphasis added); *see also see also Moriarty*, 2019 US. Dist. LEXIS 62041, at *8. Thus, deposition notice categories are simply the basic informational categories that a corporate representative should familiarize herself with to competently answer questions on behalf of the entity—they do not serve as handcuffs to limit the examiner from asking, for example,

basic foundational questions about the deponent or the entity itself.

Accordingly, Chovanes's unrelenting attempts to limit Ryan to the categories specified in the deposition notice were untethered to any legal authority or principle and were utterly baseless. Chovanes then compounded the error by instructing Gardner to not answer questions because, as explained below, "scope of deposition notice" is not a proper basis upon which a deponent can be instructed to not answer.

3. Chovanes also instructed Gardner to not answer various questions based on relevance grounds. (*See, e.g.*, Doc. No. 93-6 at 31:3-8; 45:10-20; 50:6-51:1; 53:13-22; 53:24-54:4; 60:4-61:8; 68:18-69:12; 73:8-12; 75:22-76:2; 78:11-15; 118:10-120:1.) A sub-set of Chovanes's relevance-based objections were based on Chovanes's incorrect assertion that this Court had limited the scope of *all* discovery to matters after May 2014. Chovanes's reference to the May 2014 "cutoff" was related to an Order this Court issued on February 8, 2019 following a discovery conference regarding disputed written discovery responses. (*See* Doc. No. 60.) Although the language of that Order seemed to limit all discovery to the time period after May 2014, the Court later issued a second written Order, clarifying that the first Order was limited to the written discovery at issue in that dispute—not discovery in general. (*See* Doc. No. 73.) At the deposition, Ryan was prepared, had a copy of the clarifying Order in hand, and he read the relevant portions to Chovanes. (Doc. No. 93-6 at 21:8-23.) Chovanes then shifted tactics, stating she recalled this Court orally limiting discovery to events after May 2014 during a telephonic discovery conference—but she could not identify when that occurred. (*Id.* at 21:25-22:11.)

***8** This Court has never limited the scope of all discovery as Chovanes asserted. However, this did not deter her from repeatedly instructing Gardner to not answer questions based on this erroneous reasoning—even after Ryan had read her the clarifying Order. (*See, e.g.*, *id.* at 45:16-20 ("Objection. Why is it relevant? This is dated '08 and we're talking about '14 and beyond. Objection. Don't answer that question. Move ahead."); 45:22-46:1 ("You can answer with regard to anything after May of 2014."); 46:15-18 ("You disagree with it, but she's not going to answer anything before May of 2014. [I]t's beyond the scope and it's not within the judge's order."); 52:13-17; 60:4-61:8 (Chovanes "foreclosing" questioning); 68:10-69:12 (question about other persons who may have maintained records related to the subject product); 70:15-18 ("I want to get to areas the Court said we should get to, not to areas that are irrelevant and before May of 2014.")).

Even if the above objections were factually accurate, Chovanes's instructions to not answer the questions based on relevance grounds nonetheless would have run afoul of basic principles of objecting during depositions. The plain and simple language of Rule 30 makes clear that

> [a]n objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, *but the examination still proceeds*; the testimony is taken subject to any objection.... *A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).*

Fed. R. Civ. P. 30(c)(2); *see also Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576, 581 (D. Nev. 2011) ("The remedy for oppressive, annoying and improper deposition questioning is not simply to instruct a witness not to answer."); *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 262, 365 (N.D. Cal. 2000) ("As a rule, instructions not to answer questions at a deposition are improper."); Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 11(IV)-A § 11:1565 ("Rule 30(c)(2) renders 'relevancy' objections meaningless in most depositions. The deponent must even answer questions calling for blatantly irrelevant information 'subject to the objection.' "). Although Chovanes at times instructed Gardner to not answer based on privilege, the *vast* majority of Chovanes's instructions to Gardner did not fall within the Rule's enumerated bases and violated this exceedingly simple rule.

4. Although the above categories constituted the bulk of the inappropriate objections and instructions to not answer, there are other violative examples sprinkled in the transcript:

- MS. CHOVANES: Well, don't answer that question. "Required to follow" is not a legal question – I mean, it's

asking for your opinion, and that's not what we're here for. (Doc. No. 93-6 at 117:25-118:2.)

- Q. Can you generally describe what those agreements were.

  MS. CHOVANES: Objection. No don't answer that question. That's a ridiculous question. What do you mean by "generally describe." That's dangerous. I'm not going to let her answer that. Rephrase. There are titles right here so why don't you just ask her that. Why are you wasting our time? (*Id.* at 33:10-19.)

- Q. And generally speaking -- and I know you're not a lawyer. Generally speaking, what is your understanding as to what the know-how agreement provides?

  MS. CHOVANES: Objection. I'm not going to let you answer that question. If you want to point her to specific areas and ask her questions about facts, but that comes too close to opinion testimony so we're not going to answer. (*Id.* at 37:17-28:1.)

- Q. Exhibit 1 reflects a number of units of inventory of Vitaphenol products. Did Avidas confirm that it received each of those units of inventory that is stated on Exhibit 52 of Exhibit 1?

  ***9** MS. CHOVANES: Objection to the question. It's not understandable. It also misstates the document itself. So I'm not going to let you answer the question because it's not an accurate reflection of what's in the document. You can't make up stuff about the documents and ask the witness to testify. Go from the document itself. (*Id.* at 44:13-45:1.)

- Q. Where were those records located?

  A. In the Doylestown office.

  Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it's leading and it implies facts that aren't in evidence. (*Id.* at 79:4-12.)

- Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?

  MS. CHOVANES: Objection. Don't answer that question.

  MR. RYAN: On what grounds?

  MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (*Id.* at 84:19-85:2.)

In addition to at times being nonsensical, none of these refusals to allow Gardner to answer complied with Rule 30(c)(2).

In sum, the transcript contains at least 39 instances where Chovanes violated Rule 30(c)(2) by instructing Gardner to not answer questions based on improper grounds.

2. Instances Where Chovanes Disruptively Instructed Ryan On How to Pose Questions to Gardner

In addition to the above, there can be no question that Chovanes deliberately frustrated, delayed, and impeded Gardner's deposition in other ways. Under Rule 30(c)(2), an objection "must be made concisely in a nonargumentative ... manner." However, Chovanes repeatedly violated this rule by making objections that were an attempt to instruct Ryan how to pose questions and disrupted the flow of the deposition. In many instances, Chovanes's objections were verbose, argumentative, accusatory, and anything but concise—all in violation of Rule 30(c)(2). Chovanes routinely engaged in speaking objections and then extensively argued with Ryan when he attempted to clarify or meet and confer about the objections. The following are representative examples from the 39 instances of this conduct identified by Plaintiff:

- Q. Are you an employee of Avidas Pharmaceuticals?

  A. I am the founder.

  MS. CHOVANES: Objection; irrelevant. Why don't you identify why the witness is here first. Okay? She's here pursuant to the 30(b)(6) notice that you issued. I think it's usually presentable to the witness at this point. Whether or not she's an employee or not is irrelevant; right? (Doc. No. 93-6 at 11:20-12:5.)

- Q. And you mentioned that Avidas Pharmaceuticals was -- began operations in around 2008. At the time that Avidas Pharmaceuticals began operations, was Vitaphenol the first product that it sold?

....

MS. CHOVANES: Objection. That question is in two parts, and I object to your saying that the witness mentioned anything. No need for a preamble. Let's just ask a nice clean question. Please restate the question. (*Id.* at 31:13-32:2.)

- Q. So Exhibit 51 is one of the agreements that Avidas Pharmaceuticals entered into with La Jolla Spa MD; is that correct?

  MS. CHOVANES: Objection. Don't ask questions so they lead, please. You may answer. (*Id.* at 37:7-12.)[6]

- Q. Did Avidas have Harmony manufacture new Vitaphenol anti-aging toner?

  A. Yes.

  ***10** MS. CHOVANES: You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker?

  MR. RYAN: No.

  MS. CHOVANES: Why not, Counsel?

  MR. RYAN: But I think it's important that we go through each one.

  MS. CHOVANES: Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time. (*Id.* at 58:9-24.)

- Q. Where were those records located?

  A. In the Doylestown office.

  Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: .... Just ask her simple questions. It's not that complicated.

  MR. RYAN: It's a simple question.

  MS. CHOVANES: No, it's not.[7] (*Id.* at 79:4-16.)

- Q. Do you believe that your file folder that contains emails relating to Vitaphenol contains all of the emails that were sent or received relating to Vitaphenol from 2008 to the present?

  MS. CHOVANES: Objection to the question; it's irrelevant, the use of the word "believe." Do you want to rephrase the question, please? I mean, you're obviously hunting to pin her down for destroying documents, and I think it's unfair. So ask a good question. (*Id.* at 88:24-89:9.)

- Q. In connection with this agreement, Avidas sold its inventory of Vitaphenol products to SciDerma; is that correct?

  MS. CHOVANES: .... Can you do that? Can you ask just open-ended questions -- was inventory transferred? -- and then maybe we can get into it that way.

  MR. RYAN: Well, I don't think I'm required to only ask open-ended questions.

  MS. CHOVANES: Well, I understand. You can ask them how you -- but my objection is with regard to the word "sold," which as you recall we already went through on an extensive go-around already with regard to paper discovery. I mean, I would just ask the witness -- you're pulling teeth. Why don't you just ask her what happened as a result of the agreement and see what happens. Maybe you'll get the statement you want. (*Id.* at 103:7-104:6)

- Q. Does SciDerma still owe Avidas some money in connection with the Harmony product inventory that was transferred to it?

  MS. CHOVANES: To the extent SciDerma is a company, that's an interesting question. I don't know if they're still in business. So why don't you ask within the scope of if the client knows they're -- if the witness even knows they're a company.

  MR. RYAN: Well, I just want to know whether Avidas believes that SciDerma still owes money in connection with the Harmony product.

  MS. CHOVANES: Avidas' belief is not relevant to this case, and she's not going to testify with regard to a legal matter. (*Id.* at 109:21-110:11.)

• Q. With respect to the inventory values that we see on Exhibit Roman numeral IV, do you know who came up with those values for the inventory?

MS. CHOVANES: Objection to the question. I don't know what "come up with" means," and I'd ask you to clarify and be precise with regard to your question. (*Id.* at 113:7-13.)

• Q. The packaging that we see on the left side of Exhibit 58 that's similar to the packaging we see in Exhibit 57. Do you see that?

MS. CHOVANES: Objection to your statement about similarity. Ask a question. Don't editorialize. (*Id.* at 160:3-9.)

***11** • Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

MS. CHOVANES: ..... Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts. (*Id.* at 196:15-23.)

• Q. This report on Bates-stamped Page 1042 in the upper left-hand corner says "November and December sales." So is it your belief that these are November and December sales from the year 2010?

MS. CHOVANES: You're not entitled to her belief. Ask a question that seeks relevant information.

MR. RYAN: I disagree.

MS. CHOVANES: You're not entitled to her belief. That's an opinion. You're entitled to facts. Ask a simple question. I don't know why you mess them up by putting "belief" in. That calls for opinion testimony on its face.

MR. RYAN: I'm entitled to her opinion based on her foundation so far.

MS. CHOVANES: No, you're not entitled to her opinion. We'll go to the judge on that. You're not entitled to a person's opinion. They're a fact witness. So ask the question if you want. Again, I'll make the same objection. (*Id.* at 202:21-203:18.)[8]

• Q. On May 8th of 2014, you emailed Joe Kuchta, "Joe, this is the draft of the email I will send to Dianne York." Why did you send that email to Joe Kuchta?

MS. CHOVANES: Objection; there's been no foundation laid for the fact it's an email. Do you want to do that first?

BY MR. RYAN: Q. Did you send an email to Joe Kuchta on May 8th of 2014 a 7:35 a.m.?

A. Yes.

MS. CHOVANES: No, that's not the way to do it. Come on, Counsel. (*Id.* at 246:12-25.)

3. Instances of Chovanes Initiating or Attempting to Initiate Unnecessary Colloquy

Under Rule 30(d)(2), sanctions may be imposed for impeding, delaying or frustrating the fair examination of the deponent. Chovanes did all of these things by initiating or attempting to initiate unnecessary and frivolous colloquy and unnecessarily "noting" things during the deposition. Plaintiff identifies fifteen instances during which Chovanes initiated or attempted to initiate unnecessary colloquy. These unnecessary interruptions and discussions prolonged the deposition and served to continually harass Ryan. Some examples include:

• Q. Are you an employee of Avidas Pharmaceuticals?

MS. CHOVANES: Are you going to respond to what I said?[9]

MR. RYAN: No, you made your objection.

THE WITNESS: I'm the founder of the company.

MS. CHOVANES: Okay. I would like to know why we're here then, if you're not going to produce a 30(b)(6) notice. Are you going to acknowledge we're here pursuant to that?

MR. RYAN: We are here pursuant to a 30(b)(6) notice.

MS. CHOVANES: And what are the categories of that notice? Do you want to present them? Because as I pointed out to the Court, it's very difficult, given the history of this case and your repeated items -- your repeated arguments that you keep identifying, it's very difficult for us to have this deposition when you should have done this a long time ago.

You have been carefully proscribed by the Court to certain areas of relevance. I would suggest we start with

those and, therefore, you get that 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that.

***12** Do you understand?

MR. RYAN: I've listened to your objection. I feel like I'm allowed to ask questions.

MS. CHOVANES: Okay. Well, you're not going to be. Anything beyond the scope of what the Court has ordered is the scope. And we reiterated at our last conference. We're not going to get into -- and don't interrupt me please. Let me finish.

Anything the Court specifically noted at the last conference that the Court's order was in place and the witness is not to answer anything beyond those orders. So we're going to have a continuing objection to anything beyond those and she's not going to answer.

You can either identify those categorically or waste everyone's time by going through those individually. But right now let's stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.

MR. RYAN: Okay. Well, here's what I'm going to do. I'm going to ask questions, and you can make objections. And if you want to instruct the witness not to answer, you have that right.

MS. CHOVANES: Okay. Note that you've refused my offer to speed this up. Go ahead. (Doc. No. 93-6 at 12:7-14:12.)

- MR. RYAN: Well, I'm trying to develop foundational information, and this witness has already testified that she's the founder of the defendant in this case. So I'm trying to get some information –[10]

  MS. CHOVANES: What -- there's nothing on here, on your 30(b)(6) notice, that says "foundational information."[11]

  So you're beyond the scope of the 30(b)(6) notice too.[12] So that makes no sense, foundational information. You're just making that up, sir.

  Let's proceed to what's on the 30(b)(6) notice, which is why we're here. (*Id.* at 23:3-24:7.)

- Q. The information that's contained in Exhibit 61, the monthly reports, what's the source information for those reports?

  MS. CHOVANES: I'm going to object. That's an impossible question to answer, because this is a made-up document.

  Go through slowly and ask her the source of individual information to the extent she knows. But to say the source of all this information, if she can answer that summarily, go for it. But I think the question is confusing and unfair. (*Id.* at 192:23-193:9.)

- MR. RYAN: I'm not wasting your time.

  MS. CHOVANES: They're right in the 30(b)(6) notice. In fact, since there's no question outstanding -- is there? Or my objection to it, asking to rephrase. No, no question outstanding?

  I'm going to ask the witness to reread the 30(b)(6). And counsel do the courtesy of rereading the 30(b)(6) with the witness so as not to try to trick her.

  MR. RYAN: I don't need to read it. I wrote it.

  MS. CHOVANES: You need to read it, because you're trying to trick the witness, which I object to.

  So why don't you read it carefully and show her what agreements you're talking about.

  MR. RYAN: I'm not trying to trick the witness.

  MS. CHOVANES: Then why are you asking her questions without any foundation -- tenure to this 30(b)(6) notice? It just makes no sense.

  MR. RYAN: I'm sorry it doesn't make sense to you.

  MS. CHOVANES: Right --

  MR. RYAN: I'm allowed to ask questions.

  ***13** MS. CHOVANES: Right, you are, questions that make sense and are relevant and aren't wasting our time. And this is a garbage case, and we've known that since the beginning, and you're just wasting our time more.

  Now ask questions that she can answer with regard to the 30(b)(6). Whether or not she remembers the agreements

independently of a 30(b)(6) is meaningless and a waste of our time. (*Id.* at 33:20-35:7.)

- MR. RYAN: Well, it's not beyond the scope because the 30(b)(6) notice doesn't have any specific dates in it.

  MS. CHOVANES: Where does it have your statement about inventory?

  MR. RYAN: I'm asking questions about the sales and distribution agreement.

  MS. CHOVANES: Right. Where is -- no, you're asking about something that was received. That has nothing to do with this except it's listed in the agreement. You're not asking about the agreement, sir.

  MR. RYAN: I am. It's --

  MS. CHOVANES: No, you're asking about inventory, which is totally different and not on your list.

  MR. RYAN: It's No. 8 on my list.

  MS. CHOVANES: Inventory of products, not whether they were received from -- whatever. So your question, again, is not on this, according to your own example.

  MR. RYAN: Well, just so we're clear, a 30(b)(6) notice does not require me to list every question that I'm going to ask of a witness.

  Do you agree with that?

  MS. CHOVANES: I'm not going to talk about 30(b)(6) depositions generally. I'm talking about this one, and the scope is proscribed -- there's that word again -- by the 30(b)(6) as well the judge's order.[13] We've been going over this again and again. Please answer your questions – ask your questions within that scope. Why are you surprised? You keep re-attacking it. It's a statement, and we made it.

  MR. RYAN: Because you keep preventing me from asking questions.

  MS. CHOVANES: Right. That's exactly right. Yes, you're right.

  MR. RYAN: Right. So you're preventing me from asking questions about inventory at Avidas; is that true?

  MS. CHOVANES: Beyond the scope of the judge's order. Okay. Stop it. Go ask questions. We're not going to -- you've already wasted five minutes making meaningless arguments.

  Ask questions that are acceptable. Go. Otherwise, we're going to leave because you're wasting our time.

  MR. RYAN: I've already read you the judge's order clarifying his prior order. He said that his prior order is only limited to the interrogatories.

  Now, you had an opportunity to make a protective order motion, which you said you were going to do at one of the conferences, and you didn't do that. So if you had any objections to the scope of discovery, you could have raised them with the Court at the time, but you didn't.

  MS. CHOVANES: The Court -- that's because right after I said that, the Court said, Of course that's limited by our orders. That's what's in the transcript.

  I'm not going to argue anymore. Do you want to take her deposition with the allowable questions after 2014, which are, by the way, on your 30(b)(6). There are plenty of them. Go. (*Id.* at 46:19-49:11.)

- Q. I'm handing you a document that was previously marked as Exhibit 33 --

  MS. CHOVANES: Previously marked where?

  MR. RYAN: At a deposition of Topix?

  MS. CHOVANES: What deposition?

  MR. RYAN: Of Topix Pharmaceuticals.

  ***14** MS. CHOVANES: Where is the exhibit marker from Topix? Where is the original? Because otherwise, it's your reference, and I don't believe you.

  MR. RYAN: I'm representing that it was previously marked as Exhibit 33.

  MS. CHOVANES: Okay. We're subject to the objection that this is an unmarked exhibit, we're not going to -- we're going to take this whole area under advisement.

  What do you want to ask about this? Why don't you let me know that. And if you want to go off the record and

tell me why you want to ask about an unmarked exhibit that we've never seen before, that would be good.

MR. RYAN: I'm not sure why you can say you've never seen this before because this document was produced by Avidas and it's Bates number A_1138 --

MS. CHOVANES: There's no exhibit sticker on this, sir. There's no exhibit sticker. We've never seen this before, and you just represented it as an exhibit. You can't do that.

Where is the one with the exhibit sticker? Would you answer that?

MR. RYAN: Here's what I'll do. I'm going to mark this as Exhibit 54, as a new exhibit. (*Id.* at 61:10-62:18.)

- MS. CHOVANES: Well, what's the relevance of your question? Transaction happened in 2010. Give me an offer of proof and maybe we can forestall the Court.

  MR. RYAN: I'm not required to give you an offer.

  MS. CHOVANES: I know that, but maybe we can forestall the Court because you're asking about stuff that's in 2010 and makes no sense.

  I'm sure you have some elements in mind and you're just holding it back to extend this and torture me and the Court. So what's your -- what's your --

  MR. RYAN: If you've reviewed the third amended complaint –

  MS. CHOVANES: Okay. Well, tell me.

  MR. RYAN: If you've read the third amended complaint, you would know why this document was --

  MS. CHOVANES: Okay. Well, tell me. Don't hide it. Tell me.

  MR. RYAN: I don't need to educate you about the case.

  MS. CHOVANES: Oh, my goodness. Okay. Well, if you're not going to talk about why it's relevant and you're not going to explain what you have in mind -- (*Id.* at 118:24-120:1.)

- MR. RYAN: Next I want to mark as Exhibit 59 some images that were attached ... to a filing that Avidas made in this case.

  MS. CHOVANES: Specifically what filing?

  MR. RYAN: Docket 47-3.

  MS. CHOVANES: And what context? Again, I'm going to object to just producing documents out of context.

  MR. RYAN: Well, these are your filings so I'll leave it up to you.

  MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is "that's your filing," it's simply unfair.

  MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

  MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (*Id.* at 162:22-163:20) [14]

- Q. I want to focus your attention on Exhibit 60. Please look at the first page of Exhibit 60, which is Bates number A-1044. What is this document that we see that's Bates-stamped 1044?

  MS. CHOVANES: Objection. What is this document? What does that mean? Do you want to ask her just what it is in -- with regard to her business?

  ***15** And, by the way, this probably also objected to under the protective order, so your client has to get off the phone.

  MR. RYAN: It's not subject to the protective order.

  MS. CHOVANES: It is, and I'm declaring it as such. It has to do with the company's business.

  If you're going to ignore the protective order, we're not going to have testimony on this basis, and the judge just said that. Okay?

  If you want to give me a proffer while your client gets off the phone and we go off the record, I'm willing to listen. But right now, since this is getting into their business, I have a real issue with you asking about it with her on the phone.

MR. RYAN: You didn't mark this document as confidential.

MS. CHOVANES: Great. And now you're asking about it.[15] (*Id.* at 175:4-176:6)

- Q. If you take a look at Exhibit 5, there's a series of emails. And the sequence of how the emails are set up is that the oldest email is on the top, and then the latest email in the chain is -- follows behind there.

  MS. CHOVANES: Did you produce this in discovery?

  MR. RYAN: Yes.

  MS. CHOVANES: You produced this in discovery?

  MR. RYAN: No, Mr. Kuchta did.

  MS. CHOVANES: No, you produced it, your client.

  MR. RYAN: No, no, no. Mr. Kuchta.

  MS. CHOVANES: Yeah, why didn't your client produce this in discovery?

  MR. RYAN: My client is not on the document. Why would my client have it?

  MS. CHOVANES: I thought you just said it's a series of emails, and what's that? Her name right in the front here. Why didn't you produce this?

  MR. RYAN: This is an embedded email. It's forwarded by Ms. Gardner to Mr. Kuchta?

  MS. CHOVANES: Right. And why didn't you produced [sic] this email?

  MR. RYAN: We'll deal with it at a different point in time.

  MS. CHOVANES: No, no, no. It's unfair for you to be hiding documents and then all of a sudden produce them here.

  MR. RYAN: I'm not hiding anything.

  MS. CHOVANES: Are you saying you produced this? And if so, let me know exactly when.

  MR. RYAN: I'm talking about Exhibit 5 as an entirety, this document was produced by Mr. Kuchta. Okay?

  MS. CHOVANES: What document? There's no Bates numbers or anything on it. I just don't -- I'm -- all this is objection. We're going to go real slow, because I don't believe you, and your client should have produced this document. (*Id.* at 241:10-243:3)[16]

4. Instances of Chovanes Unnecessarily "Noting" For the Record

Plaintiff also identifies seventeen instances when Chovanes unnecessarily noted various things for the record. However, the Court isn't particularly concerned with many of these instances. Although many were gratuitous and certainly pointless, some happened when Ryan was calling his client or when the unnecessary "noting" did not disrupt the flow of the deposition. However, the following instances when Chovanes unnecessarily made objections or comments did disrupt and delay the deposition:

- [Discussing photographic exhibits attached to a motion Defendant had filed and Chovanes had submitted as part of a declaration.] MS. CHOVANES: What filing, sir?

  MR. RYAN: Filing document 47-3.

  MS. CHOVANES: And why was this -- do you have the rest of where this was? An appendix or something?

  MR. RYAN: No.

  ***16** MS. CHOVANES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it's unfair and out of context. Plus I'll note that there is no identification, there's no Bates number or anything on this, so I don't really accept counsel's representation.

  With that said, you may answer if it's a relevant, nonprivileged question. (*Id.* at 157:1-15.)

- [Discussing the same photographic exhibits as above.] Do you believe that Exhibit 57 depicts the Vitaphenol packaging that was created by Harmony Labs?

  A. I believe so but I'm not certain.

  MS. CHOVANES: I'm sure something was said about this. Again, I'll note my continuing objection, as this was in a brief, and pulling it out of a context of a brief is unfair to the witness.

MR. RYAN: Do you agree that any statements made in the briefs filed by Avidas can be used as admissions against Avidas, Ms. Chovanes.

MS. CHOVANES: Don't answer that. That's a privileged question. Don't answer that.

MR. RYAN: I'm asking you, Ms. Chovanes.

MS. CHOVANES: I have no idea what you're talking about. We're here to ask the witness questions. Keep going. Note my objection. (*Id.* at 158:13-159:6.)

- Q. Next I'm handing you a document that's previously marked as Exhibit 24.

  MS. CHOVANES: By whom? By when?

  MR. RYAN: By me.

  MS. CHOVANES: When?

  MR. RYAN: At the deposition of Joe Kuchta.

  MS. CHOVANES: Again, the record will reflect there's no exhibit number, there's no Bates number, and I have a continuing objection to asking questions about this material.

  If counsel could show me in the transcript where this document has been marked, I would gladly withdraw my objection. (*Id.* at 251:8-21.)

None of the above colloquy served any reasonably practical purpose and served only to disrupt Ryan's questioning and delay the deposition further. Chovanes's petty quibbling about photographs that had been filed in this case by her own client were frivolous and served no useful purpose. Nor did her objections about Ryan's use of those photographs during the deposition based on them being used out of context simply because the photographs had originally been used as exhibits to one of Chovanes's client's court filings. What these continuous, unnecessary interruptions did do, however, was to systematically eat away at Ryan's allotted seven hours of deposition, disrupt Ryan's line of thinking and flow of questioning, and continue to obstruct the deposition.

5. Instances Where Chovanes Made Objections That Suggested To Gardner How She Should Answer the Question

Under Rule 30(c)(2), an objection "must be made concisely in a ... nonsuggestive manner." However, Chovanes repeatedly violated this rule by making suggestive objections that subtly coached Gardner how to answer Ryan's questions. The following are some representative examples.

- Q. What are the brand names of the products that Avidas has developed and produced since 2008?

  A. We have –

  MS. CHOVANES: To the best of your recollection.

  MR. RYAN: Ms. Chovanes, please don't provide speaking objections for the witness.

  MS. CHOVANES: That's an objection. I'm allowed to object. Are you objecting to the fact that I'm objecting?

  MR. RYAN: Yes, because --

  MS. CHOVANES: I'm allowed to object. It's not a speaking objection to say that your assumption may be incorrect.

  MR. RYAN: That wasn't what you said. You said to the witness --

  ***17** MS. CHOVANES: Your assumption – of course that's what I said. Your assumption was -- we're not going to read back. Just please go on.

  MR. RYAN: Please don't make speaking objections.

  MS. CHOVANES: Please ask questions that aren't objectionable; I won't be making speaking objections, which I'm not doing anyway. (Doc. No. 93-6 at 26:11-27:9.)

- Q. Has Avidas Pharmaceuticals ever had any involvement with a product called Vitaphenol?

  MS. CHOVANES: You can answer that.

  THE WITNESS: Yes.

  MS. CHOVANES: To the extent you understand what "involvement" means. (*Id.* at 30:10-15.)

- Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?

MS. CHOVANES: That's a really long question. And what do you mean by "look" Because "look and feel" is actually a legal question, what's look and feel. So I -- excuse me, let me finish.

So I'm going to ask you to rephrase in light of the definition of "look" as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

MR. RYAN: I'm not intending them in any legal sense.

MS. CHOVANES: Okay. Well, if you can answer, go ahead. (*Id.* at 151:6-152:1.)

- Q. Do you know who signed any of the checks that Avidas sent to La Jolla Spa at any point in time?

  MS. CHOVANES: Objection; irrelevant. It's your client. How should she know that?

  THE WITNESS: No, I do not. (*Id.* at 185:4-10.)

- Q. So if SciDerma made a mistake in the reports that it sent to Avidas, Avidas wouldn't know that there was a mistake; correct?

  MS. CHOVANES: Objection; asked and answered, plus it calls for speculation.

  You can answer if you are able.

  THE WITNESS: We didn't have any reason to mistrust the information --

  MS. CHOVANES: Just answer the question. (*Id.* at 209:12-21.)

Like Chovanes's other objections quoted throughout this Order, these objections lacked conciseness. While it appears Gardner at times did not heed Chovanes's comments, the objections nonetheless suggestively coached Gardner on how to answer Ryan's questions.

6. Instances of Chovanes's Discourteous or Aggressive Behavior Towards Ryan

Plaintiff also identifies two instances of Chovanes's discourteous behavior towards Ryan, one of which was an inexplicable outburst during which Chovanes stood and loomed over the examination table, aggressively accused Ryan of threatening Gardner, and then left the deposition room for a break. This bizarre incident occurred after Ryan declined Chovanes's request to take a break. Ryan instead stated he wished to proceed to finish the two-hour block of time since the Court had previously ordered the deposition proceed in two-hour increments with thirty-minute breaks. When Chovanes persisted, Ryan simply asked Gardner if she needed a break and likely would have taken a break had Gardner said she needed one. The bizarre outburst proceeded as follows:

MR. RYAN: We're not off the record.

MS. CHOVANES: Okay. Well, let's stay on. I want to talk about taking a break. It's 11:30, and the Court said they'll call in at 12:30 our time; right?

MR. RYAN: Yes.

***18** MS. CHOVANES: Okay. So what do you want to do about a break?

MR. RYAN: Well, I think we need to go for our allotted two hours, and then we'll take a break.

MS. CHOVANES: There's no allotted two hours. [17]

MR. RYAN: That's what the Court said, is we should take --

MS. CHOVANES: No, the Court didn't say anything about timing. [18] The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.

MR. RYAN: Do you need to take a break?

MS. CHOVANES: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?

MR. RYAN: Why are you standing up? [19]

MS. CHOVANES: And how unprofessional that is?

MR. RYAN: Why are you standing up?

MS. CHOVANES: Because you're a male exercising male privilege and talking to my witness in a situation where she's already nervous. And you're talking to her directly?

That's, first of all, a violation of the ethical rules, as you know.

MR. RYAN: Why are you standing up?

MS. CHOVANES: We're going to take a break. Come on, Margie, let's take a break.

MR. RYAN: You're leaning over the table.

MS. CHOVANES: Yes, because of your threatening nature --

THE VIDEOGRAPHER: I'm sorry. You have the microphone on.

MS. CHOVANES: Because you threatened my witness just now. Don't you ever talk to her directly.

MR. RYAN: I did not threaten the witness.

MS. CHOVANES: Okay.

THE VIDEOGRAPHER: The [microphone] clip is still on it.

THE WITNESS: I'm sorry. I hope I didn't break it.

THE VIDEOGRAPHER: You can just leave it there. Off the video?

MR. RYAN: Not yet.

THE WITNESS: Excuse me.

(Whereupon, Ms. Chovanes and Ms. Gardner leave the deposition room.)

MR. RYAN: Now we're off the record.

THE VIDEOGRAPHER: Time is 11:37 a.m. We're going off the video record.

(Doc. No. 93-6 at 80:19-83:7.) This troubling tirade began with Ryan's seemingly benign question to Gardner, asking whether she needed to take a break. As with the rest of Chovanes's conduct during this deposition, the cold, typed words of the transcript truly do not do justice to the tone and tenor of Chovanes's sustained harassment of Ryan. This Court has reviewed the video clip of the above exchange. The video demonstrates that Ryan's voice was calm, relaxed, and non-threatening in any way. He also said nothing to Gardner that could remotely be considered threatening to trigger Chovanes's grossly disproportionate response.

What the Court can surmise from this interaction following Chovanes's rebuffed request to take a break is that it may have been fabricated in order to take the break. This appears to be the only reasonable explanation because nothing Ryan said could have warranted the inexplicably disproportionate response from Chovanes. However, once Chovanes reacted in this manner, she was able to leave the room and take the break she had requested under the guise of some feigned outrage in response to Ryan's completely benign and reasonable question to Gardner about her need for a break. Based on the transcript, this appears to be the only reasonable explanation for Chovanes's outburst. It certainly cannot be justified as a reasonable, rational response to anything Ryan said or did. In any event, such irrationally aggressive conduct toward opposing counsel is precisely the type of disturbing, unprofessional behavior that has no place in the legal profession. This conduct further served to disrupt the deposition and perpetuate the incredibly tense, rancorous atmosphere Chovanes had singlehandedly created from the opening minutes of the deposition.

7. Additional Examples of Chovanes's Harassing, Obstructive Behavior

***19** In addition to the above categories and examples Plaintiff cited, the Court's review of the full deposition transcript revealed many more instances of Chovanes's obstructive behavior.

1. For example, Chovanes constantly instructed Ryan to "hurry up," accused him of wasting her and Gardner's time, and generally attempted to rush Ryan's questioning. (*See, e.g.*, Doc. No. 93-6 at 14:24-15:1; 30:3; 33:18-19 ("Why are you wasting our time?"); 35:3; 48:16-18 ("Ask questions that are acceptable. Go. Otherwise, we're going to leave because you're wasting our time."); 50:16; 58:21-24 ("Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time."); 60:25; 74:18-20 ("You can answer, but that's the last question, because this is just wasting everyone's time."); 81:13; 85:25-86:1; 170:24; 214:8-9.) These comments by Chovanes are quite puzzling because Ryan was entitled to question Gardner for 7 hours regardless of how quickly or slowly he questioned her. Thus, these repeated comments by Chovanes served no other purpose than to harass and antagonize opposing counsel and to perpetuate the hostile atmosphere of the deposition.

2. Additionally, Chovanes made at least thirty "asked and answered" objections. (Doc. No. 93-6 at 70:4-6; 77:12-13; 77:19-20; 79:21-22; 85:23-24; 86:9-10; 87:13-14; 90:5-6; 92:13-14; 99:23-24; 105:5-6; 114:7-8; 132:22-23; 137:19-20; 138:1-2; 138:16-17; 161:13-14; 161:24-25; 162:7-8; 171:8-9; 173:11-12; 205:11-12; 210:3-4; 217:15-16; 225:20-21; 225:24-25; 228:12-19; 229:2-3; 237:9-10; 278:23-279:1.) In the context of a deposition, "asked and answered" objections are utterly pointless and serve no purpose.

3. Then there were eleven instances on which Chovanes simply objected by saying "objection" without specifying any basis for the objection. (Doc. No. 93-6 at 117:8; 191:20; 197:12; 197:17; 211:18; 236:19; 244:6; 261:13; 261:24; 262:4; 276:16.) Without a specific basis for an objection, "objection" alone is a pointless interjection and can serve no other purpose but to interrupt. These objections were consistent with Chovanes overall obstructive modus operandi in this deposition.

4. And then there were eighteen objections with a basis identified where the basis was nonsensical in the context of a deposition or intentionally obtuse about the meanings of words and could only be intended to obstruct and harass Ryan. Also included are argumentative "objections." These instances included:

- Q. How long has Avidas done that?

  MS. CHOVANES: Objection to the term "long." (Doc. No. 93-6 at 18:22-24.)

- Q. You signed as the president on behalf of Avidas Pharmaceuticals; is that correct?

  MS. CHOVANES: Objection; the document speaks for itself. (*Id.* at 39:6-9.)

- Q. Do you have any documents that reflect how much inventory Avidas received in 2008 from La Jolla Spa?

  MS. CHOVANES: Objection. Don't answer that question. You're getting into materials that even by your own admission are foreclosed.

  MR. RYAN: I didn't make any admissions. (*Id.* at 52:13-21.)

- MS. CHOVANES: Objection; mischaracterization of her -- now, don't start mischaracterizing her testimony just because you're upset. (*Id.* at 69:16-19.)

***20** • Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

  MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it's leading and it implies facts that aren't in evidence. (*Id.* at 79:6-12.)

- Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?

  MS. CHOVANES: Objection. Don't answer that question.

  MR. RYAN: On what grounds?

  MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (*Id.* at 84:19-85:2.)

- Q. This document is also signed on behalf of SciDerma Medical by someone named Douglas S. Neal. Do you know who that is?

  MS. CHOVANES: Objection to the characterization. (*Id.* at 101:3-7.)

- Q. Has it done anything affirmatively to try to collect that money?

  MS. CHOVANES: Objection to the question. Don't answer. I don't like the prejudicial nature of the word "anything" and what was the other part -- anyway, rephrase the question, if you would. (*Id.* at 109:12-19.)

- Q. In the last column on Exhibit Roman numeral IV it lists inventory values for various products. Do you know who placed the value on those inventory items?

  MS. CHOVANES: Objection; assumes a fact not in evidence. (*Id.* at 112:23-113:4.)

- Q. So Mr. Henn was an outside consultant to Avidas; is that correct?

  MS. CHOVANES: Objection; asked and answered. Plus the vagueness of the term "outside consultant" is objectionable. (*Id.* at 134:6-10.)

- Q. Well, there's a difference between taking a bottle that's existing and pouring it into a new bottle, and taking

the existing bottle and then putting a new label on it. I'm trying to understand which of those two things, or something else, that SciDerma did. Do you have an understanding --

MS. CHOVANES: Objection. Can you ask a question that makes sense? That made no sense. I'm not going to let her answer it because it's inconsiderate of her to give her questions that make no sense. Come on. (*Id.* at 150:7-18.)

- Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?

  MS. CHOVANES: That's a really long question. And what do you mean by "look"? Because "look and feel" is actually a legal question, what's look and feel. So I -- excuse me, let me finish.

  So I'm going to ask you to rephrase in light of the definition of "look" as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

  I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

  MR. RYAN: I'm not intending them in any legal sense. (*Id.* at 151:6-24.)

- [Chovanes objecting to a document that her client filed on the docket.] MS. CHOVANES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it's unfair and out of context. Plus I'll note that there is no identification, there's no Bates number or anything on this, so I don't really accept counsel's representation. With that said, you may answer if it's a relevant, nonprivileged question. (*Id.* at 157:7-15.)

***21** • [Same as above.] MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is "that's your filing," it's simply unfair.

  MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

  MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (*Id.* at 162:1-20.)

- Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

  MS. CHOVANES: Objection.

  MR. RYAN: -- related to sales?

  MS. CHOVANES: Sorry. Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts.

- Q. So this is the monthly report for November 30th of 2011; is that true?

  MS. CHOVANES: Objection; document speaks for itself.

- Q. Who did you have discussions with at SciDerma about terminating the agreement between Avidas and SciDerma?

  MS. CHOVANES: Assumes a fact not evidence. Objection. (*Id.* at 215:12-16.)

- Q. How was -- how were the Vitaphenol products being sold in early 2014, before May of 2014?

  MS. CHOVANES: Objection. Please clarify the question. "How" means so many things I'm not going to let her answer it because it's too ambiguous. (*Id.* at 220:24-221:5.)

The deposition transcript contains additional examples, and the Court could go on. Suffice it to say that all of the above representative examples of various pointless or nonsensical objections highlight Chovanes's unrelenting interruptions of Ryan's questioning, interposing objections that either made no sense or served no practical purpose in the context of a deposition (as opposed to a trial). For example, there is no planet in any solar system on which the word "how" is ambiguous in the context of Ryan's final question above. The same is true for the word "long" in the first example cited above.

5. Finally, the transcript contains examples of discourteous conduct towards Ryan that interrupted and delayed the completion of the deposition. Chovanes disparaged Ryan and his case throughout the deposition, calling the case

"garbage" (Doc. No. 93-6 at 35:1-2, 68:24) or maligning him personally and the nature of his questioning (*see, e.g.*, *id.* at 118:3-4 ("Again, you're belaboring the witness, you have so many 'belief' questions."); 228:10-13 ("If you keep asking questions that are objectionable, we're really not getting anywhere. So let's go, come on Counsel. Ask questions that are good ones."); 267:16-17 ("Ask a real question with a noun, a topic and date.")).

B. Chovanes's Conduct Multiplied Proceedings Under Rule 30(d)(2)

The Court has painstakingly enumerated numerous examples that collectively demonstrate Chovanes systematic impeding, delaying, and frustrating the fair examination of Gardner. From the opening moments of the deposition, Chovanes adopted a hostile tone and posture against Ryan and then unrelentingly proceeded to make Ryan's examination as difficult as possible. Chovanes employed all of the categories of tactics identified above to continuously interrupt the deposition and mercilessly harass Ryan. Every baseless objection, diatribe, argumentative comment, and petty argument cumulatively compounded to greatly extend the time spent in deposition. And every baseless interruption identified above served to harass Ryan, shift his focus away from the purpose of the deposition and towards battling Chovanes, and greatly frustrated the fair examination of Gardner. Rather than being able to focus on Gardner and this case, Ryan was continuously drawn into squabbles with Chovanes as the seven hours allotted for the deposition quickly burned away. Accordingly, this Court easily finds sanctions upon Chovanes are appropriate under Federal Rule of Civil Procedure 30(d)(2). [20]

C. Chovanes Unreasonably and Vexatiously Multiplied Proceedings Under 28 U.S.C. § 1927

***22** Under 28 U.S.C. § 1927, any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority "to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings." *Gadda v. Ashcroft*, 377 F.3d 934, 943 n.4 (9th Cir. 2004). Here, the Court finds Chovanes unreasonably and vexatiously prolonged Garner's deposition *far* longer than necessary and *far* longer than it would have taken without Chovanes's incessant, baseless, petty interruptions and drawing Ryan into unnecessary, frivolous disputes and discussions. Indeed, the transcript is replete with Chovanes's misconduct, and it appears Chovanes spoke more at the deposition than Garner spoke. Without Chovanes's conduct, the deposition would have concluded far sooner and would have been a far more productive and pleasant experience for everyone involved, including Garner. Interruptions and objections could be justified if they could reasonably add value to representing a client in a deposition. However, Chovanes's frivolous conduct added no such value and instead created a highly corrosive atmosphere that never should have been created. Because Chovanes's conduct was often baseless, it was unreasonable and vexatious. [21] Accordingly, this Court finds ample basis to impose section 1927 sanctions upon Chovanes. [22]

D. Sanctions Are Also Appropriate Under the Court's Inherent Power

Finally, sanctions are appropriate under the Court's inherent power because Chovanes's conduct went far beyond the multiplication of proceedings that Rule 30(d)(2) and section 1927 address. The Court's inherent power "extends to a full range of litigation abuses." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *see also Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001) ("Under both *Roadway* and *Chambers*, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct.") In addition to wastefully prolonging and multiplying proceedings at the Gardner deposition, Chovanes engaged in a wide range of harassing and abusive behavior that this Court finds intolerable. As explained immediately below, this behavior was carried out in bad faith and with the intent to obstruct the fair examination of Gardner.

E. Chovanes Acted In Bad Faith

For the purposes of both section 1927 and inherent power sanctions, this Court finds Chovanes acted in bad faith. Because this Court has had extensive experience with Chovanes and Ryan over the past seven months over many hours of hearing arguments and a Mandatory Settlement Conference, this Court has become very familiar with both attorneys. *See generally Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) ("Deference to the determination of courts on the front lines of litigation [that sanctions are warranted] will enhance these courts' ability to control the litigants before them."); *see also Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 965, 966 (9th Cir. 2004). Based on this Court's extensive experience with Chovanes, her

conduct at the deposition was hardly surprising. It was simply a *drastically* amplified version of the conduct that the Court had witnessed first-hand in the past. Given the totality of the deposition transcript, this Court finds that Chovanes acted with knowledge, with the intent to harass Ryan, and to delay and obstruct the questioning of Gardner as much as possible. The Court further finds that her conduct was frivolous and that she acted with subjective bad faith.

***23** Chovanes demonstrated a knowing intent to harass Ryan based on the long-held belief that this case is "garbage"—a belief that Chovanes has repeated multiple times during on-the-record discovery conferences before this Court prior to the deposition and even during the very hearing the Court held on this sanctions motion. Based on that long-standing belief, Chovanes unleashed her harassing, obstructive behavior full force against Ryan during a critical moment in Plaintiff's case—the deposition of the founder of Defendant that could potentially yield valuable information for Plaintiff's case. The transcript amply demonstrates that Chovanes's conduct was not inadvertent, accidental, or negligent—it was knowing, intentional, and willful. And the transcript is littered with example after example of frivolous objections, comments, arguments, and attacks—many so ludicrous that any competent attorney would refrain from employing. In addition to the frivolity of the objections, comments, and interruptions, Chovanes's improper purpose is plainly evident in the transcript. She intended to harass and obstruct Ryan's questioning as much as possible based on the staunch belief that this is a "garbage" case brought to harass Defendant. Obviously, the more frequently Chovanes interrupted Ryan and engaged him in distractions and argument for extended periods, the more of the seven hours allotted for Gardner's deposition would be consumed by Chovanes speaking rather than Gardner answering questions that could harm Defendant's case. And that is precisely what happened here, as the transcript is littered throughout with Chovanes's wasteful, frivolous interruptions.

In her defense, all Chovanes can muster is that Plaintiff suffered no prejudice despite her conduct because Ryan was ultimately able to ask his questions and stated at the end of the deposition that he had no further questions. Chovanes has never acknowledged that her conduct was in any way improper. Unfortunately, Chovanes's weak defense falls flat because sanctions under the Court's inherent powers are available *even if* an attorney's conduct was not frivolous if that conduct was for an improper purpose. *Fink v. Gomez*, 239 F.3d 989, 992-94 (9th Cir. 2001). And for purposes of section 1927, the relevant inquiry is not whether the victim suffered prejudice, but whether the improper tactics were intended to increase expenses or delay proceedings. *See New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989) ("Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith.").

Here, of course, Chovanes's conduct *was* frivolous and, as the Court concludes above, her conduct was undertaken for an improper purpose to harass, obstruct, and delay the orderly questioning of Gardner to which Ryan was entitled. Chovanes's repeated and unyielding interference with Ryan's efforts to conduct a professional, orderly deposition revealed her true motive—to improperly frustrate Gardner's deposition. This obstructive tactic, which has no place in the legal process, was conceived and executed in bad faith.

Chovanes accordingly violated the basic standards of professionalism expected of all attorneys appearing before this Court. *See* S.D. Cal. Civ. L.R. 83.4 Chovanes was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at Gardner's deposition. The sheer volume of Chovanes's antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct Ryan for no good or justifiable reason or purpose. Chovanes undeniably acted in bad faith.

F. Amount of Sanctions

Plaintiff seeks a two-fold sanctions award of $7,242.03 in costs incurred by Dianne York, the President of Plaintiff La Jolla Spa MD, Inc., and $21,360 in its attorney's fees incurred for the Gardner deposition and these sanctions proceedings. Although Defendant has now had two opportunities to challenge the propriety or amount of costs and fees, Defendant failed to argue these amounts were either improper or excessive. Defendant's opposition made no such attempt, and Chovanes also made no such attempt at the sanctions hearing. The only objection to these amounts is as follows: "The sworn statements seeking the thousands of dollars lack any back up documents and counsel and his client tell different stories about what happened and their supposed expenses." (Doc. No. 94 at 5.) First, with respect to the "back up documents," the Court finds York and Ryan's sworn declarations sufficient and reliable evidence of their fees and costs. Ryan's declaration sets forth his hourly rate, the

time spent on each billing entry, and describes each entry with reasonable particularity to allow the Court to review its propriety. This is common practice for plaintiffs' attorneys who seek fees or sanctions. And York's declaration sets forth sufficient details and supporting documentation to justify the costs incurred. This Court has no reason to doubt the accuracy or veracity of the declarations or the amounts set forth therein.

***24** Second, it is of no moment that the two declarations differ as to the date on which Ryan travelled for the Gardner deposition. Whether he travelled on May 1 or May 2, there is no dispute that he actually travelled to Philadelphia for the deposition. He was there, and he incurred costs and fees to get there. The trivial discrepancy between the declarations does nothing in this Court's mind to discredit the declarations *in toto*.

Other than the objection discussed above, Chovanes has not provided any other specific basis or challenge to the amount Plaintiff requests in sanctions. Nor has she even argued that sanctions amount is generally excessive. At the sanctions hearing, although the Court specifically addressed Chovanes's failure to do so, she again failed to raise any challenge to the amount or portions thereof. As a result, no reduction is appropriate. *See Bylin Heating Sys. v. Thermal Techs., Inc.*, No. 11CV1402-KJM-KJN, 2014 U.S. Dist. LEXIS 30809, at *13-14 (E.D. Cal. Mar. 10, 2014) (imposing $32,851.29 in sanctions and finding: "In any event, by twice failing to oppose plaintiffs' motion for attorneys' fees and costs after appropriate notice, defendant has waived any argument that the time spent on any particular task, and/or the total number of hours spent on this case, are unreasonable."); *see generally Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (fee opponents failed to meet burden of rebuttal, because opponents failed to point out with specificity any charges that were excessive or duplicative); *Columbia Pictures Tel. v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 296 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 340 (1998) (rejecting argument that certain hours should have been excluded, because no specific objection was raised in district court); *see also Smith v. Rogers Galvanizing*, 148 F.3d 1196, 1199 (10th Cir. 1998) (district court did not abuse discretion in refusing to reduce hours as to which fee opponent made no specific objection); *Sheets v. Salt Lake City*, 45 F.3d 1383, 1391 (10th Cir. 1995) (fee opponent who argued merely that fee request was exorbitant and duplicative failed to carry burden of opposing fee, and waived issue for purposes of appeal). In any event, the Court has independently reviewed both declarations and requests for sanctions and finds the hourly rate, total amounts, and bases for sanctions reasonable and proper. *See Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9th Cir. 1992) (court has duty "to independently review plaintiffs' fee request even absent defense objections").

IV. CONCLUSION

***25** Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes's atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it. Chovanes's frivolous, willful, vexatious conduct greatly expanded the Gardner deposition far beyond what the proceedings would have lasted without her unending unjustified interruptions and harassment of Ryan. Plaintiff's motion for sanctions is GRANTED, and Chovanes is sanctioned for the conduct, reasons, and under the authority set forth above. Accordingly:

1. Without reimbursement from Defendant, Chovanes is sanctioned in the amount of $28,502.03 payable to Ryan's trust account **on or before September 17, 2019**.

2. Chovanes shall self-report to the State Bar of Pennsylvania **on or before September 24, 2019**. The reporting shall consist of a copy of this Order, the full transcript of the Gardner deposition, the full transcript of the August 16, 2019 sanctions hearing, and the 128 video clips submitted as part of Plaintiff's sanctions motion. **On or before October 1, 2019,** Chovanes shall file a declaration under oath that confirms compliance with this Order and that all documents and video clips were submitted to the State Bar of Pennsylvania.

3. Chovanes shall henceforth attach a copy of this Order as an exhibit to any pro hac vice application for admission to practice before the United States District Court for the Southern District of California. This requirement shall have no expiration date and shall remain in effect *in perpetuity.*

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 4141237

Footnotes

1 This discovery conference resulted in extension of the fact and expert discovery deadlines to April 23, 2019 and June 17, 2019, respectively. (Doc. No. 76 ¶ 7.)

2 The only restrictions the Court had placed on the deposition was that it be taken over the course of one day, in two-hour blocks, with 30-minute breaks, and for seven hours, exclusive of breaks. Because Defendant did not seek a protective order despite the opportunity the Court had provided, there were no substantive restrictions on the deposition aside from the standard restrictions applicable to all depositions.

3 Unless otherwise noted, all citations to documents filed on the CM/ECF docket refer to the electronic page numbers generated by the CM/ECF system, not to the document's original pagination. However, citations to the Gardner deposition transcript refer to the transcript's original page numbers.

4 The cold typewritten words of the deposition transcript fail to do justice to the truly hostile environment Chovanes created at the deposition. To be sure, the transcript conveys great tension and hostility, but the video shows the true story. The Court has reviewed each of the 128 video clips Plaintiff submitted in support of its sanctions motion. Chovanes's aggressive, argumentative, accusatory, and hostile tone of voice greatly amplified the thick tension and hostile atmosphere of the room even beyond what the transcript conveys.

5 Because the Court's imposition of sanctions will necessarily require discussion of the specific conduct and findings thereon, the specifics of these 133 examples—and other examples the Court found in the transcript—will be set forth in greater detail in Part III below. In addition to these 128 clips, the full deposition transcript evidences other instances of Chovanes's unjustified obstructive, cantankerous behavior.

6 As an initial matter, this was not a leading question. The question sought confirmation or denial of the nature of the document Ryan referenced. But in any event, of course Ryan was allowed to ask leading question of Gardner, who was a witness identified with an adverse party. Fed. R. Evid. 611(c)(2). This objection and admonition was frivolous, unnecessary, and another example of the frivolous and incessant haranguing Ryan endured throughout the deposition. (*See also* Doc. No. 93-6 at 79:11-12; 103:12-13.)

7 In fact, Ryan's question *was* exceeding simple.

8 Of Course, lay witnesses—like Gardner was—may provide opinion testimony if the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. In any event, even if Gardner's testimony eventually would not be admissible at trial, Rule 30(c)(2) nonetheless did not allow Chovanes to instruct Gardner to not answer or to completely preclude questions that called for opinion testimony. The testimony should have proceeded subject to the objection. These are basic principles that are not confusing, ambiguous, or subject to differing interpretations.

9 Chovanes began the deposition by insisting that Ryan produce the Rule 30(b)(6) deposition notice and enter it into the deposition record. This Court is not aware of any requirement for such a procedure. Nonetheless, Chovanes refused to allow Gardner to answer questions until Ryan produced the notice (Doc. No. 93-6 at 14:16-17; 14:21-22; 15:7-10; 16:8-16) and threatened to terminate the deposition if he did not do so (*id.* at 14:32-15:4). Apparently seeing that he would get nowhere without capitulating to Chovanes's demand, Ryan finally yielded and marked the notice as an exhibit. (*Id.* at 17:7-13.)

10 While she herself demanded she not be interrupted and be allowed to finish statements (*see, e.g.*, Doc. No. 93-6 at 10:5-6; 13:16-18; 151:13-14, 174:16-20), Chovanes repeatedly interrupted Ryan and did not allow him the same courtesy (*see, e.g.*, *id.* at 26:21-22; 27:1-2; 62:9-11; 160:11-14).

11 Of course basic foundational or background information is plainly a proper area to question a witness.

12 Chovanes repeatedly pushed this Rule 30(b)(6) deposition notice scope issue, which was neither a valid basis for objecting nor instructing Gardner to not answer questions. The Court addresses this issue of Chovanes's dubious instructions elsewhere in this Order.

13 This Court issued no orders limiting the substantive scope of the deposition. Although this Court provided Defendant the opportunity to file a motion for a protective order for this very deposition (*see* Doc. No. 82 ¶ 2), Defendant failed to eve file any such motion.

14 Docket Entry 47 was Defendant's opposition to Plaintiff's motion for leave to file a third amended complaint. Docket Entry 47-3 contained ten color photographs attached as exhibits to the opposition. The opposition included a declaration signed by Chovanes, stating that these specific exhibits were "true and correct copies of images of products and invoices that LaJolla [sic] provided Avidas in discovery." (Doc. No. 47-1 ¶ 27.) Here, Chovanes challenges the very exhibits her own client filed on the case docket.

15 Of course Ryan had no reason not to ask about the document since Chovanes had admittedly not marked it as covered by the general Protective Order that covered the confidentiality of documents and information in this litigation. (*See* Doc. No. 63.) Regardless, to appease Chovanes, Ryan hung up the telephone call with his client. (*Id.* at 176:7-8.) But after briefly discussing the document, Chovanes conceded it was not covered by the Protective Order after all. (*Id.* at 177:3-7.)

16 This is yet another example of an unnecessary diatribe that wastefully consumed Ryan's available deposition time. The email communication in question was a forwarded message from Kuchta (Defendant's buyer) to Gardner (Defendant's founder).

17 (*But see* Doc. No. 82 ¶ 1.)

18 (*But see id.*)

19 The video clip shows Chovanes standing and leaning across the examination table with her arm half extended across the table. At the sanctions hearing, Chovanes briefly mentioned displeasure with the videographer's choice of camera angles. However, the camera was placed directly in front of Gardner and did not show either of the attorneys until Chovanes stood up and leaned across the table and into the video frame. The video angle is standard, and the Court finds nothing questionable about the videographer's positioning of the camera.

20 Although a finding of bad faith is not required for Rule 30(d)(2) sanctions, this Court expressly finds Chovanes's impeding, delaying, and frustrating Gardner's fair examination was in bad faith. (*See*, *infra*, Part III(E).)

21 However, this conclusion does not end the section 1927 analysis. Because subjective bad faith is relevant to both section 1927 sanction and "inherent powers" sanctions, the Court will discuss Chovanes's subjective bad faith below.

22 *Accord Grochocinski v. Mayer Brown Rowe & Maw LLP*, 452 B.R. 676, 686 (N.D. Ill. 2011) (exercising discretion to impose section 1927 sanctions for counsel's unprofessional and childish behavior because plaintiff's counsel, during plaintiff's deposition, repeatedly obstructed questioning with improper interruptions, objections, insults, and accusations that defendants' motions were fraud.); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987) (finding attorney was personally liable, without reimbursement from client, for costs of deposition of plaintiff where counsel's "contentious, abusive, obstructive, scurrilous, and insulting conduct" resulting in comments and statements other than objections to form of question apparent on 132 out of 147 pages of deposition transcript, constituted bad faith, intended to harass and delay and reflected willful disregard for orderly process of justice.); *Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 466-67 (S.D.N.Y. 1989), modified, 1989 U.S. Dist. LEXIS 14190 (S.D.N.Y. Nov. 30, 1989) (finding attorney was subject to sanctions for discovery behavior in asking repetitive questions, making improper objections and directing clients not to answer proper questions, and made speaking objections even after court expressly prohibited them, resulting in deposition proceeding lasting hours longer than necessary.)

End of Document

On January 13, 2020, the City of Medford filed a Motion for Summary Judgment (#51) and requested oral argument. Plaintiff's response, originally due on February 3, 2020, was extended to February 28, 2020 via stipulated motion. On February 28, 2020, Plaintiff filed his Response (#58) consisting of 40 pages of memoranda and nearly 800 pages of exhibits. Defendant's reply memorandum was originally due March 13, 2020. Defendant's reply memo deadline was then extended to April 10, 2020 via unopposed motion, based upon "the voluminous summary judgment record and due to a temporary swell in workload caused by a temporary period of short-staffing in the undersigned's office." (#66 and #67).

On April 3, 2020, Defendant City of Medford filed a second Motion for Extension of Time with request for expedited consideration. This time, the motion was opposed. In his declaration in support of the second motion for extension, City Attorney Eric Mitton, explained that the need for a second extension related to the current global pandemic of COVID-19. Specifically, Mr. Mitton stated,

> Since that first motion for extension of time occurred on March 9, circumstances changed substantially. The COVID-19 pandemic took hold and increased at an exponential rate. Legal work related to COVID-19 response ended up taking over the vast majority of my workload for several weeks. The State of Oregon declared a state of emergency on March 12. Medford's Mayor declared a local emergency on March 16, ratified by Medford's City Council on March 19. The emergency declaration, and researching and advising policy-makers on precisely what actions that authorized and how, required substantial legal research and legal involvement. The City of Medford closed its City buildings to the public and transitioned a substantial portion of its workforce to work-from-home status on March 20. The work up to this transition required substantial legal research and legal involvement in the associated Human Resources matters. The City is continuing to take other COVID-related actions requiring substantial legal research and legal work, such as an executive order from the City Manager establishment of additional temporary transitional housing for homeless individuals on March 30th to help mitigate the pandemic's effect on the homeless population. Throughout this time, the a great deal of my time has been spent researching and helping implement these various COVID-related matters; my normal work load has had to take a back seat to these emergency matters.

Mitton Decl. at 2 (#69). Under such unprecedented emergency circumstances, the Court would expect no objection. However, Mr. Mitton confirmed that the City's motion for extension was opposed because Plaintiff's attorney withheld his consent on the condition that he be given the right to file a sur-reply. The City of Medford understandably declined to agree to this condition:

> I respectfully disagreed, pointing out the types of briefing set forth in Local Rule 7-1(f) (unless otherwise ordered by the Court, briefing consists of the motion, the response, and the reply). After more discussion on this issue, Plaintiff's counsel reemphasized that he would agree to the extension of time as part of a package deal that also included Plaintiff gaining the right to file a sur-reply to the City's motion for summary judgment:
>
> > Well Eric. You're asking for a second, long extension. I am happy to give it, but would like a sur reply. Let's give the judge a stipulation to an extension and sur reply. I doubt he would say no.
>
> The City needs an extension of time because of my COVID-19-related work discussed above, which had to take priority over normal matters. But I do not wish to surrender substantive rights of the City in order to obtain this extension, including the right of a moving party to have the last word on its own motion, as set forth in LR 7-1(f).

Mitton Decl. at 3.

After considering the City of Medford's motion and supporting declaration, the Court granted the Second Motion for Extension of Time on April 6, 2020. (#70). Remarkably, on the morning of April 13, 2020, the Court received an ex parte email from Plaintiff's counsel stating, "I am wondering why Defendant's request for an extension was granted, when it was opposed, and the Court did not give me time to respond. There are legitimate concerns regarding the granting of the extension, and I did not get a chance to put them in front of the court. I am requesting that the approval be rescinded until such time as I have had a chance to respond."

DISCUSSION

Reflecting this court's and this state's long tradition of professionalism in the practice of law, Local Rule 83-8, entitled "Cooperation Among Counsel," provides in relevant part:

> The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.

Local Rule 83-8(b). Under normal circumstances, lawyers arguing over the propriety of a three-week extension for filing a reply when the record is particularly voluminous and oral argument has not yet been set would contravene the local rule's directive. Under the current national health emergency, refusal to agree is incomprehensible.

Context feeds common sense here. On March 23, 2020, Governor Brown issued Executive Order 20-12 in which, following the president's March 13, 2020 declaration of a national health emergency because of the COVID-19 virus and her previous March 8, 2020 declaration of a state-wide health emergency, she ordered Oregonians to stay at home. Executive Order 20-12, at 1, 3. She prohibited the operation of "non-essential" businesses (which term includes law firms and law offices), ordered closed all Oregon colleges and universities in the state, and imposed severe restrictions on the ability of childcare facilities to continue operating. *Id.*, at 1, 4.

The health emergencies announced, and safety protocols implemented by national and State of Oregon authorities, have created unprecedented challenges and changes to the manner in which personal needs and occupational endeavors are accomplished. The effects of the current health emergency have been felt equally in this court, as evidenced by Standing Orders 2020-4, 2020-5, 2020-7, 2020-8 issued by Chief Judge Marco Hernandez between March 12, 2020 and March 31, 2020, as well as the page on the court's website dedicated to information about COVID-19's effect on court operations. *See* https://www.ord.uscourts.gov/index.php/information-regarding-coronavirus-disease-covid-19-and-court-operations, last visited April 13, 2020. Thus, criminal trials have been continued, civil jury trials have been suspended, court

hearings are by phone or video conference, and non-essential court staff have been directed to telework.

This context proves true the underlying bases for Mr. Mitton's declaration. As the City Attorney for the City of Medford, Mr. Mitton is responsible for providing legal advice to the City's policy-makers, including advising those policy-makers during the unprecedented circumstances of the COVID-19 pandemic. Mr. Dimitre cannot credibly dispute the current health emergency's impact upon Oregonians and the important role that Mr. Mitton plays in keeping the community of Medford safe. The court is left to wonder, then, both why Mr. Dimitre refused to agree to an extension and what "legitimate concerns" he has now as a basis for asking the Court to rescind its Order granting the extension.

As presented in Mr. Mitton's declaration, it appears that Mr. Dimitre was willing to consent to the extension on the condition that Plaintiff be granted the right to file a sur-reply to the pending summary judgment motion. Mitton Decl. at 3. The Court finds this condition unreasonable. As Mr. Mitton pointed out to Mr. Dimitre, and pursuant to Local Rule 7-1(f), briefing consists of the motion, the response, and the reply. Once a reply is filed, no additional memoranda, papers or letters may be filed without court approval. Local Rule 7-1(e),(f). Therefore, it would be improper and impermissible for Mr. Mitton to agree to such a condition, as only the Court can grant leave to file a sur-reply. Moreover, under general standards, a sur-reply is permitted only when new arguments are raised in the reply. *See JG v. Douglas County School Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008) (district court did not abuse discretion in denying leave to file sur-reply where it did not consider new evidence in reply); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without giving the non-movant an opportunity to respond). For Mr. Dimitre to anticipate the need for a sur-reply prior to having received a reply is contrary to the basic rules of motion practice.

For these reasons, the Court finds both Mr. Dimitre's refusal to consent to the extension and attempt to condition his consent upon an agreement that he may file a sur-reply unreasonable. If Mr. Dimitre has legitimate reasons for why the Order granting the extension should be withdrawn, he is granted leave to file an affidavit under oath explaining those reasons by five o'clock p.m. on Wednesday, April 15, 2020.

ORDERED and DATED this 13th day of April, 2020.

s/ Mark Clarke
MARK D. CLARKE
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TAMMY THOMSEN, personal representative of the Estate of DALE L. THOMSEN, deceased,

Plaintiff,

v.

NAPHCARE, INC., an Alabama Corporation; and WASHINGTON COUNTY, et al.,

Defendants.

Case No. 3:19-cv-00969-AC
ORDER

ACOSTA, Magistrate Judge:

This Order GRANTS defendant NaphCare, Inc., and related defendants' Motion (ECF No. 99) for Extension of Time to Respond to Plaintiff's Motion to Take Additional Depositions, and imposes sanctions on plaintiff's counsel for violation of this court's Local Rule 83-8(b). Defendant NaphCare, Inc., is awarded $472.00 in attorney fees pursuant to Local Rule 83-8(b).

\\\\\

Background

Plaintiff represents the estate of her husband, who allegedly died of alcohol withdrawal while in custody at defendant Washington County's jail, for which NaphCare provides medical services. On March 25, 2020, plaintiff filed a Motion (ECF No. 94) for Leave to Take Additional Depositions ("Depo Motion"). She seeks to take ten additional depositions: five additional Rule 30(b)(6) depositions of NaphCare corporate representatives and five additional depositions of NaphCare fact witnesses. Plaintiff already has deposed seven NaphCare employees, and she represents in the Depo Motion that she and defendant NaphCare previously agreed that she may take an additional four depositions of NaphCare employees. Thus, at the time plaintiff filed the Depo Motion, she had taken and would be taking eleven total depositions of NaphCare employees (a total separate from any depositions she has taken of the Washington County employees and representatives), one more than permitted by Federal Rule of Civil Procedure 30(a)(2)(A)(i)'s ten-deposition limit.

On April 2, 2020, one of NaphCare's lawyers, Alexander Bluestone, filed an opposed Motion for Extension of Time to Respond to Plaintiff's Motion to Take Additional Depositions ("Extension Motion"). NaphCare seeks a two-week extension of the April 8, 2020 deadline by which to file its response to the Depo Motion. In the supporting declaration (ECF No. 100), Mr. Bluestone states:

> 3. Defendants' response to the motion for leave to take additional depositions is currently due on April 8, 2020. Defendants seek an extension to April 22, 2020 for their response to the motion.
>
> 4. The extension is requested to allow defendants' counsel to complete the response. Counsel is working from home due to the COVID-19 pandemic, and is caring for small children due to statewide school closures.

> 5. Defendants are medical providers whose attention is presently focused on providing medical care amidst a global pandemic. Obtaining information from defendants which would be necessary to prepare a response brief is taking longer than usual, given the current circumstances. Further, to the extent defendants expect an opportunity to review and provide input regarding counsel's response drafts, this is also taking longer than usual.
>
> 6. Counsel for defendants conferred with counsel for plaintiff regarding the requested extension. Counsel for plaintiff indicated he would consent to an extension to April 15, 2020, but refused to consent to defendants' proposed extension to April 22, 2020.

(ECF No. 100, at 1.)

Later on April 2, after receiving and reading the Extension Motion, the court entered this minute order:

> **SCHEDULING ORDER by Judge Acosta:** Plaintiffs' counsel is to confirm to the court no later than noon tomorrow, April 3, 2020, whether in fact they do object to the additional one-week extension, to April 22, defendants ask the court to allow. If plaintiffs' counsel confirms they do so object, then the court ORDERS one of them is to submit a declaration, explaining in detail and under oath why, given the facially legitimate reasons for the requested extension described in defendants' counsel's declaration, and in the current circumstances of a global pandemic, the governor's stay-at-home directive, the closure of schools state-wide, and the court's suspension of all in-person proceedings – including criminal jury trials – plaintiffs' counsel's objection is reasonable and this court should not impose sanctions for his having made that objection. *See* USDC Oregon Local Rule 83-8(b) ("The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee."). Failure to submit the ordered declaration by noon, April 3, will be deemed confirmation of plaintiffs' counsel's objection, and the court will rule on the record before it. There will be no extensions of the noon, April 3, 2020 deadline. (pjg)

(ECF No. 101.)

Shortly before noon on April 3, Tim Jones, one of plaintiff's lawyers, filed a declaration (ECF No. 102) in response to the court's minute order. He stated that "Plaintiff withdraws any objection and stipulates to Defendants' request for an extension of time to April 22, 2020[.]"

(ECF No. 102, at 1.) He also listed the six previous occasions since July 2019 on which plaintiff "has stipulated to each and every request from defense counsel for extensions of time during the course of this case[.]" (ECF No. 102, at 1.) In his declaration, Mr. Jones does not refute Mr. Bluestone's description of their conferral on the Extension Motion or contest Mr. Bluestone's representations of his good-cause reasons for the requested extension. Nowhere in Mr. Jones's declaration does he provide the reasonable basis for refusing NaphCare's two-week extension request in the first instance, nor does he offer any justification, including avoidance of prejudice, for insisting on only a one-week extension.

Discussion

Reflecting this court's and this state's long tradition of professionalism in the practice of law, Local Rule 83-8, entitled "Cooperation Among Counsel," provides in relevant part:

> The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.

Local Rule 83-8(b). Under normal circumstances, lawyers arguing over the propriety of a two-week rather than one-week extension to file a response to a non-routine motion such as the Depo Motion, which seeks a substantial exception to the Federal Rule of Civil Procedure 30(a)(2)(A)(i), would contravene the local rule's directive. Under the current national health emergency, refusal to agree is decidedly inexplicable – an observation proved by Mr. Jones's own declaration, which omits any explanation for plaintiff's previous refusal to agree to NaphCare's facially legitimate request.

Context feeds common sense here. On March 23, 2020, Governor Brown issued Executive Order 20-12 in which, following the president's March 13, 2020 declaration of a

national health emergency because of the COVID-19 virus and her previous March 8, 2020 declaration of a state-wide health emergency, she ordered Oregonians to stay at home. (Executive Order 20-12, at 1. 3.) She prohibited the operation of "non-essential" businesses (which term includes law firms and law offices), ordered closed all Oregon colleges and universities in the state, and imposed severe restrictions on the ability of child care facilities to continue operating. (*Id.*, at 1, 4.) Previously, the governor had ordered closed all K-through- 12 schools in the state. (*Id.* at 1.)

The health emergencies announced, and safety protocols implemented by national and State of Oregon authorities, have created unprecedented challenges and changes to the manner in which personal needs and occupational endeavors are accomplished. The effects of the current health emergency have been felt equally in this court, as evidenced by Standing Orders 2020-4, 2020-5, 2020-7, 2020-8 issued by Chief Judge Marco Hernandez between March 12, 2020 and March 31, 2020, as well as the page on the court's website dedicated to information about COVID-19's effect on court operations. (*See* https://www.ord.uscourts.gov/index.php/information-regarding-coronavirus-disease-covid-19-and-court-operations, last visited April 5, 2020.) Thus, criminal trials have been continued, civil jury trials have been suspended, court hearings are by phone or video conference, and non-essential court staff have been directed to telework.

This context proves true the underlying bases for Mr. Bluestone's declaration. Mr. Jones cannot credibly dispute the current health emergency's impact upon Oregonians, such as Mr. Bluestone, and Mr. Jones does not refute or challenge Mr. Bluestone's under-oath explanation for the requested extension. The court is left to wonder, then, both why Mr. Jones refused to agree to that extension and why he deemed reasonable such refusal.

Mr. Jones's recitation of the six previous occasions he, on behalf of plaintiff, agreed to NaphCare's and the Washington County defendants' respective extension requests does not provide the answer, despite the apparent suggestion that it should do so. Quite the contrary, as that previous willingness makes more inexplicable the refusal to agree to NaphCare's request in this specific instance. Further, a lawyer's previous instances of cooperation with opposing counsel do not create a line-of-credit against which one may charge an instance of unreasonable refusal to cooperate. That same willingness should have been extended here but, because it was not, NaphCare's counsel had no alternative but to file the Extension Motion.

For these reasons, the court finds unreasonable Mr. Jones's refusal to agree to NaphCare's request for a two-week extension. That Mr. Jones withdrew plaintiff's objection and now stipulates to NaphCare's extension request does not undo the violation of or nullify the appropriateness of sanctions under Local Rule 83-8(b), because only after NaphCare filed the Extension Motion did plaintiff agree to the extension request. Federal Rule of Civil Procedure 37, entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," subsection (a)(5)(A), provides guidance on this point:

> *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Local Rule 83-8(b) authorizes the court to impose a sanction for failing to accommodate a reasonable request and here a sanction is appropriate, in the form of the attorney fees NaphCare incurred to prepare and file the Extension Motion. This court uses the most recent Oregon State Bar Economic Survey to determine the reasonableness of fee requests generally and hourly billing

rates specifically. (*See* "Message from the Court Regarding Fee Petitions," https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/notices/fee-petitions, last visited April 5, 2020.) Mr. Bluestone's resume shows that he first was admitted to the practice of law in 2018, here in Oregon, after graduating from Willamette University's College of Law that same year. The 2017 OSB Economic Survey[1] shows a mean hourly billing rate of $236.00 for Portland lawyers with 0-3 years of private practice experience. (*See* 2017 OSB Economic Survey, at 38.) Based on its experience both as a lawyer and as a judge, the court estimates that the Extension Motion required two hours of Mr. Bluestone's time to prepare for, write, file, and serve.

Accordingly, plaintiff's counsel is ORDERED to pay $472.00 in attorney fees to NaphCare as a sanction for violating Local Rule 83-8(b), such payment to be delivered to or received by NaphCare's counsel's office no later than April 16, 2020.

IT IS SO ORDERED.

DATED this 6th day of April, 2020.

JOHN V. ACOSTA
United States Magistrate Judge

[1] The PDF version is available at https://www.osbar.org/surveys_research/snrtoc.html.

Why 'Kill All the Lawyers'?

How Shakespeare helps us define professionalism for Oregon's lawyers and judges

By Hon. Wallace P. Carson Jr. and Barrie J. Herbold

William Shakespeare wrote *Henry VI, Part II*, around 1590; it is one of his 10 "Histories" dramatizing the chaos of leadership in England during the 15th century. Set in England in 1445-55, it brings to life efforts of Henry VI to retain his monarchy in the face of a challenge by the competing House of York, dissatisfaction with his rule among the English nobility and a peasant revolt. When Henry sends the Duke of York to put down a rebellion in Ireland, York arranges with the English rebel John Cade to make life difficult for Henry in York's absence.

In Act IV, scene ii, Cade, a commoner, gathered with his supporters at Blackheath in preparation for a march on London, announces that he has a claim to the throne as a purported grandson of the Earl of March. He speaks of how the world will be different when he is king:

CADE: Be brave then; for your captain is brave, and vows reformation. There shall be in England seven halfpenny loaves sold for a penny...

ALL: God save your majesty!...

DICK (a rebel): The first thing we do, let's kill all the lawyers.

CADE: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say, 'tis the bee's wax; for I did but seal once a thing, and I was never mine own man since.

It is the height of irony that Shakespeare's words, so often quoted to depict lawyers as parasites in society, instead express the very essence of the importance of law and lawyers.

At this point, the unfortunate clerk of Chatham, who is said to be able to "write and read and cast accompt" appears on the scene:

CADE: Here's a villain!

SMITH: Has a book in his pocket with red letters in't.

CADE: Nay, then, he is a conjurer.

DICK: Nay, he can make obligations, and write court-hand.

CADE: ... Come hither, sirrah, I must examine thee...Dost thou use to write thy name? Or hast thou a mark to thyself, like an honest plain-dealing man?

CLERK: Sir, I thank God, I have been so well brought up that I can write my name. ...

CADE: Away with him, I say! Hang him with his pen and ink-horn about his neck!

When in Act IV, scene vii, the rebels march on London, Cade commands destruction of the Inns of Court and orders his followers to "burn all the records of the realm" saying "[m]y mouth shall be the parliament of England."

Indeed, it is an historical fact that in 1450, 30,000 peasants sympathetic to the Duke of York marched on London seeking land reform. Viewed in both their literary and historic context, the words "kill all the lawyers," coming from the mouth of an English commoner, as imagined by one of the great creative geniuses in the history of the world, take on a significance that give us guidance almost 400 years later about the power of knowledge, the degradation of those who are deprived access to the use of knowledge and the harm that comes to society as a result of that deprivation. It is the height of irony that Shakespeare's words, so often quoted to depict lawyers as parasites in society, instead express the very essence of the importance of law and lawyers.

When the quote is viewed in context, it becomes clear that lawyers, and indeed all those who held the keys to the legal

and commercial structure of that time, were not the abusers of the poor and oppressed. They were not those who sought money and power and should therefore be destroyed, as Shakespeare's language is so often used to imply. Cade and his friends wanted to "... kill all the lawyers" because to them lawyers and others with knowledge and education were the gatekeepers of the legal system. Crucial to the plot to overthrow the king was to eliminate all lawyers and others of learning who stood between the rebels and the destruction of the monarchy.

Shakespeare's articulation of this idea is stated with brilliant clarity when Cade, referring to the poor clerk of Chatham, says, "He is a conjurer." Lawyers and other people with learning were seen by non-lawyers as possessing magical powers. Cade's reference to "a bee's wax seal" that made him "never mine own man since" is an equally powerful metaphor. Our final lesson from their plight: in their helplessness, the only recourse of the mob is to plunge the system into further chaos – to destroy the law.

Like so much of Shakespeare's work, the ideas expressed by Cade and his followers are entirely timeless. If you have ever spoken to a senior citizen with a paper he or she signed but cannot understand, then you know that little has changed from the 15th to the 20th century in this regard. Today, even for very sophisticated clients, lawyers routinely hold the golden key to the legal system – to get you in or keep you out, to protect your rights or destroy them. We are the interpreters, the counselors, the guides, to all those who must use the legal system. By virtue of our learning, we have great power to make the system work for good or ill. When the system fails to work, all of us pay the price – in acts of senseless violence, in the confusion and destructiveness of fractured lives, and in the perpetuation of social and economic injustice on an enormous scale.

It seems obvious that Oregon lawyers, so readily able to ensure that the court system provides to all the opportunities and protections that Cade and his compatriots believed that they could not obtain from the system in England in 1450, should as privileged professionals see that it does so. We note the distinction between the OSB Code of Professional Responsibility (Disciplinary Rules), which carefully and specifically addresses our obligations to our individual clients – but which does not obligate us to use our unique powers and skills to serve the common good, that is, to ensure that the system of justice works, for everyone – and professionalism, the heights to which we should aspire.

Here, we draw the connection between chaos and rebellion in 15th century England and professionalism in 20th century Oregon: We believe that the truly professional lawyer and judge will take it as her or his obligation to ensure that, in modern-day Oregon, unlike in Cade's England, justice is available to all. Professionalism, as distinct from ethics, is characterized by a conviction on the part of an individual lawyer or judge that she or he is charged with the responsibility to continuously to ensure that the legal system works – effectively, efficiently, and fairly – for all.

Why, one asks, do lawyers have this obligation? We start with the proposition that our culture recognizes certain "core

OREGON BENCH/BAR COMMISSION ON PROFESSIONALISM

By Wallace P. Carson Jr. and Barrie J. Herbold

The Oregon Bench/Bar Commission on Professionalism was established 1995 by order of the chief justice of the Oregon Supreme Court. It is comprised of four judges and two lay persons appointed by the chief justice, and four lawyers, a law professor from one of Oregon's law schools and one lay person appointed by the president of the Oregon State Bar. The chief justice and the bar president are de facto members. Commission members are drawn from specified geographic regions; the commission is required to meet at least four times annually.

As a rule, the commission conducts CLE seminars, in the form of round-table discussions of professionalism hypotheticals for members of the local bar at its meeting places. In addition, the commission has sponsored and conducted CLE programs using a similar format at the annual meeting of the bar each year since 1995, and, henceforth, will do so at the biennial meetings of the bar in conjunction with the meeting of the OSB House of Delegates. Further, in conjunction with the bar the commission has conducted professionalism CLEs at other times during each of those years, as well. The commission also sponsors a very effective and well-received orientation course for first-year law students at Willamette University College of Law. The University of Oregon School of Law is beginning a similar program this month.

The commission in 1997 received an award from the ABA as one of the outstanding programs promoting professionalism in the country; the financial reward from that honor, together with an anonymous donation for the purpose of purchasing literature and videotapes regarding professionalism, made it possible for the commission to hire a contractor to assist with its work and to purchase materials for training that are available to all members of the bar from a library at the offices of the OSB.

The commission's charge is to "promote among lawyers and judges principles of professionalism, including civility and commitment to the elimination of discrimination within the judicial system." Interestingly enough, however, one of the key concerns of commission members has been and continues to be a *definition* of the term "professionalism," a word so often used and yet so "soft," so broad and vague as to defy understanding, much less make possible the promotion of a specific kind of conduct. By the accompanying article, Chief Justice Carson and Herbold, one of the members of the state bar task force that proposed formation of the commission and a current member, propose a basic definition of the term "professionalism" to become an aspirational standard and the hallmark of professional behavior among Oregon lawyers and judges. ■

We can expand the reach of our good works far beyond the needs of our individual cases and clients if we take responsibility for making the system work.

values" as to which there is substantial agreement. These values are taught in many contexts – in the family, in religious organizations, in community gatherings, in schools, in professional training and in many other ways. Michael Josephson of the Josephson Institute for the Advancement of Ethics, a well-known and respected writer and speaker regarding ethics, identifies the "six pillars of character" as caring, fairness, respect, trustworthiness, citizenship and responsibility.

These values are mostly other-directed; that is, they encourage us to treat others in positive, supportive ways while promoting our own integrity and acknowledging our individual accountability and responsibility. In the legal profession, similar values that direct us to take responsibility for others – honesty, trustworthiness, courage, a sense of fairness and accountability – all are subsumed under the notion that we must ethically represent our individual clients consistently and concomitantly with the promotion of the fair and efficient administration of justice in our state. That is, those of us who are privileged with the gifts of intelligence and access to knowledge sufficient to obtain and maintain a license to practice law should use those gifts for the common good, just as those with other gifts should use theirs in other contexts. We can expand the reach of our good works far beyond the needs of our individual cases and clients if we take responsibility for making the system work.

If we consider this "core value" of professionalism in light of other definitions of professionalism, we see a common thread. The OSB Statement of Professionalism states, "professionalism sensitively and fairly serves the best interests of clients and the public, ... fosters respect and trust ... between lawyers and the public, promotes the efficient resolution of disputes, [and] simplifies transactions... ." Quoting Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (1953), *The Ethical Oregon Lawyer*, section 2.2 (1994) agrees that professionalism "reaches beyond the minimum standards" of the disciplinary rules and "emphasizes the pursuit of a learned art not only as a means of earning a livelihood but also in the spirit of public service."

Moreover, when one considers specific "professionalism" concerns repeated by article after article and group after group, it is clear that our over-arching standard – that we as lawyers and judges must accept responsibility for the overall efficacy of Oregon's justice system – creates a structure within which all such concerns can be simply and constructively analyzed.

These are examples:

Lawyers' obligation to support legal services for low income people.

At a CLE program given a few years ago by the commission on Professionalism, participants were asked if they believed that lawyers have a different obligation than non-lawyers to contribute to the provision of legal services to the poor. About two-thirds of those in the room agreed that they do. Certainly a basic tenet of the notion of professionalism we articulate here includes ensuring low income people's access to legal services – by giving money (to the Campaign for Equal Justice or various programs such as St. Andrews Legal Clinic), or by giving time through any of a variety of groups (such as the Volunteer Lawyers Project or

the Senior Law Project). The November 1998 Access to Justice Conference is another example of lawyers working to improve access to the courts for all Oregonians.

Promotion of diversity among lawyers.

While this goal can and should be seen as encouraging an increase in the numbers of minority lawyers within the state for the simple reason that it is of benefit to those individuals, it is important to remember that real access to the system often depends upon the public's ability to find lawyers with whom they feel comfortable and can communicate. This "fit" may or may not be racially driven, but ensuring that Oregon has lawyers of every color and ethnic background can only assist in making the system more accessible.

The elimination of bias within the system.

It seems a proposition too obvious to state that any kind of discrimination within the system does just what bias against the commoners of 15th century England did – it shuts people out. Oregon's judges and lawyers have a continuing obligation to ensure fair treatment, including the provision of interpreters and others when necessary to assist those who cannot fully participate in the system otherwise.

The accessibility and use of alternative dispute resolution.

Douglas County Circuit Judge Joan Seitz ("Professionalism, Viewed from the Bench", page 72) discusses the important role that judges and lawyers can play in leading parties to settlement of difficult dissolutions. The OSB's Statement of Professionalism similarly encourages lawyers to offer ADR early and often. When the overriding goal of making the system work effectively and efficiently is considered in this context, it is easy to see why eager and constructive participation in mediation must be a trait of the professional Oregon lawyer and judge.

Courtesy and civility.

Lawyers should be courteous, reasonable and responsive – not simply so that we can enjoy our practices, although that is a valuable goal. Incivility creates tensions that waste time and energy, leading to negative rather than positive outcomes. The system works best when the practice of law is conducted in a polite and positive way. Moreover, it is clear that when we act with civility we are also modeling behavior that is one of the key parts of our societal standards as a whole.

Use of the court to enforce professionalism requirements.

It appears to be a controversial issue whether the Oregon courts should become involved in issues arising from unprofessional conduct among lawyers. If this question is considered in light of the standard that our fundamental goal is to insure that the system *works*, it becomes clear that it is the task of the trial judge to get involved in such disputes to the extent necessary to see that all participants are behaving in such a way that the matter will be concluded as quickly, efficiently and fairly as possible.

"Rambo" tactics.

As Michael Long points out in his excellent discussion of "cut-throat" trial techniques in this issue, "according to this theory, civil and criminal litigation are merely mercenary games played by opposing sides ... ." The notion that, as lawyers, we are engaged in a battle to win at any cost, even of the truth, is a pervasive idea. It is seen as such an impediment to professional behavior that the Multnomah Bar Association's Summit on Professionalism recommended that the word "zealous" be removed from the title of DR 7.107 regarding advocacy. When so-called "Rambo tactics" are considered in light of our professional responsibility to see that the system promotes justice for all, we see that they are undoubtedly unprofessional. Moreover, deposition, discovery and courtroom tactics that are oppressive, unreasonable, time-consuming or mean-spirited clearly prevent the system from operating fairly and efficiently. We all know that these tactics are unprofessional. If we make reference to our basic standard, we know why.

As lawyers and judges, we live out who we are by our actions. Professionalism is not something to don at the office or take off with our suits and our robes; our behavior continuously demonstrates who we are. We can improve our own lives and spirits, those of our clients, opposing counsel and parties and the community as a whole, if we simply remember that our part in this system gives us tremendous power, to make life better for every citizen of Oregon. If every lawyer and judge in the state would analyze every action she or he takes in light of the goal of ensuring that the system works fairly and efficiently for everyone, questions about professionalism would simply disappear – and tremendous good would result for our community. ■

ABOUT THE AUTHORS

Wallace P. Carson Jr. is chief justice of the Oregon Supreme Court. Barrie J. Herbold, a Portland attorney, is member of the Oregon Bench/Bar Commission on Professionalism.

984 N.E.2d 1201
(Cite as: 984 N.E.2d 1201)

Supreme Court of Indiana.
Jacqueline WISNER, M.D. and The South Bend Clinic, L.L.P., Appellants (Defendants below),
v.
Archie L. LANEY, Appellee (Plaintiff below).

No. 71S03–1201–CT–7.
Dec. 12, 2012.

Background: Patient brought medical malpractice action against physician, alleging failure to diagnose and treat a transient stroke. Following a jury trial, the St. Joseph Superior Court, Margot Reagan, J., entered judgment for patient and denied patient's motion for prejudgment interest. Physician appealed, and patient cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded in part. Transfer was granted.

Holdings: The Supreme Court, David, J., held that:
(1) denial of physician's motion for relief from judgment based on opposing party's misconduct was not abuse of discretion;
(2) physician's witness's interaction with patient did not violate separation of witnesses order;
(3) patient's written offer of settlement complied with prejudgment interest statute's requirement that offer provide for payment of settlement offer within 60 days; and
(4) written offer of settlement was untimely under prejudgment interest statute.

Trial court affirmed.

Opinion, 953 N.E.2d 100, vacated in part.

West Headnotes

[1] Judgment 228 ⇨375

228 Judgment
228IX Opening or Vacating
228k372 Misconduct of Party or Counsel
228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

Denial of physician's motion for relief from judgment based on misconduct of patient's counsel at jury trial of medical malpractice action was not abuse of discretion; although patient's counsel repeatedly returned to lines of questioning that trial court had forbidden and acted contemptuously of physician's counsel throughout trial, physician's counsel also engaged in similar misconduct, and trial court was in best position to gauge impact of misconduct of both parties on the jury. Trial Procedure Rule 60(B)(3).

[2] Appeal and Error 30 ⇨982(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k982 Vacating Judgment or Order
30k982(2) k. Refusal to vacate. Most Cited Cases

Appellate court reviews denial of motion for equitable relief from judgment for abuse of discretion. Trial Procedure Rule 60.

[3] Judgment 228 ⇨375

228 Judgment
228IX Opening or Vacating
228k372 Misconduct of Party or Counsel
228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

Judgment 228 ⇨379(1)

228 Judgment
228IX Opening or Vacating
228k379 Meritorious Cause of Action or Defense
228k379(1) k. Necessity. Most Cited Cases

In order to obtain relief from judgment based on misconduct of adverse party, the moving party

must show that (1) misconduct occurred; (2) the misconduct prevented the moving party from fully and fairly presenting the case at trial; and (3) the moving party has a meritorious defense. Trial Procedure Rule 60(B)(3).

[4] Appeal and Error 30 ⚿946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

An "abuse of discretion" occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court.

[5] Judgment 228 ⚿375

228 Judgment
228IX Opening or Vacating
228k372 Misconduct of Party or Counsel
228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

When considering motion to set aside judgment based on misconduct of opposing party, trial judge is in the best position to gauge the behavior of the attorneys and whether or not it impacts the jury and in what context. Trial Procedure Rule 60(B)(3).

[6] Appeal and Error 30 ⚿207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and conduct of counsel. Most Cited Cases

Physician waived argument on appeal in medical malpractice action that patient's counsel improperly referred during closing argument to medical records allegedly lost by clinic that had been dismissed from case and that physician thus was entitled to new trial based on such misconduct, where physician did not object to patient's counsel's closing argument at trial.

[7] Trial 388 ⚿41(5)

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k41 Separation and Exclusion of Witnesses
388k41(5) k. Violation of rule. Most Cited Cases

Physician's expert witness's interaction with patient did not violate separation of witnesses order in patient's medical malpractice action against physician; witness simply asked patient how patient was feeling during chance encounter, and witness did not ask about anything related to trial. Rules of Evid., Rule 615.

[8] Appeal and Error 30 ⚿206

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k202 Evidence and Witnesses
30k206 k. Reception of evidence. Most Cited Cases

Appellate court does not disturb trial court's determination regarding a violation of a separation of witnesses order absent a showing of a clear abuse of discretion. Rules of Evid., Rule 615.

[9] Appeal and Error 30 ⚿207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and conduct of counsel. Most Cited Cases

Physician waived argument on appeal in pa-

tient's medical malpractice action that physician was entitled to a new trial based on improper questions concerning insurance coverage that patient's counsel asked during voir dire, where physician did not argue to trial court that jury pool had been tainted or otherwise object to statement or ask for specific relief.

[10] Jury 230 ⚿131(1)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) k. In general. Most Cited Cases

A question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith.

[11] Appeal and Error 30 ⚿984(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) k. In general. Most Cited Cases

Interest 219 ⚿39(2.10)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.10) k. Discretion in general. Most Cited Cases

An award of prejudgment interest is discretionary; accordingly, appellate court reviews trial court's ruling on a motion for prejudgment interest for abuse of discretion.

[12] Interest 219 ⚿39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

A written settlement offer must be made within one year following the filing of a claim to be eligible for prejudgment interest, although settlement offer can also be made prior to filing of a lawsuit. West's A.I.C. 34–51–4–6(1).

[13] Interest 219 ⚿39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

Patient's counsel's settlement letter to physician's counsel containing an offer to "resolve this matter at this time" met requirement to identify 60-day settlement requirement period in prejudgment interest statute, as offer to settle "at this time" was offer to settle by payment within 60 days, although better practice would be to cite prejudgment interest statute in settlement letter and make clear that letter was intended to invoke statute. West's A.I.C. 34–51–4–6.

[14] Interest 219 ⚿39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

Patient's counsel's settlement letter to physi-

cian's counsel sent two years and five months after patient's medical malpractice lawsuit against physician was originally filed was untimely under one-year deadline in prejudgment interest statute, even though letter was sent within one year of patient's dismissing original lawsuit without prejudice and refiling second lawsuit alleging same claim. West's A.I.C. 34–51–4–6.

[15] Interest 219 ⇐39(2.10)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.10) k. Discretion in general. Most Cited Cases

An award of prejudgment interest is committed solely to the discretion of the trial court if the statutory prerequisites are satisfied. West's A.I.C. 34–51–4–7, 34–51–4–8.

***1203** Edward L. Murphy, Jr., Heidi K. Kocneman, Fort Wayne, IN, Attorneys for Appellants.

Timothy S. Schafer, Timothy S. Schafer, II, Merrillville, IN, Attorneys for Appellee.

On Petition to Transfer from the Indiana Court of Appeals, No. 71A03–1007–CT–382

DAVID, Justice.

In this case, the jury returned a verdict for plaintiff in the amount of $1.75 million. The issues presented focus on two separate, but significant, matters.

The first is whether the trial court erred by denying defendants' [FN1] motion for a new trial based upon the cumulative effect of plaintiff's counsel's alleged unprofessional conduct during the trial. The second issue is whether the trial court erred when it refused to grant plaintiff prejudgment interest.

FN1. The record indicates the St. Joseph Superior Court granted a motion for directed verdict and dismissed plaintiff's claims of negligence against the South Bend Clinic, leaving them as a named defendant for purposes of respondeat superior liability to Dr. Wisner. The record further indicates defendants' counsel represented both South Bend Clinic and Dr. Wisner at trial and now on appeal.

We affirm the trial court, as did the Court of Appeals, on the denial of defendants' motion for a new trial. Under the circumstances of this case, we defer to the judgment of the trial court. However, this decision does not lessen our dissatisfaction and frustration with the behavior of counsel during the trial, particularly plaintiff's counsel.

Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it.

Further, we affirm the trial court's decision to deny the discretionary award of prejudgment interest.

Facts and Procedural History

In 2001, Archie Laney was at work when she became dizzy, lightheaded, weak, and had difficulty walking. She was sixty-six-years old. Laney called her daughter, who drove her to the South Bend Clinic where Laney's primary care physician worked. When they arrived, Laney learned that instead of her primary care physician being on duty, Dr. Jacqueline Wisner was on duty that evening. Dr. Wisner conducted an examination consisting of an oral history of Laney's symptoms and an examination of Laney's eyes, ears, lungs, and stomach. Dr. Wisner further conducted an Accu–Check blood glucose test, as well as a hemocue test for anemia. Dr. Wisner observed considerable wax build-up in

Laney's ears. Dr. Wisner diagnosed Laney with vertigo due to an inner ear infection, and discharged her with medication for the dizziness and an antibiotic. Dr. Wisner advised Laney the medication could take up to three days to work and instructed Laney to return to her primary care physician if the symptoms continued.

Two days later, Laney called her daughter and told her she could not move her right arm or right leg. Her daughter drove Laney to the Emergency Room at St. Joseph Medical Center. Laney was evaluated that evening and diagnosed as ***1204** having suffered an ischemic stroke affecting the right side of her body.

The stroke has rendered Laney unable to use her right side, thus Laney now struggles with independent living.

On November 26, 2002, Laney filed a complaint with the St. Joseph Superior Court alleging negligence by Dr. Wisner and The South Bend Clinic on eleven different counts, generally relating to the failed diagnosis of a transient stroke, which later caused Laney to suffer a disabling stroke. The complaint also alleged that Dr. Wisner or the Clinic negligently failed to maintain the medical record from Laney's March 9, 2001 visit to the Clinic.

In 2006, the original complaint was dismissed without prejudice, pending the adjudication of the proposed complaint before the Indiana Department of Insurance, a statutory condition precedent to the filing of the court complaint, which plaintiff had not done here.[FN2]

> FN2. This Court gave a detailed analysis of the steps taken in medical malpractice cases in *Ramsey v. Moore,* 959 N.E.2d 246, 250 (Ind.2012).

On August 6, 2007, Laney filed virtually the same complaint in the St. Joseph Superior Court, alleging negligence by the Clinic and Wisner. In March 2010, a five-day jury trial was held. The jury returned a verdict in favor of Laney and against Dr. Wisner and The South Bend Clinic in the amount of $1.75 million. The trial can best be described as hotly contested, not only as to the disputed facts but also to the rate of objection by the attorneys.

On March 12, 2010, Dr. Wisner and the clinic filed a motion for reduction of the verdict and judgment to the statutory maximum prescribed by the legislature in the amount of $1.25 million. Laney objected to the reduction and also asked for an award of $100,000 in prejudgment interest based on Indiana Code section 34–51–4–7. On March 18, 2010, the trial court granted the motion to reduce the award and entered judgment in favor of Laney for the amount of $1.25 million, the maximum allowable under Indiana Code section 34–18–14–3, but on April 14, 2010, denied the motion for prejudgment interest.

On April 15, 2010, defendants filed a motion to correct error, requesting a new trial pursuant to Indiana Trial Rules 59(J) and 60(B)(3). Trial Rule 59(J) allows for the court to correct any error it determines to be "prejudicial or harmful." Ind. Trial Rule 59(J). Trial Rule 60(B)(3) allows for the court to relieve a party from a judgment for "fraud ..., misrepresentation, or other misconduct of an adverse party." T.R. 60(B)(3). Specifically, defendants alleged the following: (1) the trial court erred when it failed to order a mistrial based on the consistent, unprofessional and prejudicial conduct of plaintiff's counsel, which deprived defendants of a fair trial; (2) the trial court erred in allowing plaintiff to argue the missing 2001 record should be attributed to Dr. Wisner; (3) the trial court erred in allowing the testimony of plaintiff's expert witness, Dr. Campbell, after learning he violated a separation of witnesses order; and (4) the court erred in not admonishing plaintiff's counsel for asking voir dire questions that were in violation of the motion in limine order.

The trial court held a hearing and denied defendants' motion to correct error. Defendants appealed the trial court's denial of their motion to cor-

rect error, and Laney cross-appealed on the issue of the propriety of the trial court's order denying prejudgment interest. The Court of Appeals affirmed the trial court's order denying the motion to correct error, but reversed the trial court's order denying ***1205** prejudgment interest. We granted transfer.

I. Behavior of Laney's Counsel

[1][2][3][4] Dr. Wisner and the clinic contend the behavior of plaintiff's counsel was so unprofessional and so permeated the entire trial that it tainted the proceedings and therefore the cumulative effect was prejudicial enough to warrant a mistrial. We review denial of a Trial Rule 60 motion for abuse of discretion. *Outback Steakhouse of Florida, Inc. v. Markley,* 856 N.E.2d 65, 72 (Ind.2006). When the motion is based on Trial Rule 60(B)(3), the appellant must show that (1) misconduct occurred; (2) the misconduct prevented the appellant from fully and fairly presenting the case at trial; and (3) the appellant has a meritorious defense. *Id.* at 73–74. An abuse of discretion occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court. *McCullough v. Archbold Ladder Co.,* 605 N.E.2d 175, 180 (Ind.1993).

Dr. Wisner and the clinic argue the trial court's finding Laney's counsel in contempt of court on day three of the trial and instructing the jury to disregard certain statements made by Laney's counsel were insufficient remedies that failed to undo the cumulative effect and prejudice caused by such conduct. Defendants cite to several exchanges in the record that were particularly harmful to such a degree they claim that the harm could not be undone. The first are instances where Laney's attorney asked specific questions in front of the jury in violation of the trial court's order not to broach a certain subject.

While questioning plaintiff's daughter, plaintiff's counsel asked if Laney was still seeing a particular physician. This was met with an objection, which was sustained by the trial court. Immediately following the sustained objection, plaintiff's counsel asked another objectionable question and again the trial court sustained the objection and prohibited the inquiry.

Following an overnight break, counsel resumed questioning plaintiff's daughter along the very same lines that the trial court forbid the day before. Defendant's counsel objected, and a side bar conference was held where the trial court again found the desired testimony to be irrelevant. Undeterred by the trial court judge, immediately following the side bar conference, plaintiff's counsel once again went right back to the same line of questioning, drawing yet another objection from defendant's counsel and yet another side bar conference.

At the second side bar conference, the trial court made it clear that this prohibited area of inquiry would not be ventured into again by plaintiff's counsel. Nonetheless, plaintiff's counsel would pursue the prohibited testimony once again, this time attempting to solicit the prohibited testimony through the plaintiff herself. Ultimately, the court instructed the jury to disregard the previous questions and not to consider at all the questions that had been asked by plaintiff's counsel on this subject.

On the following day of trial, the trial judge held yet another side bar conference and warned plaintiff's counsel that if he brought up that particular issue again during the next witnesses cross-examination a fine of $500 would be imposed for contempt of court.

This example is one of many displays of inappropriate behavior of counsel. There were excessive objections by both counsel, over eighty by the defendant's counsel and over thirty by plaintiff's counsel. While objections are clearly permitted if made in good faith and on sound substantive grounds, repeated objections despite adverse***1206** rulings already made by the trial court are not appropriate. However, far more problematic for the trial judge in this case was the unnecessary sparring and outright contemptuous conduct of each attorney directed to-

ward the other.

The record reveals at least five instances where the trial court judge had to admonish the attorneys about their behavior. Furthermore, by any conservative measure there were at least ten instances of questionable behavior by each attorney during the trial. Examples are bountiful throughout the record, but a few examples are highlighted below.

Plaintiff's counsel stated during the trial,

"There was no discussion of the testimony here in court. He's wasting our time, Judge. There's no violation.... I've about had it. Cut the scenes in front of the jury.... Yeah. Judge, this conduct's got to stop by Mr. Murphy. This has got to stop."

"We don't want to hear about your unsolicited advice. I don't care for your unsolicited advice."

"What are you talking about Murph.... You're slipping, Murph."

"No, no. I never said that at all. That's an outright lie."

"Well, I must [be] wrong. I must be wrong for the fifth time, but I think I'm going to show Mr. Murphy has been wrong every time he's objected and I'm going to show later on.... He keeps telling me I'm wrong, Judge. The record's going to bear me out. How about this? Loser pays a thousand dollars it wasn't faxed? ... There's something unprofessional going on here, I'll agree. It's going to come back."

[Tr. at 607, 98, 179, 192, 957, respectively.]

Defendants' counsel stated during the trial,

"Your Honor, I think it's really unfortunate that we start off with a misrepresentation to the Court."

"He's already violated it twice."

"Are we going to put up with this?"

"I would prefer you not talk to me. You talk to the Judge. I'll do the same."

"Keep your hands off me. I don't get with this, Judge."

[Tr. At 14, 47, 737, 272, 286, respectively.]

[5] We hope this is not the way attorneys conduct themselves at trial. As specifically found by the trial court judge, "the trial was replete with improper behavior, in this judge's opinion, by *both* attorneys." The trial court ultimately concluded there was no substantial prejudice resulting from counsel's actions. The trial judge is in the best position to gauge the behavior of the attorneys and whether or not it impacts the jury and in what context. *Strack & Van Til, Inc. v. Carter,* 803 N.E.2d 666, 677 (Ind.Ct.App.2004). We cannot conclude this decision was against the logic and facts before the court. Here, defendants failed to show the alleged misconduct prevented them from fully and fairly presenting their case at trial.

The contentious nature of the relationship between plaintiff's and defendants' counsel was evident at the beginning of trial. It apparently began during depositions with defendants' counsel remarking that no competent lawyer would conduct a deposition in the manner plaintiff's counsel was. There were accusations of misrepresentations, lying, and not following the rules. The five-day jury trial was filled with unnecessary comments back and forth between counsel. Plaintiff's counsel did not care for defendants' counsel's unsolicited advice. The attorneys would frequently interrupt each other.

The trial judge even noted one time, "I don't want you both to behave like this and ***1207** I don't want to embarrass you either because I'm not going to put up with it." On another occasion, the trial judge remarked "I'm just concerned about what the jury is thinking right now. I think you guys are representing the legal profession and I don't think you're helping each other."

Near the end of the trial, the trial judge even directed plaintiff's counsel to apologize to the jury for personal comments about defendants' counsel. Even during the subsequent hearing on the motion to correct error, some four months later, the lawyers could not behave civilly toward each other.[FN3]

> FN3. The acrimony between plaintiff's and defendants' counsel did not end at the trial. During the June 2010 hearing on the motion to correct error, the poor behavior began anew. Mr. Murphy accused Mr. Schaffer of bragging about his numerous sanctions having no effect on him, describing his conduct as unprofessional and making gestures during the trial, while Mr. Schaffer called Mr. Murphy an "outright liar" on two occasions.

A jury trial is not a free-for-all. It is a civil forum in which advocates represent their clients before a panel of citizens, in front of a judicial officer who is responsible for enforcing the rules of procedure and rules of evidence and assuring the proper behavior of everyone in the courtroom. It is similar to an athletic event with two opposing teams competing and a referee observing to ensure all of the rules are followed. In this trial, both plaintiff's counsel and defendants' counsel committed fouls. Did plaintiff's counsel commit more fouls? Yes. However, defendants' counsel also committed fouls. It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession.

All attorneys in Indiana take an oath and each and every statement in the oath is sacred. One particular statement is, "I will abstain from 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." Ind. Admission and Discipline Rule 22. Our law schools are trying to train our law students in certain core values of the legal profession, and some of the most important for the future of our profession are collegiality, professionalism and civility. At every trial, indeed at every moment of our practice, we have the opportunity to better our profession. Here, the trial judge presided over the entire trial and had the benefit of observing the overall conduct of both attorneys, not only in the presence of the jury, but outside their presence. The trial judge redirected both counsel on numerous occasions, admonished both counsel on occasions, and even used her contempt powers in an attempt to manage the conduct of counsel and ensure a fair trial. Again, the trial court judge is in the best position to determine when enough is enough and whether or not the behavior of counsel would warrant a new trial.

While we find that the judge did not abuse her discretion in denying the motion to correct error, we nonetheless express our displeasure with the conduct of counsel, particularly that of plaintiff's counsel.

Professionalism and civility must be the foundation of the practice of law. Upon this foundation we lay competency, honesty, dedication to the rule of law, passion, and humility. Every lawyer and every judge is charged with the duty to maintain the respect due to the courts and each other. Our clients and the public expect it. Our profession demands it.

***1208 II. Closing Argument**

[6] Defendants also contend that the trial court erred in denying their motion to correct error relating to the closing argument of Laney's counsel. Their argument is that once the clinic was removed as an independent party from the case, any references to alleged misconduct in not producing the medical records should warrant a new trial, when taken together with the previous behavior by Laney's counsel. The relevant portion of plaintiff's closing statement is as follows:

> And what's worse is there's no records. The records are conspicuously missing. The one record on the one day we need just happens to be miss-

ing. And we would submit, ladies and gentlemen, if we had that record it would show exactly what was done, and more importantly, exactly what was not done in this case.

Even more ironic is Dr. Wisner had no independent recollection of what happened. Very convenient. And we had no nurses called to try to rebut what we're saying.

So none of the evidence they show was consistent with what their diagnosis was. They gave nothing whatsoever to support it. The one doctor said vertigo earlier today, remember, and it was gone. It was gone by the time she got to Monday. None of the other doctors ever diagnosed it, none of them. All the doctors that saw her at Saint Joe right after Sunday night, none of them found vertigo. None. Isn't that something? It went away. Another coincidence.

Missing record. Coincidence.

The evidence showed there was no treatment for TIA. The evidence will show there was absolutely no tests run to rule out a TIA. And the evidence showed that they failed to hospitalize and all the doctors said that's what should have been done here. Instead, she was sent home without any additional medication, sent out the same way she came in and ...

We believe, as we have stated previously, the trial court was in a better position to determine any prejudicial affect from Laney's counsel's closing statements. We summarily affirm the analysis of the Court of Appeals, noting also that neither Wisner nor the Clinic objected to these statements and waived the issue. *Wisner v. Laney,* 953 N.E.2d 100, 108 (Ind.Ct.App.2011).

III. Testimony of Laney's Expert Witness

[7][8] Defendants next contend the trial court erred by not granting a new trial due to a violation of the separation of witnesses order. Indiana Rule of Evidence 615 states, "at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses." Ind. Evidence Rule 615. We do not disturb a trial court's determination regarding a violation of a separation of witnesses order, absent a showing of a clear abuse of discretion. *Jordan v. State,* 656 N.E.2d 816, 818 (Ind.1995). A review of the record reveals that any violation was merely accidental. The alleged violation stems from a chance encounter of Dr. Campbell and Laney, and one merely asking how the other was feeling. At no time did Dr. Campbell ask about their testimony or anything related to trial. The trial court did not abuse its discretion in concluding no impropriety occurred. It is clear to this Court that no violation of separation of witnesses occurred. We are in agreement with the excellent analysis of the Court of Appeals.

IV. Voir Dire

[9] Defendants further argue the trial court erred in not granting a new trial ***1209** based on questions by plaintiff's counsel during voir dire, about insurance coverage. We view this as another argument about the misconduct on the part of plaintiff's counsel. We note that plaintiff's counsel asked the prospective jurors whether they worked for ProAssurance Insurance Company or owned stock in that company. There was no objection from defendants' counsel as this question was not inappropriate. Next, plaintiff's counsel asked if the jurors were opposed to injured parties asking for damages. Again, a proper question. Then counsel asked if anyone was employed in the healthcare industry. Again, a proper question. One prospective juror raised their hand and the following interaction took place:

[PLAINTIFF'S COUNSEL] Do you think that would anyway affect you, lean a little toward a healthcare side of this, or you heard stories about lawsuits or have feelings about lawsuits?

[PROSPECTIVE JUROR] Yes, I have.

[PLAINTIFF'S COUNSEL] What have you

heard?

[PROSPECTIVE JUROR] I've heard both sides where I don't know how to put this in a general sense. Specifically, I don't know of any specific suits, but the association with the different doctors and everything else, I've heard things said about how high the—what's it called? The cost of their insurance and everything else is and how difficult it is for them to be in practice. This is just general stuff that I've heard. I don't know anything specific.

[10] Thereafter, a side bar conference was held to discuss the question before voir dire resumed, and defendants' counsel dropped the subject. Defendants' counsel did not move immediately for a mistrial or argue the jury pool had been tainted. He did not ask for any specific relief or otherwise give the judge an opportunity to cure any potential defect. For this reason, we believe this argument was ultimately waived. Notwithstanding waiver, we would note that "a question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith." *Stone v. Stakes,* 749 N.E.2d 1277, 1281 (Ind.Ct.App.2001). Again, the trial court was most certainly in the best position to make these determinations. In our review, absent any evidence of bad faith, the trial court's decision to deny a mistrial was not an abuse of discretion.

V. Prejudgment Interest

[11] On cross-appeal, plaintiffs counsel challenges the trial court's refusal to grant prejudgment interest. At issue is the Tort Prejudgment Interest Statute (TPIS). Ind.Code § 34–51–4. An award of prejudgment interest is discretionary; accordingly, we review a trial court's ruling on a motion for prejudgment interest for abuse of discretion. *Hupfer v. Miller,* 890 N.E.2d 7, 9 (Ind.Ct.App.2008). The trial court abuses its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." *Turner v. State,* 953 N.E.2d 1039, 1045 (Ind.2011).

Laney filed her original complaint with the trial court on November 26, 2002. She then filed a written settlement offer on April 6, 2005. In 2006, the original complaint was dismissed without prejudice. On August 6, 2007, Laney refiled her complaint in the St. Joseph Superior Court. The applicable statutory provision provides that for TPIS to apply, the plaintiffs (1) must make a written offer of settlement to a party against whom the claim is filed within one year of filing the claim in court; (2) the terms of the offer must provide for payment of the settlement offer within sixty***1210** days after the offer is accepted; and (3) the amount of the offer does not exceed one and one-third the amount of the judgment awarded. Ind.Code § 34–51–4–6 (2008).

At issue is Laney's April 6, 2005 letter, which states:

As a follow-up to our deposition of Dr. Wisner, it appears that there is liability against the clinic as well as Dr. Wisner for failure to properly diagnose Mrs. Laney's condition and failing to properly treat her on March 9, 2001 resulting in a stroke three (3) days later and substantial and irreversible permanent impairment, specifically a stroke to the left side of her brain with resulting impairment to her right upper and lower extremities as well as impairment to her cognitive functions.

The clinic, as well as Dr. Wisner, can each be held liable for $250,000.00 plus pre-judgment interest up to four (4) years according to statute and case law for a total amount of $660,000.00. Please be advised my client has authorized me to settle this matter for a structured settlement in the amount of $250,000.00 with a present value of $187,001.00 which is the minimum structured settlement permitted to allow my client to proceed to the Patients' Compensation Fund. I think it would be in the best interest of all parties to amicably resolve this matter without a trial on the merits since it is likely that Mrs. Laney would obtain a substantial verdict in light of her per-

manent injuries and the conspicuously missing medical records of the clinic regarding March 9, 2001 day in question.

Would you kindly discuss this matter with your clients as well as their insurance carrier and advise me as to your position within the next thirty (30) days. If we are able to resolve this matter at this time, it will avoid any further inconvenience to Dr. Wisner and eliminate her necessity to travel from Baltimore, Maryland to Indiana for a trial on the merits and thereby avoid any further litigation expense. I will await your response.

Laney argues her letter is clearly an offer to settle within the guidelines of TPIS.

There are two lines of analysis at play in this case. The first is whether this letter met the requirements of Indiana Code section 34–51–4–6. The second is whether prejudgment interest must be awarded if the statutory requirements are met.

Laney's original complaint was filed November 26, 2002 and her settlement letter to Dr. Wisner was written on April 6, 2005. She then dismissed her suit in 2006, only to file it again on August 6, 2007. Laney argues we should not take into consideration the original complaint from 2002 in determining the timeliness of the letter because the lawsuit was dismissed without prejudice, and thus we should act as if the 2002 suit had never been brought at all. By doing this, plaintiff contends the letter of April 6, 2005 properly predated the subsequent lawsuit of 2007. This appears to be one way to attempt to bypass a failure to follow the prejudgment interest statute—dismiss the suit without prejudice, prepare a settlement letter, and file suit anew.

In order to seek prejudgment interest, Indiana Code section 34–51–4–6(1) requires a party to make their written settlement offer within one year of a claim being filed. The trial court determined "within one year" meant the settlement offer could not be made until the claim was filed and that it must be made within one year thereafter. In other words, the trial court found a starting line existed with the filing of a claim and ended one year later at the deadline. We disagree with the trial ***1211** court's analysis and instead we agree with the Court of Appeals analysis that the one-year requirement "defin[es] the deadline for the submission" of a settlement offer,

> Not ... whether the settlement offer may be filed before or after the filing of a claim. In other words, the written offer of settlement may be submitted to the defendants before or after the filing of suit, but ... it may not be submitted later than one year after the filing of suit.

Wisner v. Laney, 953 N.E.2d 100, 113 (Ind.Ct.App.2011). Thus the Court of Appeals held there was no *starting line,* only a *deadline,* which was one year after the filing of a claim. If the statute is to be interpreted otherwise, it would serve to discourage settlement of lawsuits before a lawsuit is filed. Certainly the legislature did not intend to limit the effective use of the TPIS and settlement negotiations.

This position is further supported by the statute addressing when prejudgment interest begins to accrue. Under Indiana Code section 34–51–4–8(a), prejudgment interest may not exceed forty-eight months and "begins to accrue on the latest of the following dates:

> (1) Fifteen (15) months after the cause of action accrues;
>
> (2) Six (6) months after the claim is filed in court if IC 34–18–8 and IC 34–18–9 do not apply;
>
> (3) One hundred eighty (180) days after a medical review panel is formed to review the claim under IC 34–18–10 (or IC 27–12–10 before its repeal).
>
> Ind.Code § 34–51–4–8(a).

If subsection (3) permits prejudgment interest

to begin accruing 180 days after the review panel is formed, regardless of the date a complaint is filed in court, then Indiana Code section 34–51–4–8 permits prejudgment interest to accrue before the filing of a complaint.

[12] Thus, we hold today that a written settlement offer must be made within one year following the filing of a claim [FN4] to be eligible for prejudgment interest. However, a settlement offer can also be made prior to the filing of a lawsuit. We believe this interpretation is broader and more in line with the legislature's intent to facilitate and encourage settlement of claims amicably without legal recourse, but also to give real meaning and effect to the prejudgment interest statute. The trial court's interpretation would potentially foreclose meaningful settlement talks until the filing of a complaint.

> FN4. Indiana Code section 34–51–4–6 also allows for a longer period of time than one year if the trial court determines it necessary and upon a showing of good cause.

[13] In addition to whether or not the settlement letter is timely filed, we must also examine whether the letter identifies the sixty-day settlement requirement period. In other words, does the letter itself comply with the statute. The case most closely on point is *Cahoon v. Cummings*, 734 N.E.2d 535, 546 (Ind.2000), where a letter stated the plaintiff was "offering to settle this claim now for $75,001." This Court wrote on the sixty-day requirement,

> The whole point of the statute is to address the cost of delay in payment. Accordingly, an offer to settle "now" is an offer to settle by payment within sixty days. The delay is solely for the benefit of the defendants, and the defendants had the power to accept [Plaintiff's] offer immediately.

Id. at 547. In our view, Laney's offer to "resolve this matter at this time" meets the same threshold as we discussed in *Cahoon*. The key is to include the time-limiting language in the offer. However, ***1212** rather than run the risk of a trial court being forced to decide whether a settlement letter did or did not comply with the requirements of Indiana Code section 34–51–4–6, we believe the better practice for lawyers in the future would be to cite the statute in the settlement letter and make it very clear that the letter is intended to invoke the statute, including the sixty-day settlement window and the possibility of prejudgment interest.

[14] Despite the fact that the letter itself satisfied the statutory requirements as to content, it was untimely sent in this case. The first complaint was filed with the trial court on November 26, 2002. Laney's counsel wrote a settlement letter two years and five months after the original claim was filed. This falls squarely outside the one year window as discussed previously. While plaintiff dismissed that original action, she failed to send a subsequent settlement letter and now attempts to rely on the settlement letter, which would have been untimely filed but for the dismissal of the previous lawsuit. Laney's counsel should have sent a new settlement letter after the dismissal of the first lawsuit, either prior to the filing of the second, or within a year of the filing of the second. Neither was done in this case. The TPIS is not intended to serve as a trap for the unwary. It is designed to put the adverse party on notice of a claim and provide them with an opportunity to engage in meaningful settlement and if they do not do so, they run the risk of incurring the additional obligation of prejudgment interest.

[15] Finally, had the settlement letter been timely sent, we note Laney is not automatically *entitled* to prejudgment interest. TPIS permits the trial court to award prejudgment interest, but does not require an award of prejudgment interest. *See* Ind.Code § 34–51–4–7 ("*The court may award* prejudgment interest as part of a judgment."); *Id.* § 34–51–4–8 ("*If the court awards* prejudgment interest, the court shall determine the period during which prejudgment interest accrues") (emphasis added). Thus, an award of prejudgment interest is

committed solely to the discretion of the trial court if the statutory prerequisites are satisfied. This is consistent with the TPIS serving as a tool for the trial court to encourage settlement and incentivize the expeditious resolution to cases.

Conclusion

Although plaintiff's counsel's behavior was most troubling, *both* attorneys should have acted in a manner more becoming of our profession. The duty to zealously represent our clients is not a license to be unprofessional. Here the trial court determined that the conduct of counsel did not prevent the jury from rendering a fair and just verdict. The trial court did not abuse its discretion in denying defendants' counsel's request for a new trial. We also affirm the trial court denial of plaintiff's request for prejudgment interest. Laney's 2005 letter did not meet the requirements for awarding of prejudgment interest. The awarding of prejudgment interest is not mandatory and is left to the discretion of the trial court. The trial court was most certainly within its proper discretion in declining such an award.

DICKSON, C.J., and RUCKER, MASSA, and RUSH, JJ., concur.

Ind.,2012.
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The Supreme Court of South Carolina has issued "four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition."
—Lesley Coggiola

William Gary White III was accused of being so uncivil and unprofessional that the South Carolina Supreme Court suspended him in 2011 for 90 days and ordered him to complete the state bar's legal ethics and professionalism program.

White was found to have violated a slew of South Carolina's ethics rules in a letter to his client, an Atlantic Beach, S.C., church that had received a town notice that it needed to comply with zoning laws. White's letter, copied to the town manager and later made part of the published opinion, was a scorcher:

"You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no order. He also has no brains, and it is questionable if he has a soul. Christ was crucified some 2,000 years ago. The church is His body on Earth. The pagans at Atlantic Beach want to crucify His body here on Earth yet again. ...

"First-graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the federal law. They do not seem to be able to learn. People like them in S.C. tried to defy federal law before with similar lack of success."

A town council member filed the disciplinary complaint that led to White's suspension. In its opinion, the state supreme court held that White ran roughshod over an oath it implemented in 2003 mandating that lawyers act with "fairness, integrity and civility, not only in court, but also in all written and oral communications."

White says he's learned from the experience. He says his client told him to make the comments in the letter and at the time believed them to be political statements regarding a religious matter. "I thought it was free speech," he explains. "I think the rules are clearer now; I didn't consider it a breach of ethics before that. I considered it representing a client."

South Carolina is just the latest in a string of states formally demanding their lawyers treat others with respect. But it's been only recently that the state's highest court has punished lawyers solely for uncivil acts, as it did with White.

"Until two years ago, we didn't have any public opinions or sanctions simply on civility," says Lesley M. Coggiola, disciplinary counsel for the Supreme Court of South Carolina. "There might have been problems with communication, diligence and any number of other issues, and the court would say, 'By the way, we'll cite the oath as well.' We now have four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition."

The South Carolina court may just be warming up. "We take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication," it said in a 2011 opinion. "We are concerned with the increasing complaints of incivility in the bar."

MULTILATERAL APPROACH

It's impossible to say whether incivility in law is escalating or there's simply more grousing about it. But the profession's leaders are calling out what they say is a troubling lack of civility, and states like South Carolina are cracking down. However, the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges.

Coggiola's agency doesn't track complaints about incivility, nor do other states. And even anecdotally, some aren't discerning a spike. "We haven't seen it here," says Wallace E. "Gene" Shipp Jr., bar counsel at the District of Columbia Bar. "We're not receiving complaints about that sort of thing."

However, there is unmistakably more talk about a troubling

PHOTOGRAPH BY STAN KAADY

"Young lawyers are hungry for information on the proper balance between advocacy and civility. ...They want to do the right thing, but don't know what the right thing is."
—Jonathan Smaby

growth in incivility. "My speech to the opening assembly at the 2011 ABA Annual Meeting was all about civility," then-President Stephen N. Zack recalls. "At the same meeting, former Supreme Court Justice Sandra Day O'Connor, Justice Stephen G. Breyer and the chief justice of Canada's highest court all talked about civility. We didn't plan it, but we all ended up on the same page."

Lawyers posit a range of theories on where and against whom incivility is most often directed. Some believe it's more prevalent in large cities. Others say they've seen entirely too much directed at young female associates, often to gain a tactical advantage. Yet the more important question may be why incivility may be becoming the norm.

Lawyers blame incivility on:

- Over-the-top portrayals of lawyers on TV and in films.
- Inexperienced lawyers and a lack of mentoring.
- The fuzzy line between aggressive advocacy and rudeness.
- The broad platform provided by today's technology, coupled with the ability to act anonymously online.
- The country's current, fractious public discourse.

By far, technology is cited most often as the foundation for boorish behavior. Coggiola says she feels old saying it, but she attributes a good deal of the problem to the ability of the everyday jerk lawyer to broadcast views online.

"We've had some serious issues, and they're all related to social media," she explains. "Our court has already spoken on the First Amendment—you give some of that up when you become a lawyer. But we're really struggling with a case sitting at the court right now. A lawyer is blogging, and it's just vile, insulting everybody from Hispanics to women to 'midgets.' It's horrible."

Because South Carolina's civility oath applies only to opposing parties and counsel, Coggiola's office has asked the court to sanction the lawyer for bringing the profession into disrepute. The argument? If he were personally blogging or posting the comments on Facebook, without identifying that he's a lawyer, the bar couldn't touch him. "However, if you say you're a lawyer, and if there's a nexus between you being a lawyer and what you're posting, then we're going to come back to this rule and find it a ground for discipline," contends Coggiola. "We need the court to come out and say this is not OK."

A close second and third place behind technology are just-licensed lawyers who perhaps watch too many rogue lawyers on TV and in movies. The labor market has forced many to hang their own shingles without the mentoring they'd have through a traditional employer.

"Young lawyers are hungry for information on the proper balance between advocacy and civility," says Jonathan Smaby, executive director for the Texas Center for Legal Ethics in Austin. "They get mixed messages from law school and the media, which portrays lawyers in movies, television and fiction—and sometimes in real life—as much more cutthroat and cutting corners than really goes on.

"They want to do the right thing," he says, "but don't know what the right thing is."

FIGHTING BACK

Lawyers aren't just complaining about incivility. They're fighting back—civilly, of course.

Bar organizations and disciplinary bodies are flooding the zone with training. Florida's Orange County Bar has reached out to local law schools to provide more professionalism education to students. A recent topic, according to James Edwards—a shareholder at Zimmerman, Kiser & Sutcliffe in Orlando, who's headed his state and local bar's professionalism committees—covered the interplay between professionalism and civility on one hand and technology and social media on the other. Coggiola and her staff are also providing more frequent opportunities for civility education.

"One thing we do in this office is speak [to legal audiences]

PHOTOGRAPH BY JOHN HUSKIN

On switching from litigation to transactional work: "Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money."
—Mick Meagher

all the time," she says. "I've made it very clear that if somebody wants us, we're there—and we always cover civility. I often say it baffles me that we had to change the oath to tell people to be nice to each other. But clearly the court thought it was necessary."

Other state courts have also felt obligated to formalize a civility requirement. Florida is among the latest, revising its oath of admission to include a duty of civility in 2011, citing the American Board of Trial Advocates' similar inclusion. Also in 2011, the ABA's policymaking House of Delegates endorsed a renewed commitment to civility. And in 2012, ABOTA published an online Civility Matters tool kit to provide ideas and direction for sessions teaching civility.

Courts are also more often sanctioning egregious behavior. But that requires lawyers and judges to report louts, which can still be a roadblock.

"I don't think people are often willing to report," Coggiola says. "They like to complain about other lawyers, but they don't want their name on it. We also speak to judges and tell them that if they see this behavior, they've got to report it."

First, however, judges have to know the basics of civility themselves, something that can be disputed. In March 2010, the *Plain Dealer* in Cleveland reported that Cuyahoga County Common Pleas Court Judge Shirley Strickland Saffold used her office computer to comment on cases before her under the online username "lawmiss." A later search revealed comments attacking Arabs, Asians and white men on at least 10 other websites using that name. Saffold denied making comments about any cases before her, while her daughter admitted to making some under the lawmiss moniker.

"Judge Saffold has always recognized the fine line between civility and enforcing decorum in the courtroom," says her lawyer, Brian Spitz of South Euclid, Ohio. Saffold and her daughter sued and later settled with the company that administers the newspaper's website over the release of their names to reporters, according to the *Plain Dealer*.

The best judges set an example and rein in bad behavior before it becomes the norm. "My father was a judge for 20 years, and he was very strict," Edwards says. "People frequently tell me they were afraid of him because he required absolute adherence to the rules and politeness, and if you didn't do right you were in trouble."

That's the opposite of what Calvin House, a partner at Gutierrez, Preciado & House in Pasadena, Calif., recently saw in court. While waiting for a case to be called, House witnessed a lengthy argument between a lawyer and a judge that included the lawyer accusing the judge of violating a bankruptcy stay.

"It was a very heated discussion throughout, and to accuse a judge of basically committing a criminal act—which violating a bankruptcy stay is—was pretty extreme," says House. "That comment the judge sort of rolled with. Eventually he got visibly angry and said, 'We're done!' But that was after, I'd say, 30 minutes of interchange."

House was not only taken aback at how personal and persistent the lawyer's behavior toward the judge became; but also astounded at how long the judge tolerated the lawyer's rant.

"One thing that's surprised me is the amount judges will sometimes put up with before they get to that point," House says. "I get it. From their standpoint, if they're harsh early on, they run the risk of not getting information they need and not appearing fair. But that's part of the problem. There were probably three other cases besides mine while this was going on, so four sets of attorneys were observing what happened. That lawyer got a $4,000 reduction in what his client had to pay. So someone just learning the business might get the message that this is the way to represent your client."

A judge in that situation risks losing credibility with lawyers and lay observers, neither of which is good for the administration of justice. "I think judges get involved in exchanges with

PHOTOGRAPH BY JONAH LIGHT

attorneys more often than they did 10 years ago," adds House. "With that exchange, the judge seemed to feel the need to justify his position. I don't understand why he didn't say, 'Look, I've made my ruling. If you believe I'm wrong, you'll need to appeal. Let's move on.' Where that's done, it can be effective, and it doesn't have to be done in a vehement or rude way."

Edwards says most judges he appears before do just that. Most, but not all: "One told me—and I was sad to hear it—that if you're too tough on people, you're going to draw an opponent in the next election. How can you worry about that? If you do a good job, all the good lawyers will stand up for you."

IT TAKES A VILLAGE

Lawyers are also policing their peers. In the past few years, Edwards has begun to try to set a professional tone by calling opposing counsel at the beginning of each case to pledge cooperation. "I say, 'I really hope we can get along because we'll have enough to fight over without fighting over the petty details,' " he explains. "Surprisingly, that works pretty well."

Many also advocate professionally pushing back as soon as an ugly incident erupts. M. David "Mick" Meagher, a solo litigator in Escondido, Calif., had his first experience with incivility about an hour and a half after he began practicing.

"It was a fairly simple dispute, and this attorney just went off on me on a phone call," he recalls. "He was attacking me personally and I was completely caught off guard."

A friend suggested a tactic Meagher has employed ever since. "I send a confirming letter spelling out as closely as I can recall everything the person said," he explains. "In that case, this guy called me every name in the book, so I put all that in a letter. Later, I got a phone call from the lawyer complaining, 'My daughter's the secretary, and she had to read that letter!' I told him, 'Then I suggest you not use that language again.' "

Meagher says calling out the behavior is especially important when incivility occurs in public. A lawyer recently shook Meagher's hand and exchanged pleasantries—and then walked into court and told the judge Meagher had lied and deserved to be sanctioned.

Stunned, Meagher called his bluff. "I suggested something I've now used several times," he explains. "I told the judge: 'Let's set a show-cause hearing. This attorney just accused me of gross misconduct in front of a whole gallery of people who don't understand the law, making all lawyers look bad. I think he should prove everything he just said. If he can't, you should sanction him.' " Each time, the lawyer has backed down, Meagher says.

The difficulty for new lawyers is not only recognizing that they should stand up for themselves but also properly calibrating their response.

"If I'm a young lawyer dealing with a particularly difficult opponent whom I think is trying to intimidate me, I may be tough back," explains Smaby of the Texas Center for Legal Ethics. "But as lawyers get more experienced, the good ones figure out how to handle the difficult opposing counsel just like they handle difficult clients. A more experienced lawyer may have more tricks in the tool bag to counter that."

One female family lawyer in Dallas told Smaby that when she runs into a nasty opposing counsel, she mails a copy of the Texas Lawyer's Creed, the state's professionalism and civility code.

"I've also seen young female lawyers not respond to intimidation but make the older lawyer believe they're naive and not very sophisticated," Smaby adds. "Then at the proper time, they come in and wipe them out in court. I tell young lawyers that the most effective way to be a lawyer is to understand your own personality and use that."

Despite his ability to do that, Meagher has had enough. After 19 years of a primarily litigation-based practice, he's transitioning exclusively to transactional work to escape the ugliness. "[Transactional work isn't] perfect—I get that," he says. "But it's better. Most of the civil transactional lawyers have been very reasonable because their goal is solution-oriented, not win-oriented. Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money."

CAN WE ALL GET ALONG?

Ultimately the best solutions, lawyers say, are those that bring diverse practitioners together. Patricia Lee Refo, a litigation partner at Snell & Wilmer in Phoenix and former chair of the ABA Section of Litigation, supports the American Inns of Court.

"It organizes lawyers from all years of practice into small groups to meet to create an environment in which young, medium and seasoned lawyers talk about the pressing issues of the day," she explains. "That also helps provide an opportunity for younger lawyers to be mentored by seasoned practitioners."

Specialized bar groups are also attempting to bridge divides. The National District Attorneys Association has created a committee to work with the defense bar to foster civility, says Scott Burns, executive director of the NDAA in Alexandria, Va. It's also working with the ABA to offer joint training sessions with prosecutors and defense attorneys covering civility toward one another.

"I'm personally in close contact with the Innocence Project, the Constitution Project and the National Association of Criminal Defense Lawyers," says Burns. "They've all been very receptive about how we can come together and agree to handle criminal trials and deal with one another."

Burns' "pie in the sky" goal to increase cooperation among prosecutors and defense attorneys is the National Criminal Justice Academy, a facility backed by the S.J. Quinney College of Law at the University of Utah, the NDAA and leaders in the defense bar. So far, they've raised $1.2 million to launch the center, which would train prosecutors and defense attorneys under one roof.

"We'd each have our own training tracks, but there would also be a coming together of America's prosecutors and America's defense attorneys—and nothing but good can come from that," Burns says. "Those I've spoken with on both sides say that would go far in fixing our roles in civility. I truly believe if you bring people together, things get better." ■

G.M. Filisko is a lawyer and freelance journalist in Chicago.

IVORY TOWER *Interventions*

Responding to Professionalism Dilemmas with Judges

By Judge Susie L. Norby

"We are all formed of frailty and error; let us pardon reciprocally each other's folly – that is the first law of nature."

— Voltaire

Judges are human, and humans err. Judges' legal errors can be challenged by appeal, of course — but behavioral lapses are trickier.

There are 175 state trial judges in Oregon, each with our own limitations. No matter how long each one practiced law before reaching the bench, practice rarely makes perfect. Judges hope for understanding when we falter, just as attorneys and parties hope for compassion from judges when their frailties are exposed.

Hon. Susie L. Norby

If a lawyer encounters a judge who falters, what can or should be done? Judges work in ivory towers, separated from open social interaction to avoid the appearance of impropriety. Entry into the inner sanctum of judicial chambers is unusual, so those who feel slighted by a judge seem to have few options to clear the air.

Would communication make matters worse? Is a motion to disqualify necessary? Should a complaint be filed with the Judicial Fitness Commission?

Or is it better to do nothing?

The law can unravel countless thorny dilemmas. But this one is different. Diplomacy and intuition solve many relationship problems, but it takes more to navigate the hierarchical pitfalls that clutter the legal landscape between lawyers and judges. The Code of Professional Conduct calls upon lawyers and judges alike to promote and embody collegiality.

Judges are often consulted by lawyers for advice about professionalism in practice. But many lawyers feel strongly inhibited from approaching a judge with a reminder of the reciprocal obligation for collegiality toward attorneys in and out of the courtroom. This is a guide to help identify the need for intervention after a judge falters, and the options available to do so.

Distinguishing Lapses in Judgment from Misconduct

Professionalism and our obligation to promote and embody collegiality require that we differentiate discrete transgressions from unmistakable misconduct. Both may create concern, but one is less urgent than the other.

An aberrant transgression allows the offended attorney to wait for the right time to consider the issue. Misconduct requires swifter action.

Some clashes between lawyers and judges arise from conflicting expectations. Lawyers may expect judges to innately grasp nuances of unspoken struggles outside of court — with disobliging clients, or spiteful opponents, or overwhelming workloads. (We can't.) Judges may expect lawyers to strategically sift every bit of evidence, to anticipate which arguments the court wants to hear, and to eliminate the rest. (You can't.) Friction arises when conflicting pressures and obligations clash with unrealistic expectations.

If a judge says or does something concerning in court, it's best to take time to allow emotions to calm. Evaluate the severity of the event later, in retrospect. In court, emotions run high, and the severity of a judge's actions or words may be misperceived in the heat of the moment. After the event, allow calm reflection to help you differentiate between words and actions that are merely frustrating and truly serious improprieties.

Among other things, consider whether there was unusual provocation or possible shared fault for the transgression, whether there could be an alternative inoffensive interpretation of what transpired, and whether the event was an aberration or part of a pattern of ongoing behavior. Was the behavior rooted in circumstance or was it personal? Was it persistent throughout the proceeding, or momentary? All these factors will shape a decision on what to do.

A similar analysis is helpful to assess whether a statement or action outside a courtroom merits a response. For example, when I was a deputy district attorney in the early 1990s, a male judge took me aside after a court trial to warn me that a female litigator who wears fitted pants at work will never be taken seriously as an attorney. Although his comments were unwelcome, he seemed to believe that my pant suit would imperil my career.

I considered whether to do something to express my concern, but I perceived that he was shaped by the customs of his more conservative generation, and he meant to help. I chose not to do anything about it. I did not believe it reflected poorly on his judicial ability, and his helpful intention offset the transgression enough.

* * *

"A man carries within him the germ of his most exceptional action; and if we wise people make eminent fools of ourselves on any particular occasion, we must endure the legitimate conclusion that we carry a few grains of folly to our ounce of wisdom."

— George Eliot

* * *

Collegiality-Focused Remedial Options

Direct Approach

Keeping in mind our professional duty to act collegially — even in response to someone who failed to do so — the threshold option to resolve concerns about judicial behavior is to speak directly to the judge in person.

Ideally, this kind of conversation will be delayed until after the conclusion of the court matter in which the troubling incident occurred. If it can't wait, though, be sure to seek permission from your opponent to speak with the judge about "a topic unrelated to the case." If they won't give permission, then ensure that your opponent is included in the private conversation to eliminate any risk of *ex parte* contact.

iStock.com/Chris Ryan

Ask the judge's court clerk whether the judge will see you in chambers about a private matter. If that isn't allowed right away, then ask if there is a better time for you to return to talk. If all else fails, consider writing a polite and respectful email to request a meeting or convey your concern.

Ideally, approach the matter as an opportunity to learn, not to teach. Give the judge a chance to explain what happened from her perspective, then share the alternative point of view that raised the concern. Allowing the judge to save face in the moment creates the best context for future change, and instills a sense of gratitude in the judge for your sensitivity.

Indirect Approach

If a direct approach does not work out, or if the circumstances make a direct approach unlikely, the next option is to make an indirect approach, either through a judicial colleague of the offending judge or through a colleague in the bar who knows the judge better. This may be another judge who makes you feel more at ease, a colleague whom the offending judge already trusts, or it may be the presiding judge.

Share your concern with your chosen go-between and explain your reasons for an indirect approach. Also ask whether any further action by you could be helpful in resolving the concern for the future. If a go-between judge deems the concern significant enough, then he must report it under CJC Rule 3.11(A).[1]

Semi-Direct: Signed or Anonymous Letter

If neither a direct nor an indirect personal approach fits the situation, the next option is to write a letter to the judge and mail it or have it delivered. Write the letter with respect and without insult, criticism or hyperbole. Objectively state the concern and consider noting that your respect for the judge and her role in the justice system are the reason you believe she deserves to be told that the concern exists and allowed the opportunity to weigh its validity.

OAAP Outreach

Some concerns may raise suspicion that a judge is in personal distress. If there are such signs, or if the transgression is coming out of the clear blue sky from a judge who is known for patience, discretion and professionalism, then a call to the Oregon Attorney Assistance Program at (503) 226-1057 or (800) 321-6227 should be considered.

When a judge offends or acts unprofessionally, it may be reflexive to assume that power or status has propelled his behavior. But it is always kinder to begin with the converse assumption, by remembering that judges are human and at risk of indisposition by tragedy, medical conditions or issues of abuse just as we all are. The OAAP is a confidential program, and its staff is committed to protecting the confidentiality of callers.

If you have clear and convincing evidence (not a mere suspicion) that a judge's performance is significantly impaired physically or mentally — or severely impacted by habitual or excessive use of intoxicants or controlled substances, temporarily or permanently — you may submit a complaint to the chief justice of the Oregon Supreme Court pursuant to ORS 1.303. This is an option for situations on the most severe end of the spectrum and beyond hope of informal resolution.

* * *

"Intolerance is a form of egotism, and to condemn egotism intolerantly is to share it."

— George Santayana

* * *

Reconciling More Radical Options with the Duty for Collegiality

Immediate Reactionary Comments: Effectiveness of Collegial Comebacks

When court is in progress and a concerning event transpires, it may be tempting to reflexively react. Court proceedings heighten emotions, which can impair efforts at restraint. Moreover, litigation is adversarial, and attorneys often arrive in court readier to lock horns than to breathe deep.

Regrettably, snarky commentaries and incisive criticisms made in the moment are unlikely to facilitate instant insight by a judge into the compromised behavior you perceived.[2] They are also unlikely to instill confidence in clients, parties and court observers that the justice system is a place of honor.

Planning ahead for this unfortunate contingency may give you a useful advantage if the need ever arises. Well-chosen words or actions can improve the circumstances if properly deployed in the moment. For example, it is sometimes helpful to interrupt the problematic behavior or exchange with the code phrase "Your Honor, I have a matter for the court. I request a conference in chambers or a sidebar." This gives the judge (and everyone else) a moment to pause and shift gears.

The topic of the conference or sidebar can be as simple as a question such as "May I have a recess to talk to my client? The hearing has taken some unexpected turns I'd like to explain to him." This is the professional equivalent of a timeout and signals a judge that a moment of self-reflection may be appropriate.

Another way to prepare for this potential eventuality is to converse with attorney colleagues about courtroom stories of effective interventions they have implemented or seen that de-escalated perceived judicial misbehavior. This can be particularly helpful if the stories are specific to a judge you are likely to appear before. The most disarming rejoinders tend to be those in which the attorney expresses humility and receives the concerning judicial behavior gracefully.

Defusing a situation with refinement and respect can effectively neutralize all sorts of misbehavior and reverse the course of many types of troubling circumstances.

Affidavits for Change of Judge: Impacts on Court Administration & Case Progress

If you attempt to resolve a concern with a judge but are not satisfied with the result — or if you are unwilling to experiment with less drastic methods for resolving a concern — then a more extreme option is to avoid the judge entirely by filing motions to disqualify the judge. Under ORS 14.260 et seq. any attorney may request that a judge be disqualified from presiding over a court proceeding by filing a motion supported by an affidavit confirming the attorney's good-faith belief that the judge cannot be fair and impartial in the

proceeding. Although the judge is entitled to a hearing to challenge the affiant's good faith, judges rarely request one.

The timing of such motions is restricted by statute and local rules to ensure the court has notice of the need to procure another judge to handle the case. An attorney may disqualify up to two judges in any single proceeding.

Each jurisdiction chooses how it will handle such motions, and the processes are different from one jurisdiction to another. In larger counties, for example, the judges named in such motions are often not informed about disqualification requests; therefore, the attorneys' perspective and identity remain unknown to the offending judge.

In smaller counties (including those with only one judge), however, such motions have a greater impact on the court docket and cannot remain anonymous. It can be very difficult to secure a substitute judge in geographically remote areas, which may mean that resolution of the case is prolonged as the court struggles to procure a more acceptable judge for each appearance.

Some local rules require an attorney to consult with the presiding judge of the jurisdiction before filing a motion to disqualify. If the presiding judge is the only judge (or is the objectionable judge), this method may be problematic. Before considering this option, consult with the trial court administrator of the offending judge's jurisdiction to fully understand the transparency of the disqualification process and the practical impact that disqualification may have on the progress of your case.

Reports to Commission on Judicial Fitness: Failsafe for Clear Conduct Code Violations

If you believe that a judge has clearly violated a rule in the Code of Judicial Conduct, then another option is to lodge a complaint about the offending judge with the Commission on Judicial Fitness.

ORS 1.410–1.480 create the commission and describe its processes for investigating and addressing complaints about judges, while ORPC 8.3(b) states: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Before filing a complaint, however, professionalism dictates that a complainant should consider carefully the specific rule the judge may have violated, and the unlikelihood of misunderstanding the situation. Best practice is to confer with trusted colleagues about the concerning event and ensure that others support your perspective and agree that the issue rises to the highest level and merits the filing of a complaint with the commission.

The commission website[3] describes its mission this way: "The Commission on Judicial Fitness and Disability reviews complaints about Oregon state judges and justices of the peace[4] and investigates when the alleged conduct might violate the state's Code of Judicial Conduct or Article VII, Section 8 of the state Constitution. If the commission files formal charges, a public hearing is held. The commission recommends action to the Supreme Court. Recommendations include dismissal of the charges, censure, suspension or removal of the judge."

The commission, which meets six times a year, can't change a judge's decision in a case or the case outcome. Instead, possible fi-

nal outcomes only include dismissal of the complaint due to lack of information and insufficient evidence, issuance of an informal disposition letter to the judge pursuant to Rule of Procedure 7(c), and prosecution. Information about specific complaints remains confidential under ORS 1.440, unless formal charges are filed.

The commission also investigates complaints that a judge has a disability, which significantly interferes with the judge's job performance. If the disability appears temporary, the commission may hold a private hearing, but the judge can request a public hearing. Again, the Supreme Court makes the final decision.

The commission does not notify judges about the filing of a complaint against them unless corrective action is deemed necessary after the complaint is considered, or formal charges are filed. At its discretion, the commission may or may not notify the complaining party about how the complaint is resolved. Therefore, a complaint filed with the commission is unlikely to send a message to the offending judge in most circumstances. Unless corrective action is taken or formal charges are filed, the identity of complainants remains anonymous to the judge whom they reported.

A Risk of Inaction: Passive Reputation Destruction

Choosing a way to address a concern with a judge can be intimidating. But avoiding the need to take curative action to address the concern can have unexpected negative consequences that extend beyond the risk that the judge's misbehavior recurs.

It is human nature to dwell on wrongs we experience. Attorneys instinctively internalize perceived injustices and feel righteously indignant if an esteemed judge lets them down. Legal professionals' reflexes are to defend against injustice. Therefore, if a decisive curative step is not taken, the stifled urge to defend can devolve into deeper resentment and incurable bitterness.

The wronged person may find himself perseverating, repeatedly criticizing the offending judge to others and perpetually nurturing his own resentment. This passive, inadvertent crusade to destroy the judge's reputation may offer moments of relief when the criticism meets a sympathetic ear, but it tends to burden the person dwelling on the event far more than it affects the judge they criticize.

It also magnifies an isolated experience with a single judge into a malcontented perspective that the justice system is wholly irreparable. The complainant's suffering is revived indefinitely, while the judge likely remains oblivious that a problem ever existed.

Choosing a path to deal with a concern productively and taking that path is daunting, but also liberating. It creates a real possibility that the judge will improve and better represent the justice system itself because of the attorney's brave intervention. And it allows the attorney to unburden himself without lowering himself to the same sort of unprofessionalism he feels he encountered.

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"Give people the benefit of the doubt, over and over again, and do the same for yourself. Believe that you're trying and that they're trying. See the good in others, so it brings out the best in you."

— Liz Newman

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The suggestions offered here were curated with state court trial judges in mind. In other court contexts, such as municipal courts, justice courts and federal courts, their usefulness may be limited. One thing that judges in all courts have in common, though, is that all are human beings first, and judges second. It is fair and reasonable to assume that all try hard to bring their best self to the work of judging.

Like any other profession, judicial work impacts perspective, and a person who becomes a judge is likely to evolve and change over the arc of time. Judges' perspectives on how to communicate within the constrictive procedural context changes, their understanding of how to best serve the public and the litigants changes, and their abillty to shoulder the stressors of judicial work while striving to remain outwardly inscrutable changes.

Most of all, judges' security and confidence in their own value changes.

Attorneys may perceive judges as unfeeling or disinterested in personal growth, but that is rarely (if ever) true. Many judges keenly feel the loss of opportunities for open dialog with colleagues in the legal community that disappear when they transition into their metaphorical ivory tower. An attorney with a concern may be pleasantly surprised by a judge's receptivity to an open conversation about the frustrating event.

In the end, communication and belief in one another's potential is not only a sign of true professionalism and a commitment to collegiality, it is often more powerful than a title or a robe. Earnest efforts at respectful communication keep all of us, and the justice system we serve, revitalized and renewed. ■

Judge Susie L. Norby served as a deputy district attorney for Clackamas County and as senior legal counsel to the Clackamas County Board of Commissioners, the tax assessor and other county officials before she was elected to the Clackamas County Circuit Court in 2006. She is a member of the Oregon Bench and Bar Commission on Professionalism and the Council on Court Procedures.

ENDNOTES

1. CJC Rule 3.11(A) states: "A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects, shall inform the appropriate authority."
2. Many years ago, I sat in the gallery of a courtroom waiting for my case to be called. I watched as the judge expressed frustration with the attorney who had just spoken. When the judge finished his critical comments, the attorney paused, then said: "Judge, have you taken your meds today?" Some people gasped, some people laughed, and the judge amped up the lecture. The professional relationship between the judge and the attorney broke down that day and was never repaired. The judge remembered the comment, and focused solely on its impropriety, without reassessing his own demeanor and conduct. Nothing good came of the exchange.
3. For more information, go to *courts.oregon.gov/programs/cjfd/default.aspx*.
4. Note that the Commission on Judicial Fitness has no jurisdiction over arbitrators, mediators, administrative law judges, hearing officers, municipal court (city) judges or federal judges.

Professionalism for Litigation and Courtroom Practice

Conduct Counts

By Hon. Daniel L. Harris and John V. Acosta

Gettyimages

Ensuring the quality of our professional lives and improving the public's perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing.

Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience — and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation, arbitration and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues — many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don't always know what is and isn't right. They aren't familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side's life miserable. Some clients also might not appreciate that you and your opponent are professional colleagues and very likely will have cases against one another in the years to come, and they might not take into account that your relationship with a judge is important to your ability to represent them in the current case and other clients in future cases.

Adopting a "scorched-earth" or "take-no-prisoners" approach to litigation will not serve your client's interests and ultimately will work to your client's disadvantage in resolving the dispute. A lawyer should defuse emotions that might interfere with the effective handling of litigation and which could complicate or preclude resolution of a dispute in a way that best serves the client's interests. If a client requests or insists upon a course of action that is contrary to local custom or would be counterproductive to the client's interests, tell the client so and explain why. Some clients might take longer to understand this notion than will others, but you can't represent your client's interests by taking an action you know will ultimately harm those interests.

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can't do or agree to something, then say you can't do or agree to it. You'll find that a little candor goes a long way.

4. Don't fudge.

Credibility is everything. Some lawyers gain a reputation for being fudg-

ers. They overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer's ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don't always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn't devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can't be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don't take it as a personal affront.

6. Extend professional courtesies.

"Live by the sword, die by the sword." It's a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won't prejudice your client, there's usually no legitimate reason not to agree to an opponent's request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can't demonstrate prejudice to your client or unreasonableness by your opponent, think about how you'll look to the judge. The time will come when you'll need an extension, reset or rescheduling of a deadline or event. When that time comes, don't expect your opponent to be reasonable toward you if you've refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing it for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as: conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can't be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can't belittle or mistreat courthouse staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into

better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don't agree with — especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don't agree with in the courtroom. This tends to undermine a lawyer's effectiveness and credibility in the courtroom. The advice of one judge is to "not take a judge's ruling or decision personally."

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don't object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say "objection," and in a summary fashion state the basis for the objection, such as "relevance" or "hearsay." If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate "speaking objections," where the attorney ends up giving information to the jury that can't be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them.

Don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks.

Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don't overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you're creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer's office two or more days later.

15. Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or inexperience, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client — and make you look foolish in the process.

16. Don't do something just because you can.

Justice Potter Stewart once said, "There is a big difference between what you have a right to do and what is right to do." No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don't require that lawyers be cordial to one another. On the other hand, think about how you'd like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don't behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren't different just because the judge isn't present to watch your every move. If you wouldn't engage in the behavior in front of a judge, then don't do so when the judge isn't around.

18. Don't let your opponent control your behavior.

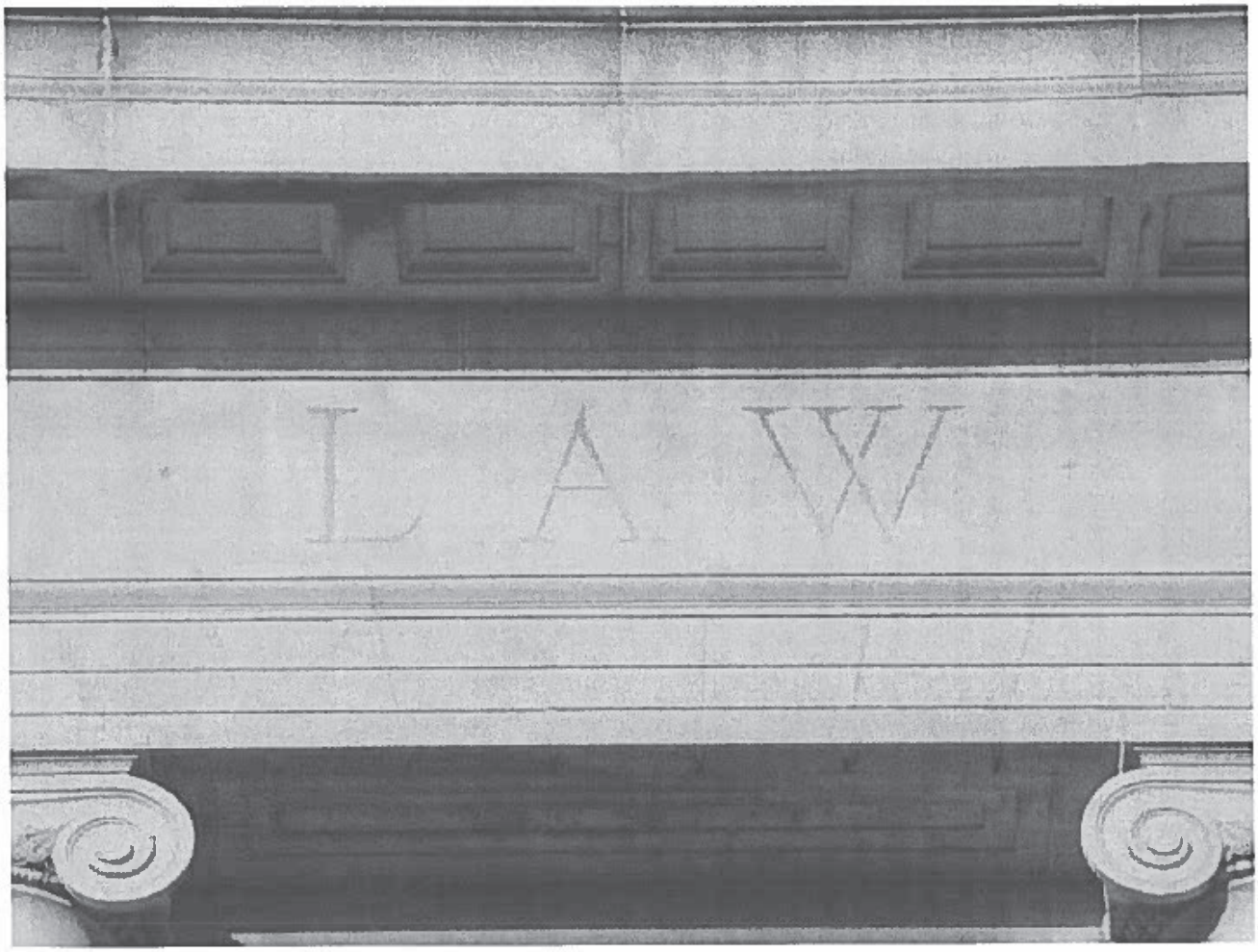
Some lawyers behave unreasonably or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to "getting back" at them. They know that if they can get you to focus on them, then you'll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client's case, they've won. So

keep your balance. Your client deserves an objective, diligent advocate — not a hothead bent on vengeance against another lawyer.

19. Don't take yourself too seriously.

A wise practitioner once said, "Take what you do seriously, but not yourself." Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

The Hon. Daniel L. Harris is a circuit court judge in Jackson County. John V. Acosta is senior deputy general counsel for TriMet. Both are members of the Oregon Bench and Bar Commission on Professionalism.



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Judges and Lawyers in Partnership

The Practical Rationale for Professionalism

By the Hon. John V. Acosta and Richard J. Vangelisti

The role of lawyers and judges is to help people in our legal system simultaneously exercise their rights and reach the common good under a rule of law. Our mandate of professionalism emphasizes the roles that judges and lawyers alike have in maintaining the integrity of the judicial process, protecting the public and ensuring the future of our profession.

Why Professionalism?

Justice Sandra Day O'Connor explained: "Lawyers possess the keys to justice under a rule of law, the keys that open the courtroom door. Those keys are not held for lawyers' own private purposes; they are held in trust for those who would seek justice, rich and poor alike."[1] Professionalism can be defined as the continuous affirmation in our day-to-day actions that we are striving for the higher ideal of justice for our clients and ultimately for the public good. When we step into the federal courthouse in Portland, lawyers are reminded of their solemn commitment to professionalism: "The First Duty of Society is Justice." It's difficult to convince clients, other lawyers and the court that you are fulfilling that duty if you are behaving as though you are ready to engage in a cage fight.

Professionalism and ethics are not synonymous. Ethics rules mandate minimum behavioral requirements, which if not met, usually result in some form of discipline from the state bar association, the regulatory body that oversees all lawyers. Professional-

ism embodies aspirational goals that lawyers, as practitioners of a distinguished profession, should strive to meet when dealing with each other, the court and clients. Conducting oneself professionally helps ensure public trust and confidence in the integrity of the justice system.

Professionalism also demonstrates the lawyer's integrity and respect for the judicial process, which in turn engenders credibility. In our profession, credibility is the currency of the realm. No lawyer gets much accomplished for a client, whether in the courtroom or in the conference room, unless he or she has built a foundation of credibility upon which to conduct the client's business. This enhanced credibility of the lawyer in the eyes of opposing counsel, the court and the jury inevitably helps a lawyer advocate towards an efficient and fair resolution of a dispute. Acting professionally helps to better focus opposing counsel, the court or the jury on the issues for decision rather than on the conduct of the lawyers, avoiding a scenario that often leads to a written and oral record clouded with personal attacks and other boorish noise.

Professionalism and effective advocacy go hand-in-hand. Professionalism begets trust, and cooperation is sure to follow closely behind. This trust and cooperation translates to lower costs of litigation and a higher probability of an early and fair resolution.

Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer's good reputation — the legacy that remains beyond one's life — will be the better for having acted with professionalism.

Finally, professionalism is necessary to maintain the integrity of the judicial process and the public's confidence in the judicial system. Professionalism increases public confidence in individual lawyers and judges as well as the judicial system. The public has a greater respect for the judicial process and the results of that process if the lawyers and judges exhibit professionalism while working through a dispute. If judges and lawyers do not act to ensure professionalism, through legislative action the public may seek changes to the judicial branch or alter the exclusive privilege of lawyers to represent clients before the courts or in legal matters.

Causes of Unprofessional Conduct

Unprofessional conduct is the result of a number of factors. First, unprofessional conduct may result from a belief that a lawyer is effective only if he or she acts like a "Rambo litigator," "hired gun," "junkyard dog," "hard fighter" or "bulldog." Some lawyers who labor under this belief are often compensating for a lack of experience, skill or confidence.

Second, client perceptions — that their lawyer must be obnoxious to achieve successful results or outcomes — are sometimes a factor in unprofessional behavior. Some clients are convinced that litigation should be conducted like armed combat against an enemy, and such clients may shop around until they find a lawyer or firm they perceive to have a "Rambo litigator" style. When we encounter prospective clients who subscribe to this philosophy, we should stop to consider whether we want to represent such clients. Often, they are the clients who criticize your judgment, find ways to dispute your fees and never seem to be happy with any result you obtain for them.

Third, the adversarial nature of the litigation process or a tense business transaction can be a factor. But while the legal process is adversarial it need not be acrimonious. We should strive to agree to disagree and not resort to personal attacks, condescending comments and threats of sanctions motions, whether orally, in briefs or in letters or e-mails, in an effort to get our way or to simply harass our opponent.

Fourth, the adversary system is inherently stressful. Practicing law is difficult enough without artificially ramping up the stress level. Be mindful too that at any given time an opponent might be coping with stress, perhaps significant, because of workload, events in his or her personal life or other factors.

Fifth, the business of practicing law can be a factor — the bottom line of the law firm or law office environment. Billable hours, high case volumes, insufficient support staff, administrative chores, client expectations, marketing and other obligations and duties can result in a "piling on" feeling of despair. The sheer weight of these responsibilities can make it difficult for us to be civil to one another, and that's when professionalism suffers.

Sixth, and finally, are size and technology. As the bar's membership grows, there is less opportunity for its members to know each other. You're less likely to be rude and harsh toward a lawyer you've known for some period of time and will deal with again, than you are toward a lawyer you've never met and likely won't encounter again. Technology hampers collegiality because it allows us to insulate ourselves from direct, real-time contact with one another. Meetings and phone calls to discuss a new case, confer over a motion or discuss trial exhibits and jury instructions are more likely to foster professionalism between lawyers than sending e-mails, texting messages or faxing letters back and forth.

Costs of Unprofessional Conduct

For starters, the costs of unprofessional conduct include a diminished quality of professional and personal life. We aren't hockey players. Do we want to spend eight, 10 or 12 hours a day engaging in the verbal and written equivalent of body-checking each other into the boards each time we interact with one another? We don't, and common sense tells us why: we can't behave badly day after day, for weeks, months and years of practicing law without becoming that personality in all aspects of our lives. Ultimately, the pernicious effect on one's family, friends and colleagues over the course of a 30- or 40-year career should be obvious.

Without professionalism lawyers are simply pieces in a game of survival of the fittest. In such a model, brute force dominates and what is right and just is often relegated to secondary importance or completely overlooked. In effect, lawyers devolve into mere agents of their respective clients' interests without regard to the broader picture of public good.

Unprofessional conduct also distorts the judicial process and "Equal Justice Under Law;" increases financial, business and personal costs to parties; inflicts personal stress on clients, lawyers and judges; causes personal and professional relationships to deteriorate; erodes personal physical and mental health; damages or destroys your reputation among colleagues and the public at large; and diminishes your ability to attract desirable clients.

The Relationship Among the Rules and Professionalism

Oregon's Rules of Professional Conduct (RPC or ethics) and

the various state and federal rules of procedure and evidence are mandatory rules. Professionalism, however, is a standard to which lawyers should aspire. Professionalism picks up where the ethics rules leave off. Professionalism means following the spirit of the rule, not just the letter of it, and the willingness to go beyond what is required to extend courtesies and accommodations to colleagues, including opponents, where doing so imposes no detriment on your client.

The Oregon State Bar's current "Statement of Professionalism," was adopted by the OSB House of Delegates and approved by the Oregon Supreme Court, effective Nov. 16, 2006. A "Statement of Professionalism" also has been adopted by the United States District Court for the District of Oregon. Other standards may apply in Oregon as well, as many professional organizations have adopted Professionalism goals. See, for example, the Multnomah Bar Association's "Commitment to Professionalism," adopted June 1, 2004. These documents may be found on the Oregon State Bar's Professionalism web page, *www.osbar.org/onld/professionalism.html*.

Whether it's a court or an organization that has adopted a statement of professionalism, the fact that it has embraced those ideals demonstrates the expectation that a standard of conduct higher than the floor created by the ethics rules applies. Simply put, a statement of professionalism sends a message that it is not enough for lawyers to comply only with the ethics rules or rules of procedure.

Moreover, as a self-regulating profession, lawyers have the primary responsibility of ensuring professionalism. While a wide range of options are available to a lawyer to effectively deal with the unprofessional conduct of another lawyer, instances exist when a lawyer must at some point present the issue to the court for resolution.

When to Bring Unprofessional Conduct to the Court's Attention

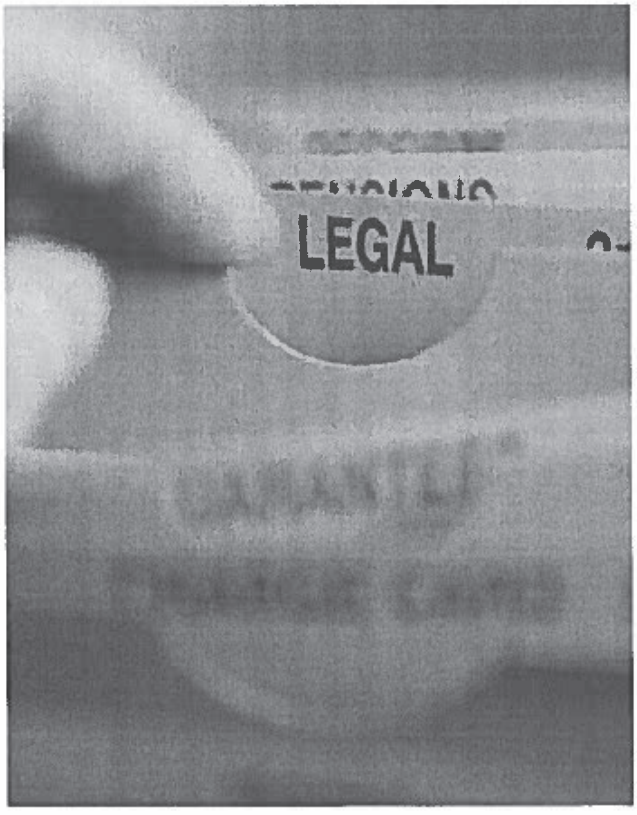
Unprofessional conduct should be brought to the attention of the court only as a last resort when a party's rights are prejudiced or there is a real threat of prejudice. Lawyers — the persons charged with resolving differences — are in the best position to resolve professionalism issues. A lawyer may take a number of steps to obviate the need for court intervention. If those efforts are unsuccessful or futile, then the matter should be presented to the court after the appropriate conferral. Consider these three steps when confronting what you perceive to be a lack of civility.

First, before making a judgment about whether a lawyer has acted unprofessionally, determine the facts. A lawyer's conduct is often caused by circumstances outside his or her control. For example, if a lawyer is not producing responsive documents in a timely manner, the delay may be caused by the actions of the client rather than the lawyer. Similarly, a delay in responding to requests for scheduling or conferral may be caused by another professional commitment or even a personal issue. Effective communication can often reveal whether there is an issue of professionalism. A telephone call or e-mail to the lawyer, co-counsel or an assistant can often clear up the matter. The bottom line is to get your facts straight before operating on the assumption that a lawyer is acting unprofessionally. With a full picture of the facts, you can effectively respond.

Second, when faced with unprofessional conduct, the first strategy may be to ignore it. The conduct may not be worth acknowledging, and at times a decision to not respond to unprofessional conduct will send the signal to the offending lawyer that unprofessional conduct will be ineffective. Some lawyers, often those who are more experienced, use unprofessional conduct as a tool to throw their opponent off balance. The offending lawyer, however, may abandon the costly approach of unprofessionalism if it proves ineffective. Sometimes ignoring unprofessional behavior requires patience, even a lot of it, and it should never be ignored if there is a real threat of prejudice to the client. Mostly, however, demonstrating that the behavior won't work and focusing on the merits of the case often is the best way to put an end to such tactics.

Third, after exercising judgment as to whether to respond to the unprofessional conduct, directly informing your opponent of the unprofessional conduct can be effective. Even those who act unprofessionally do not like to think of themselves as having acted in such a way. They might think of themselves as fighting hard or being zealous for their client. Reminding the other lawyer of basic principles of courteous or fairness or referring to the applicable standards of conduct promulgated by the court, however, can cause the other lawyer to moderate or stop the behavior.

If informal efforts are not successful, an issue of unprofessional conduct should be presented to the court if the conduct is interfering with a party's rights or the "just, speedy and inexpensive



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determination" of an action. FRCP 1; ORCP 1 B. Unprofessional conduct between lawyers that is merely rude, bothersome or petty should not be brought to the attention of the court unless it begins to interfere with discovery or the case's overall progress. A good guideline is that unprofessionalism should be brought to the attention of the court either when an ethics or court rule is clearly implicated or when a history of sufficiently documented unprofessional conduct demonstrates a threat to the rights of a party.

Obviously, considerations of time and cost are at play, but these considerations must be weighed against the potential benefit of a favorable ruling and more generally addressing the unprofessional conduct.

How to Bring Unprofessional Conduct to the Attention of the Court

The nature of the conduct determines how the conduct should be brought to the court's attention. If the unprofessional conduct occurs during trial or hearing, the court usually will address it without the need for a lawyer to call attention to it by objection or request for a side bar. If the conduct occurs outside the presence of the court, a request for a pretrial conference may be appropriate to address the issue. If an issue arises during a deposition, judges often are available by telephone to immediately address the problem. Other instances will require a formal motion.

Before a motion can be filed, however, the lawyer must have a personal or telephone conference with opposing counsel on issues or disputes. Oregon's conferral rules, Local Rule 7.1 (federal) and UTCR 5.010 (state), require a "good faith" effort to confer.

These conferral rules require that the lawyers actually talk or explain in a certificate why conferral did not occur, and these rules are often strictly enforced.[2]

The conferral rules address the situation in which a lawyer may be obstructive or dilatory in the conferral process. If a lawyer refuses to confer, simply include that in the certification. A clear refusal to confer, however, does not happen frequently. The problems most often arise when a lawyer chooses not to provide sufficient information for a meaningful conferral. For example, some lawyers choose not investigate whether there may be responsive documents and simply "stand" on their objections. The failure of a lawyer to determine if requested documents actually exist can lead to the parties briefing and courts ruling on the discoverability of documents that do not exist. This scenario is costly to the parties and the court when it ends up ruling on hypotheticals.

Lack of Experience Can Play a Role

Often times, unprofessional conduct is the product of a lack of experience or a desire to compensate for inexperience. In some instances, inexperienced lawyers neither fully understand that they are expected to be professional, nor understand that a professional approach is the most effective, nor do they understand what is or is not professional. In yet other instances, an inexperienced lawyer may attempt to make up for lack of experience by engaging in short-sighted and obnoxious strategies to gain an advantage, however short-lived. Sometimes, inexperienced lawyers are told or "taught" that being subjected to sharp practices is just a right of passage — part of the hazing process. This "tradition" perpetuates unprofessionalism.

Responsible mentorship of younger lawyers is a key to instilling professionalism. Oregon law schools are answering the call to teach future lawyers that professionalism is expected and effective in law practice. The New Lawyers Division of the Oregon State Bar and various bar associations have mentorship programs. In addition to these formal programs, judges and lawyers at every opportunity should reach out to fellow lawyers — in words and deed — to spread the message of professionalism.

Conclusion

Professionalism is consistent with that shared value to do good that led us to law school. The citizens of Oregon and members of the bench and bar who each hold the privilege to serve the public expect and deserve professionalism in our judicial system. We must constantly renew our sense of commitment to our court system and the public good. The judges and lawyers of Oregon are in partnership to support one another to live the ideal of professionalism.

Whatever a lawyer may gain by unprofessional conduct is frequently short-lived. Unprofessional conduct is subject to the law of karma or that proverbial boomerang that returns to hit its thrower between the eyes. In our Oregon legal community, conduct unbecoming of our profession is noticed by other lawyers and eventually within the circle of judges. A lawyer can labor for years to build a good reputation, but a single act of unprofessionalism can cause that reputation to evaporate.

We should avoid engaging in unprofessional behavior even if the other side is doing so. We also should refrain in argument and written submissions from personal attacks or criticisms of opposing counsel. Model professional behavior when dealing with all others encountered in your daily practice, especially younger lawyers. These acts will reward the lawyer, the client and the public we serve. B

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon. Richard Vangelisti practices plaintiff's personal injury law in Portland. The authors serve as members of the Oregon Bench and Bar Joint Commission on Professionalism.

Endnote

1 Speech, "Professionalism," Associate Justice Sandra Day O'Connor, 78 Oregon Law Review 385, 390 (Summer 1999).

2 See, for example, Section 4(A)(3) of the Multnomah County Civil Motion Panel Statement of Consensus: "[The certificate] must either state that the lawyers actually talked or state facts showing good cause why they did not."

Professionalism: A Judge's Perspective

By the Hon. John V. Acosta

Judges and lawyers are partners in ensuring professionalism. Each has a role to play in preventing and addressing unprofessional conduct that erodes the civility of practice and the quality of our professional lives. If judges and lawyers do not effectively respond to unprofessional conduct, or if they condone it by inaction, they effectively reward the actor to the detriment of the judicial process and the public's perception of our profession as a whole. Oregon lawyers and judges share a long and demonstrated commitment to ensuring that professionalism is always a foremost consideration. With all of this in mind, here is one judge's perspective on fulfilling the judicial role in addressing unprofessional conduct.

Court Authority to Address Issues of Professionalism

Yes. The court always may use its contempt power to address egregious behavior that occurs in its presence, but less severe behavior also can be — and is — the subject of court regulation. Best known are the obligations imposed on lawyers and parties under the civil rules' discovery provisions. Both the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure permit the court to impose sanctions for violations of the rules and for disregarding court orders. But the rules also permit the court to impose sanctions for conduct that undermines the purpose of the discovery rules even if the conduct is not willful. For example, FRCP 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," and subsection (a)(5)(A) of the rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. See, e.g., *Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc.*, 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, prolonged procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. See *Bilyeu v. City of Portland*, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

In addition, FRCP 83(a)(1) expressly authorizes district courts to "make and amend rules governing its practice," a source of authority that the District of Oregon has invoked to establish two rules that govern professional standards of conduct in the district. The first is LR 83-7, "Standards of Professional Conduct," providing that attorneys practicing in the District of Oregon must, among other things, be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this court's Statement of Professionalism.

The second local rule is LR 83-8, "Cooperation Among Counsel," which proscribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to "accommodate the legitimate requests of opposing counsel." Here, a reasonableness standard is applied to conduct occurring outside the judge's presence.

Finally, professionalism also is embodied in mandatory conferral requirements adopted by both the U.S. District Court and the Oregon Circuit Courts. See LR 7-1(a)(1)(A), requiring the parties to certify that before filing a motion, they "made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so"; and Oregon Circuit Court Uniform Trial Court Rule 5.010, requiring lawyers to certify that they have conferred on motions as a precondition to their filing.

These rules convey the message that judges expect lawyers to talk and attempt to resolve disputes that could lead to motions, and they apply to virtually every motion. Failure to comply with these rules will incur risk of having the motion denied outright. Ultimately, conferral requirements force lawyers to meaningfully discuss a motion and resolve the issues that lead to the filing of motions. When that occurs, parties are spared unnecessary time and expense, the case moves forward more quickly, and the lawyers might establish a foundation for resolving other disagreements without court involvement.

When Should the Court Review an Issue of Professionalism?

Judges can review an issue of professionalism when a potentially unprofessional act occurs in the judge's presence or when the issue is brought to the court's attention.

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The extent of the court's review will depend on the unique circumstances of each case. Keep in mind, however, that the court can on its own initiative inquire into conduct occurring outside the courtroom that appears to be unprofessional. For example, a constant flow of discovery or pretrial motions, especially when the motions are permeated with claims of unprofessional conduct, could result in the court ordering the attorneys to attend a hearing to explain their conduct. Judges do monitor their cases, and they will not look well upon conduct that clearly does not advance the merits of the case but instead could lead to unnecessary motions, delays in completing discovery, or unnecessarily prolonging the case. In federal court, a judge can shift to the parties the expense created by uncooperativeness by appointing a special master to preside over the parties' discovery activities, see FRCP 53(a)(1) (C), and requiring the parties to bear cost of the special master. See FRCP 53(a)(3).

How Should the Court Respond to an Issue of Professionalism?

This depends on the circumstances of the unprofessional conduct. First, the easy situation is when the conduct occurs in the judge's presence; the judge can often address it with an appropriate admonition. Remember that both state and federal courts in Oregon have established written expectations for professional behavior by lawyers, and the judge can give a pointed reminder of those expectations to the lawyer or lawyers. This could occur in the jury's presence, and while judges might try to avoid admonishing an attorney in the jury's presence, the attorney can always avoid such embarrassment by refraining from the behavior in the first place. Ultimately, the court must preserve the dignity of the court in the eyes of the jury and public in general, and doing that could require taking appropriate actions in front the jury or on the record.

Second, the court can address unprofessional content in lawyers' written submissions, either in the court's written decision or at hearing. Judges can remind counsel — on or off the record — that such language in a brief is neither helpful to the court nor professional.

Third, if a motion presents substantive violations of ethics, statutes or rules of procedure or evidence that also happen to be instances of unprofessional conduct, then the court can rely on those standards in imposing a commensurate sanction. See, for example, 28 U.S.C. § 1927 (sanctions for unreasonable or vexatious litigation conduct); FRCP 11(c) (sanctions); ORCP 17 D (same); FRCP 37 (expenses, sanctions, and expenses on failure to admit); ORCP 46 (same); UTCR 1.090(2) (sanctions for failure to comply with UTCR or SLR); UTCR 19 (contempt).

Fourth, if the judge anticipates issues of professionalism may arise in a case, there are always pretrial management procedures and rules for asserting greater control over the lawyers and their clients. See, for example, FRCP 16 (pretrial and scheduling conference); UTCR 6.010 (conferences in civil proceedings); Multnomah County SLR 6.014 (pre-trial case management conferences in civil actions).

Why is it a Challenge for Judges to Address Issues of Professionalism?

Most incidents of unprofessional conduct occur outside the presence of the judge. As an example, a discovery motion often involves accusations and counter-accusations, such that by the time it reaches the judge it's usually impossible to determine who, if anyone, is at fault.

Also, a potential incident of unprofessional conduct often has a limited factual record from which a judge may make determinations and, if there is a factual record, it may be dense with detail. It's difficult, sometimes impossible, and always time-consuming, for judges to try to determine who "started it." Thus, keep in mind that if you file a discovery motion that involves such conduct as a component of the dispute, you may well be disappointed in the outcome. Simply put, time constraints often force judges to move past such allegations and focus on promptly resolving the discovery dispute so that the parties can get on with discovery and the case will continue to move forward.

Further, the claimed conduct may be a culmination of discrete actions rather than a distinct and overt incident, making particularly difficult the determination of whether there was any unprofessional conduct at all. Judges don't live with a case the way lawyers do; they don't regularly interact with the lawyers on all matters pertaining to the case, and thus, they don't share the accusing lawyer's sense of frustration or even anger over the relationship with opposing counsel. What might look like unprofessional conduct to the accusing lawyer with many months of personal experience might look different to the judge reading the motion.

Finally, keep in mind that the source of the unprofessional conduct may become unclear if the accusing lawyer responds in similarly unprofessional fashion. Before you file a motion that involves allegations of unprofessional conduct by the other lawyer, and especially if you are seeking sanctions, first make sure that the other lawyer will not be able to say the same of you in his or her response. If she can, then don't be surprised when the judge denies your motion or admonishes both sides for unprofessional conduct.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon.

View From The Bench

Senior Judge Dan Harris

Enduring values

By Hon. Dan Harris
Senior Judge

I tried one of the most significant cases of my career in 1991. It involved a wrongful death action arising out of a crash on the Siskiyou Pass. The stakes were high. The competition between attorneys was intense. It wasn't the ultimate verdict that made it significant for me, it was the experience I had with the other jurists. The judge and the three other attorneys involved in this case all graduated from law school in the 1940s and 1950s. What I observed from this experience gave me a better understanding of what our profession was like a generation ago and how it has changed.

In this case I observed a judge and lawyers who showed great respect for each other. They were courteous at all time to all involved in the process. They were all well prepared and expected everyone else to be prepared. The lawyers freely extended professional courtesies and relied on verbal agreements with each other through out the process. They always kept their word. They played by the rules. There was no fudging or corner cutting. They maintained a steady and professional demeanor and appearance — even in the most intense situations — and exercised great restraint and control when it came to what they said, how they said it and what they objected to. The lawyers regularly conferred when issues would arise and only came to the judge when they couldn't fashion a solution themselves.

Now I understand, more than 25 years ago, I was witnessing practices and traditions that characterized our profession a generation ago, when the practice of law was viewed more as an "esteemed profession" and a "calling."[1] We have witnessed our profession become more of a business and a career. I have observed this change accelerate since I entered the profession in the early 1980s, especially from my perspective on the bench where I have had the opportunity to regularly observe the performance of lawyers.

Trying to go back to reclaim our profession's place in society, or recapture some of the traditions of generations past, is not realistic. We have to look forward and work at preserving those practices and values that have always worked for lawyers: credibility, competence, restraint and loyalty.

Credibility

A lawyer's credibility is everything in this profession. Credibility is earned from hard work, ethical practice and a believable and accurate advocacy. Some lawyers, in the heat of competition, are tempted to fudge with the facts or the law. Some lawyers will insert provisions into proposed judgments that go beyond the court's directive. Some lawyers cannot avoid the temptation to pass on information to a judge's staff that constitutes an *ex parte* contact. All of these practices undermine a lawyer's reputation. Once a reputation sets in for fudging, it is thereafter difficult to regain credibility with attorneys and judges. As stated by Justice John Paul Stevens: "An advocate who does not command the confidence of the judge bears a much heavier burden of persuasion than one who never misstates either the facts or the law."[2]

A lawyer's professional reputation is the currency of our profession. Work diligently at building it up and guard it at all costs. Then spend it frugally and wisely. And should you make a mistake that might diminish your reputation, do whatever you have to do to make amends, including the simple act of offering an apology.

Let your legal communications stand on their own legal footing without resorting to expressions of opinion or overstatement. Too often, attorneys use useless words, like "outrageous" or "ludicrous," to argue their point. This hurts rather than helps their arguments and takes away from the respect the court has for the analysis. Keep it objective and to the point.

Competence

The competent lawyer is first and foremost prepared. The process of pre-

paring for trial is usually much more than the trial itself. Devoting the necessary time to preparation will not only improve your chances of success but, more importantly, will establish a credibility and reputation that will serve you well in the long run. An important part of preparation should include the practice of stipulating with opposing counsel on as many aspects of the trial as possible. Anticipate evidentiary issues and attempt to work out agreements in advance. In many cases you can stipulate in advance to most of the exhibits, to the order of witnesses, to the appropriate resolution of evidentiary issues and to the jury instructions.

Develop a reputation for knowing the rules of procedure and evidence, and the basic skills used in court. Too many lawyers "wing it" too often. This will undermine your effectiveness as an advocate. Know and practice the fundamental procedures followed in trial: from jury selection to opening statements, to offering exhibits into the record to effective cross examination to making the closing argument.

In the end, you want the judge to say in his or her mind: I know this person. This lawyer is always well prepared, anticipates and tries to resolve in advance issues at trial, has talked with opposing counsel about stipulations, tries an efficient and effect case, and doesn't test the patience of the judge or jury.

Restraint

You can enhance your reputation and effectiveness as an advocate with the appropriate exercise of patience and restraint. Here are a few examples:

- *Don't respond immediately to that sharply worded email or letter from opposing counsel.* Produce a draft response if you must but wait for a day or two before you actually respond. Your response will be more professional, objective and effective if you have the patience to delay your response. This is a difficult task in today's world of instant communication, but it will produce significant dividends.
- *Don't do something just because you can.* We all remember what Justice Potter Stewart once said: "Sometimes there is a big difference between what you have a right to do and what is right to do." Before you decide to deny a good faith request for an extension or take advantage of opposing counsel for a missed deadline, consider how your actions will impact your reputation or future relationship with the other attorney. "Live by the sword, die by the sword," is a maxim that applies to our profession. You will most certainly be in a position someday where you are counting on a fellow lawyer to show restraint by extending to you a professional courtesy.
- *Don't let your opponent control your behavior.* We've all been there, in the heat of the contest, where we want to respond in kind to the way opposing counsel is characterizing you or our client. Don't let your opponent take you away from your game plan. Your client deserves an objective, diligent advocate — not a hothead bent on getting even with the other lawyer.
- *Learn to disagree, agreeably.* Disagreements are inherent in our profession but they don't have to devolve into a war of strong words, accusations and overstatements. Keep your discussion over disagreements cordial and objective — you will be a more effective advocate. Shakespeare reminded us of the more desirable practice in The Taming of the Shrew. Adversaries in law, he wrote, "strive mightily, but eat and drink as friends."

Loyalty

We have an ethical duty of loyalty to represent clients with competence and diligence, while maintaining confidences and avoiding conflicts of interest. This duty should be taken very seriously. The duty to loyalty does not, however, require you to be a puppet to your client's wishes. In the interest of preserving your credibility and reputation, you must insist at all time on being a counselor who balances a client's interests with your professional goals. Too many lawyers will "perform" for their clients by saying or writing things that aren't effective or credible. This may please a client in the short run but it almost always harms the client's interests, and the attorney's reputation, in the long run. Frankly, your reputation and credibility will rise or fall based on your ability to manage a client's expectations and demands.

Our duty to loyalty also includes an obligation to advise clients of the most efficient way to resolve the dispute. This should include apprising clients of the availability of mediation and other methods for resolving issues outside the courtroom. Clients should be informed of the effect litigation will have on them and the benefits — financial and otherwise — that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost.

Our approach to the practice of law has rapidly transitioned from a time exemplified by Atticus Finch into the 21st Century. Our profession is now very different in many ways, but fundamental values endure. They endure because employing these values will improve your effectiveness as an advocate while increasing the personal satisfaction you derive from your work.

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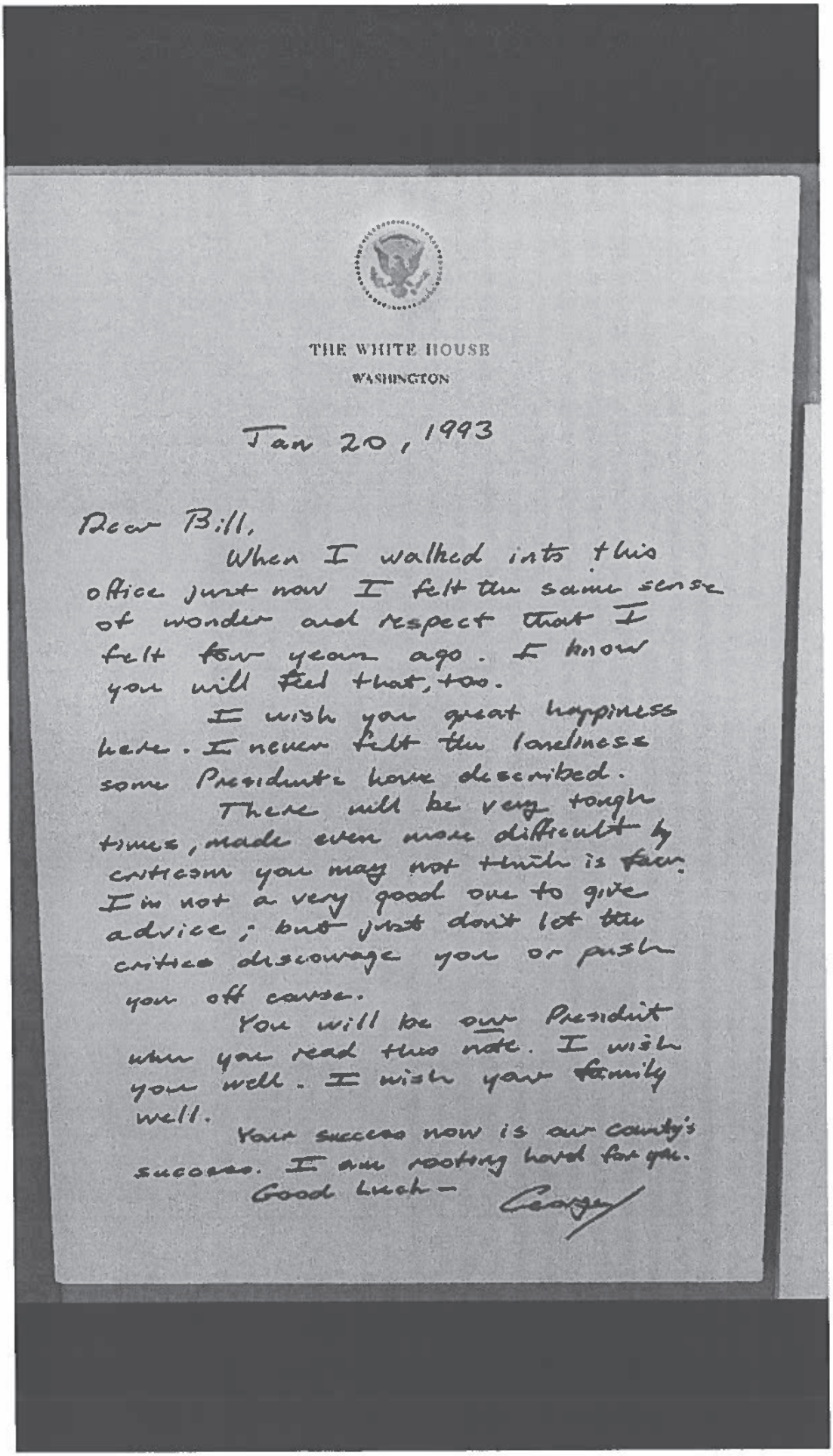
[1] The place of lawyers in American society has been recognized as holding a unique position of moral leadership since the founding of this Country. Alexis de Tocqueville in his famous study of American law and customs referred to lawyers as the Country's natural aristocracy.

[2] John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting. 12 St. John's J. L. Comm. 21 (1996).

Dan Harris is a retired Jackson County Circuit Court Judge and now fills in as a senior judge as needed around the state. He also serves as a mediator and arbitrator with Harris Mediation & Arbitration, PO Box 51444, Eugene, OR 97405. You can reach him at harrismediator@gmail.com or 541-324-1329.



THE WHITE HOUSE

WASHINGTON

Jan 20, 1993

Dear Bill,

When I walked into this office just now I felt the same sense of wonder and respect that I felt four years ago. I know you will feel that, too.

I wish you great happiness here. I never felt the loneliness some Presidents have described.

There will be very tough times, made even more difficult by criticism you may not think is fair. I'm not a very good one to give advice; but just don't let the critics discourage you or push you off course.

You will be our President when you read this note. I wish you well. I wish your family well.

Your success now is our country's success. I am rooting hard for you.

Good Luck —

George

CHAPTER 5

CIVIL MOTION PRACTICE

Xin Xu
Xin Xu Law

Chapter 5

CIVIL MOTION PRACTICE

TABLE OF CONTENTS

I. Introduction to Oregon State Court Civil Motions

There are dozens of different types of civil motions. This CLE focuses on the four most common motions you will likely come across in state court: ORCP 21 Motions, ORCP 23 Motion to Amend, Discovery Motions, and ORCP 47 Summary Judgment Motion.

A. Applicable Rules

i. Review and be familiar with Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR), and Supplemental Local Rules (SLR) for the county of filing.

ii. Review UTCR 5.010 for when conferral is required prior to filing a motion, and the certificate of compliance.

- Conferral is **required** for motions under ORCP 21A(1)-(7), 23, and 36-46. UTCR 5.010. *See Anderson v. State Farm Mutual Auto Ins. Co.*, 217 Or App 592, 595-96, 177 P3d 31 (2008) (court held defendant's violation of conferral request in UTCR 5.010 compelled denial of its motion to dismiss; futility in conferral was no excuse).

- Certificate of compliance must state either that the parties conferred or contain facts showing good cause for not conferring.

iii. Be familiar with ORCP 10 for computing time periods.

iv. Make sure you pay the correct filing fee, if any, or risk the filing being rejected. The 2023 circuit court fee schedule is located at: https://www.courts.oregon.gov/Documents/2022_CircuitFeeSchedule_public_eff-2022-01-01.pdf

v. Review UTCR 5.100 for submission of proposed order on motions.

vi. Make sure your motion complies with UTCR 5.050 by stating whether oral argument is requested, estimated time for oral argument, and whether official court reporting services are requested. If you are requesting telecommunication, make sure you comply with UTCR 5.050(2).

B. Available Resources

i. Oregon State Bar Barbooks, e.g., Oregon Civil Pleading and Litigation (2020 ed.).

ii. Multnomah County:

- Multnomah County Attorney Reference Manual

The Attorney Reference Manual is updated regularly and provides an extremely valuable resource on practices and procedures in Multnomah County. It also provides sample motions and forms to be used in Multnomah County.

https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf

- The Civil Motion Panel Statement of Consensus Multnomah County judges have compiled an explanation of rulings on a variety of issues that arise in the civil cases that come before them. The statement of consensus is a good reference point for motions and responses under consideration. https://mbabar.org/assets/documents/multnomah%20county%20motion%20panel%20consensus%20statement%20august%202018.pdf

iii. Clackamas County:

- Clackamas Court Circuit Court Reference Manual - The Reference Manual is similar to Multnomah County's Attorney Reference manual and provides valuable resource on practices and procedures in Clackamas County Circuit Court. https://www.courts.oregon.gov/courts/clackamas/resources/Documents/ClackamasCountyCircuitCourtReferenceGuide.pdf

iv. Court Clerks and Judicial Assistants: If you cannot find the answer in the rules, the court clerks and judicial assistants (if your matter is assigned to a judge) are very helpful.

C. Practice Tips

i. Create a Motions bank for different types of motions.

- Ask others in your office or your mentors for samples of good motions, responses, and replies.

- Check OECI (state court) or Pacer (federal court) in your free time to add to your motions bank.

ii. Make sure you are relying on the most up-to-date rules and resources. There have been many recent changes to the rules, especially with e-Court.

iii. Just because you can file a motion does not mean you should. Some types of motions are particularly frowned upon by the court and should only be brought when absolutely necessary.

II. ORCP 21 Motions Against Pleadings

A. Motions to Dismiss – ORCP 21 A

i. Motions to dismiss are used by defendants to eliminate claims for relief or an entire action, or, by plaintiffs to eliminate affirmative defenses. ORCP 21 A specifies the following grounds for dismissal:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. There is another action pending between the same parties for the same cause;
4. Plaintiff does not have legal capacity to sue;
5. Insufficiency of summons or process, or insufficiency of service;
6. The party asserting the claim is not the real party in interest;
7. Failure to join a party under ORCP 29;
8. Failure to state ultimate facts sufficient to constitute a claim; and
9. The pleading shows that the action has not been commenced within the applicable statute of limitation.

ii. Unlike the other ORCP 21A motions, motions to dismiss brought under ORCP A(8)(Failure to state a claim) and A(9) (statute of limitations) are limited to the face of the complaint. In other words, these motions cannot be supported by matters outside the pleading, including affidavits, declarations, and other evidence. *See Deep Photonics Corp. v. LaChapelle,* 282 Or App 533, 548, 385 P2d 1126 (2016), *rev den* 361 Or 425 (2017); *Kastle v. Salem Hospital,* 284 Or App 342, 344, 392 P3d 374 (2017).

iii. Defenses Waived if Not Raised-Certain defenses are waived if not raised by motion before pleading, or in the first responsive pleading.

- ORCP 21 G(1) – Lack of jurisdiction over the person, insufficiency of summons or process, insufficiency of service, another action pending between the same parties on the same cause. These defenses are **waived** if not raised in the party's first appearance.

- ORCP 21 G(2) – Plaintiff lacks capacity to sue, not real party in interest, and statute of limitations. These defenses are waived if it is neither made by motion nor included in a responsive pleading or, in limited circumstances, amendment thereof.

iv. **Practice Tip:** Consider whether the ORCP 21 A motion to dismiss will result in dismissal with or without prejudice if granted. If you want the court to dismiss the claim or action with prejudice, make sure you so state in your motion and order. If the order is silent as to whether the dismissal is with or without prejudice, then the dismissal shall be treated as without prejudice.

B. Other ORCP 21 Motions

i. **ORCP 21 B** provides for a motion for judgment on the pleadings after the pleadings are closed and in advance of trial. *See Simpkins v. Connor*, 210 Or App 224, 228, 150 P3d 417 (2006); *Beason v. Harcleroad*, 105 Or App 376, 379-80, 805 P2d 700 (1991). The court may enter judgment on the pleadings if the allegations show the nonmoving party cannot prevail as a matter of law. ORCP 21 B; *Rowlett v. Fagan*, 358 Or 639, 649, 369 P3d 1132 (2016); *Lehman v. Bielenberg*, 257 Or App 501, 508, 307 P3d 478 (2013); *Pendergrass v. Fagen*, 218 Or App 533, 537, 180 P3d 110 (2008), *rev den*, 344 Or 670 (2008) (court did not err in granting plaintiff's motion for judgment on the pleadings in FED action).

ii. **ORCP 21 D Motion to Make More definite and certain:** Use ORCP 21 D to "require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent." *See Stewart v. Kids Incorporated of Dallas, Or.,* 245 Or App 267, 272, 286, 261 P3d 1272 (2011), *rev dismissed*, 353 Or 104 (2012) (affirmed dismissal where complaint failed to allege facts to show why defendants were on reasonable notice of unreasonable risk of harm).

iii. **ORCP 21 E Motion to Strike:** Use ORCP 21 E(1) to strike any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated. Use ORCP 21 E(2) to strike redundant matter from the complaint.

- A "sham" allegation appears false on the face of the pleading and may be stricken. *Rowlett v. Fagan*, 262 Or App 667, 682, 327 P3d 1 (2014), *aff'd in part, rev'd in part*, 358 Or 639 (2016); *Kashmir Corp. v. Nelson*, 37 Or App 887, 891, 588 P2d 133 (1978); *Warm Springs Forest Products Ind. v. EBI Co.*, 300 Or 617, 619 n 1, 716 P2d 740 (1986) ("Good in form but false in fact; * * * a pretense because it is not pleaded in good faith.").

- A "frivolous" pleading under ORCP 21 B "is one which, although true in its allegations, is totally insufficient in substance." *See Kashmir Corp. v. Nelson*, 37 Or App 887, 892, 588 P2d 133 (1978)

- An "irrelevant" pleading pertains to matters that "are not logically or legally germane to the substance of the parties' dispute." *Ross and Ross*, 240 Or App 435, 440-41, 246 P3d 1179 (2011). A pleading may be stricken as either frivolous or irrelevant if it is legally insufficient. *Id* at 440.

iv. **Practice Tips**

- Conferral is required for all ORCP 21 motions except for motions brought under ORCP 21 A(8)(failure to state a claim) and ORCP 21 A(9)(statute of limitations).

- If you are filing an ORCP 21 D motion to make more definite or certain or ORCP 21 E motion to strike, make sure you comply with UTCR 5.020(2).

III. ORCP 23 Motion to Amend and Relation Back

A. ORCP 23A Amendment

ORCP 23A provides that a "pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served". Otherwise, a party may amend a pleading only with written consent of the adverse party or court approval. The court shall freely grant leave to amend "when justice so requires."

B. ORCP 23 B Amendment

When issues not raised by the pleadings are nonetheless tried with the express or implied consent of the parties, the pleadings may be amended to conform to the proof. ORCP 23 B; *see Agrons v. Strong*, 250 Or App 641, 282 P3d 925(2012). If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to show prejudice.

C. ORCP 23 C Relation Back

When the need for amendment becomes apparent after the statute of limitations has run, consider the application of ORCP 23 C which provides:

> **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.

New allegations or claims: An amendment adding a new claim or defense against the same party or parties will relate back to the date of original filing when it arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." ORCP 23 C; *See Concienne v. Asante*, 273 Or App 331, 359 P3d 407 (2015) (permitting relation back where predicate facts, injury and damages are the same and defendant had adequate notice of claim)

New parties: An amendment adding or substituting a party will be allowed to relate back to the date of original filing when the party to be added received actual notice of the action within the statute of limitations and knew or should have known, but for the mistake, it would have been named as a party to the action. ORCP 23 C; *McLain v Maletis Beverage*, 200 Or App 374, 115 P3d 938 (2005); *see also Smith v. American Legion Post 83*, 188 Or App 139, 71 P3d 136, rev den, 336 Or 60 (2003). This means actual notice within the statutory period, not including any extension for service under ORS 12.020. *McLain v. Maletis Beverage*, 200 Or App 374, 377-81, 115 P3d 938 (2005) (Rule 23 C requires notice within the statutory period, not service); *Richlick v. Relco Equipment, Inc.*, 120 Or App 81, 852 P2d 240, *rev den*, 317 Or 605 (1993) (court held the amendment did not relate back when party had no notice of the action within the period of limitations).

Practice Tip: A common issue arises when plaintiff realizes there was an error in naming the defendant and files an amended complaint to correct the error after the statute of limitations had expired. Whether the amendment constitutes a "change in party" and therefore requires the defendant to receive notice within the statute of limitations depends on if the error is a "misnomer" or "misidentification." A misnomer occurs when there is an "error in stating what the Defendant is called." *Worthington v. Estate of Davis*, 250 Or App 755, 760 (2012). A misidentification occurs when plaintiff makes "a mistake in choosing which person or entity to sue." *Id.* at 760. A misnomer triggers just the first sentence of ORCP 23 C and does not trigger the notice requirement. On the other hand, a misidentification constitutes a change in party and triggers the additional notice requirements for relation back as imposed in the second part of ORCP 23 C. *Id.* at 759.

IV. Discovery Motions

A. Motions to Compel – ORCP 46

If the opposing party or a nonparty fails to respond to discovery requests or if the response is inadequate, the requesting party may file a motion to compel discovery pursuant to ORCP 46 A. The moving party must establish that the material sought is discoverable, e.g., that the material is not privileged or subject to an exception to the privilege claimed. *Kahn v. Pony Express Courier Corp.,*173 Or App 127, 133

(2001). The court may award reasonable expenses, including attorney fees, to the party that prevailed on bringing or opposing the motion. ORCP 46 A(4).

B. Discovery Sanctions- ORCP 46 B

The trial court may impose a variety of sanctions for a party's failure to obey an order to permit or provide discovery. ORCP 46 B(1)-(3), C, D. Sanctions for the failure must be just, but may include striking pleadings, limiting proof at trial, and dismissal. ORCP 46 B(2), 46 D. *See Burdette v. Miller*, 243 Or App 423, 431-32, 259 P3d 976 (2011) (Court of Appeals held no abuse of discretion in striking defenses of defendant who failed repeatedly to appear for deposition or for sanction hearing). The party compelling compliance is also entitled to reasonable expenses, including attorney fees, unless the court finds that the opposing party's failure to obey the order was substantially justified "or that other circumstances make an award of expenses unjust." ORCP 46 D.

C. Motion for Protective Order-ORCP 36 C

A party opposing a request for discovery may (1) object to the discovery request or (2) move for a protective order under ORCP 36 C—an order "that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

D. Practice Tip

The parties must confer before filing any motions under ORCP 36-46. These motions are disfavored by the court. The moving party should make every attempt to resolve the issues and document in writing all of the efforts to resolve the dispute before filing the motion.

V. Summary Judgment Motions

A. Summary Judgment Standard

A summary judgment motion is a dispositive motion designed to eliminate the opponent's case or portions of the case without a trial. The motion is not designed to resolve factual disputes, but to determine whether there is any genuine issue of material fact to justify a trial. ORCP 47 C; *Bonnett v. Division of State Lands,* 151 Or App 143, 145-46 n 1, 949 P2d 735 (1997).

The court reviews the facts and draws all reasonable inferences in favor of the nonmoving party. ORCP 47 C; *Chapman v. Mayfield*, 263 Or App 528, 530, 329 P3d 12 (2014); see *Perry v. Rein*, 215 Or App 113, 168 P3d 1163 (2007) (record permitted competing inferences); *West v. Allied Signal*, Inc., 200 Or App 182, 113 P3d 983 (2005). "Summary judgment is proper if the 'pleadings, depositions, affidavits, declarations and admissions on file show that there is not genuine issue as to any material fact.' ORCP 47 C." *Greer v. Ace Hardware Corp.,* 256 Or App 132, 134, 300 P3d 202 (2013); *Hagler v. Coastal Farm Holdings, Inc.,* 354 Or 132, 140, 309 P3d 1073 (2013).

When the moving party does not have the burden of proof at trial, it may move for summary judgment without coming forward with evidence in support of its motion. Rather, the adverse party must produce admissible evidence on every issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. ORCP 47 C. Failure to do so entitles the moving party to summary judgment.

A plaintiff seeking to recover on a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, may obtain summary judgment if it is established that "there is no genuine issue as to any material fact" necessary to prove a claim, that none of the affirmative defenses asserted by defendant raise a genuine issue of material fact, and that judgment should be entered in plaintiff's favor under applicable law. ORCP 47 A; ORCP 47 C; *see William C. Cornitius, Inc. v. Wheeler*, 276 Or 747, 757, 556 P2d 666 (1976) (summary judgment was appropriate when, *inter alia*, "none of the affirmative defenses raised any triable issue").

A defendant may obtain summary judgment on a showing that "there is no genuine issue as to any material fact" necessary for the plaintiff's claim and that defendant is entitled to a judgment based on the applicable law, or when one or more affirmative defenses are established in the same manner. ORCP 47 B; ORCP 47 C; *King v. Warner Pac. Coll.*, 296 Or App 155, 172, 437 P3d 1172 (2019).

B. Responding to Summary Judgment Motions

After the moving party has pointed out the lack of any genuine issue of material fact and that it is entitled to judgment as a matter of law, the adverse party must produce admissible evidence sufficient to meet a burden of production on any issue on which that party would bear the ultimate burden of persuasion at trial. ORCP 47 C.

C. Type of Evidence Allowed in Summary Judgment

Both the moving party and adverse party may only rely on admissible materials for purposes of summary judgment. *See* ORCP 47 D; *Deberry v. Summers,* 255 OR App 152, 166 n6 (2013). Affidavits, declarations, depositions, responses to requests for admissions are typical materials used in summary judgment proceedings.

An affidavit or declaration must be based on personal knowledge and must "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein." ORCP 47 D; *Spectra Novae, Ltd. v. Waker Associates, Inc.,* 140 Or App 54, 58, 914 P2d 693 (1996). The declarant satisfies the requirement for personal knowledge when the affidavit is read as a whole, and an objectively reasonable person would understand that the statements are made from the affiant's

personal knowledge and with competence. *West v. Allied Signal, Inc.,* 200 Or App 182, 113 P3d 983 (2005).

If evidence presented in support or oppose summary judgment is inadmissible, the other party should seek to strike the evidence. When evidentiary challenges are raised, the court will assess the admissibility of particular evidence. *See Perman v. CH. Murphy/Clark-Ullman, Inc.,* 220 Or App 132, 138, 185 P3d 519 (2008) (analyzing admissibility of lay opinion under OEC 701).

D. Motion to Strike

A party must make evidentiary objections before the motion for summary judgment is decided. Otherwise, the evidence may be considered. *Aylett v. Universal Frozen Foods Co*., 124 Or App 146, 154, 861 P2d 375 (1993). Examples of objections include:

> Hearsay – Hearsay statements not falling within any exception to the hearsay rule are inadmissible and should not be considered.
>
> Opinions – "Opinions as to liability are legal conclusions and are not the proper subject of a witness's testimony." Olson v. Coats, 78 Or App 368, 717 P2d 176 (1986).
>
> Legal conclusions – An affidavit that merely states legal conclusions is not sufficient to create a question of fact. *Spectra Novae Ltd*., 140 Or App 54, 59, 914 P2d 693 (1996).
>
> Irrelevant averments – Affidavit statements that are irrelevant should play no part in the court's consideration.

E. Expert Declarations

Expert testimony may be required on specific claims, such as claims for medical or other professional negligence. *See* e.g. *Getchell v. Mansfield*, 260 Or 174, 179, 489 P2d 953 (1971) (expert testimony required to establish the standard of care in the community).

When a party opposing summary judgment is required to provide the opinion of an expert to establish a genuine issue of material fact, ORCP 47 E permits the party's attorney to submit an affidavit or declaration "stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact[.]" ORCP 47 E is designed to protect the expert's identity and opinions from disclosure before trial. *Stotler v. MTD Products, Inc.,* 149 Or App 405, 408, 943 P2d 220 (1997); *Moore v. Kaiser Permanente*, 91 Or App 262, 265, 754 P2d 615, rev den, 306 Or 661 (1988).

An ORCP 47 E affidavit or declaration must be made in good faith and be based on admissible facts or opinions of a qualified expert. *Two Two v. Fujitec Am., Inc*., 355 Or 319, 328-29, 325 P3d 707 (2014) (if ORCP 47 E affidavit is filed in bad faith, offending party pays reasonable expenses incurred by other party as a result and may be subject to sanctions).

The submission of an ORCP 47 E affidavit or declaration does not automatically create an issue of fact. *VFS Financing, Inc., v. Shilo Management Corp.*, 277 Or App 698, 706, 372 P3d 582 (2016), *rev den* 360 Or 401 (2016). It will create an issue of fact only when the expert testimony is "'required' to establish a genuine issue of material fact" and not otherwise. *Id*.

F. Considerations When Moving for Summary Judgment

Motions for summary judgment can be time consuming and expensive. Additional considerations before filing include:

- The stage of discovery
- Factual records
- Strength of legal position and likelihood of success
- Educating opponent
- Targeting all or part of the case and impact on the balance
- Timing

CHAPTER 7

FAMILY LAW

Amanda C. Thorpe
Cauble and Whittington LLP

Chapter 7

DOMESTIC RELATIONS

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LEARNING THE ROPES

DOMESTIC RELATIONS

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In preparing the materials for the course, I have chosen to emphasize the practical skills that I wish I had known early in practice as well as the ways in which Domestic Relations differs from other forms of civil litigation. At the end of the materials you will find a list of supplemental materials that are useful to draw on for the rules and regulations, forms, and substantive legal issues.

Domestic Relations is distinct in practice from other areas of Civil Litigation:

- Often you have a designated family court in which the matters are heard.
- Mandatory discovery statutes
- Mandatory mediation in custody matters
- Frequently used emergency and temporary remedies, including automatic statutory protections
- Less "winner take all" than other areas of law
- The cases are a "zero-sum game"- you are dividing what the parties already have- not adding to it, you are dividing time with children, which you cannot add to.
- More frequent client contact and troubleshooting often due to the frequent and ongoing contact between the parties
- Statutory priority of matters and expedited time frames in certain proceedings
- Opportunities to offer "unbundled services"
- Opportunity to help someone transition into a new stage in life
- Rewarding opportunities to have a positive impact on families and for children

PRACTICAL GUIDE TO DOMESTIC RELATIONS PRACTICE

I. SCREENING POTENTIAL CLIENTS

A. Who screens? Staff. Be wary of taking calls that may result in information being exchanged that creates a conflict you are not documenting in your conflicts system. There is no "quick question." The best staff to field incoming calls will be firm, organized and kind.

B. Inquire as to: conflicts, practice area, venue/jurisdiction, time frame (deadline to respond, hearing dates and/or trial dates).

C. Disclose: consultation fee, procedure, and request they bring information/ documents.

D. Practical considerations: time investment, ethics, calendaring (name, phone number, email address, issue), reminders.

E. Look out for warning signs. If you are working with experienced staff, trust them in the screening process.

II. INITIAL CONSULTATION

A. Formalities: Intake sheet, payment, conflict check, third parties.

B. Read the room: A potential client making small talk needs to be eased into the conversation. Take the time to engage with the potential client briefly to make the client comfortable before broaching the subject of the meeting. If a potential client appears eager to discuss issues, by leading with questions or talking about looking forward to the appointment, be responsive by moving right to the issues.

C. Balance the story telling with the time at hand: It is important for the potential client to tell his story, to feel heard by you. Potential clients will have different areas of emphasis, different points of origin, different details that they will want you to know. You can always politely ask for them to clarify or elaborate, or you can politely redirect. Allow the potential client to speak in a narrative format (not question and answer) if that is more comfortable and conversational. Issue spot during the narrative and then ask your questions to get the details you will need to answer questions. After the narrative, ask if the potential client has specific questions. Often the potential client is looking for a general assessment, but will sometimes have specific areas or issues. However, be mindful of the time. You may need to redirect and move on to the specific questions.

D. Feel free to ask the potential client if he/she is looking to hire an attorney or if he/she is just looking for information. This is often apparent from the conversation, but it can help you shape the information you give. Do not be discouraged when people only want information. Even these consultations provide indispensable advice to people who really need it and helps grow your professional reputation.

E. SET EXPECTATIONS: You will never have a better chance to tell a client "no" than the initial consultation. Set reasonable expectations of the process, expenses, time, and outcome of the proceeding.

F. Don't over extend yourself. If you do not know the answer to an issue, look it up. If you can't reasonably look it up in the time available, then consult a colleague or look the issue up after the appointment. It is okay to not have a complete analysis of the matter during the consultation. However, regularly committing to additional work can be difficult to manage.

G. It's okay to decline representation. It may take some time to develop a comfort level with the emotionally charged and sometimes uncomfortable nature of domestic relations matters. While I would urge you not to be too quick to judge a potential client, you should also trust your instincts. You are not doing the client a good service by taking on a case that makes you uncomfortable or taking on a client with whom you will not have a good working relationship.

H. Discuss fees: present the client with a written fee agreement, set a retainer, be clear about the steps to retain you.

I. Provide documents: keep copies of frequently used forms on hand: vital statistics forms, CIF forms, Uniform Support Declaration, Standard Parenting Plans.

J. Send a non-engagement letter to everyone unless you were retained on the spot. Even a potential client who plans to come back should get a letter stating that you are not taking further action until the retainer (if any) is paid and the fee agreement is signed and returned.

III. STARTING THE CASE

A. Retainer and fee agreement: Make sure you have a signed fee agreement, the retainer, and provide the client a copy of the fee agreement.

B. Deadlines: Deadline to respond, hearings, trial, response to request for production should be calendared.

C. Documents: Ask for copies of any documents served upon the client and also pull documents from ecourt. (Don't overlook possible RFPs served with initial pleadings.)

D. Calendar a deadline to draft initial documents, consider scheduling a signing to increase your accountability to your client; if responding send an ORCP 69 letter.

E. Allot sufficient time for the client to review drafts before client signs. Remind the client to review for accuracy (not just rubber stamp).

F. Advise the client prior to filing of any orders that will go into place at the time of filing, such as the mutual asset restraining order.

G. Consider any temporary motions that may be appropriate: temporary protective order of restraint, motion for temporary support, motion for exclusive use, motion for suit money.

H. Calendar out deadlines from the date of filing- even for those tasks that do not have a hard deadline. Service? Deadline for opposing party to respond? Send RFP? File USD?

I. Send an introductory letter to the client. Advise the client of common issues, such as preferred communication, ways to reduce expenses, timeline, and what the client can expect. Remind the client of anything that is required of the client, such as coparenting education class and mediation.

J. Review the SLRs for the county in which you are litigating. Many counties procedure on motion practice and deadlines varies significantly. Review SLR Chapter 5 for Civil Cases and Chapter 8 for Domestic Relations proceedings.

IV. DISCOVERY

A. ORS 107.089 includes mandatory discovery provisions, but rarely are these relied upon. Typically parties represented by counsel will exchange requests for production with a fairly standard set of roughly 25 requests in dissolution cases.

B. Consider creating a template of requests for standard cases including custody cases and modifications.

C. Be mindful of ORCP 36 scope of discovery and ORCP 43 format when drafting requests and responding.

D. Review any requests you receive for appropriate objections.

E. Send the request for production you receive to your client with a detailed letter explaining how to produce documents to you. Most clients are open to doing the legwork if it reduces their legal fees. Encourage clients to produce documents to you with copies in lieu of originals if possible, and organized by response number. Require clients to indicate whether documents exist (whether provided or not), do not exist, and/ or who has the documents if the client does not. Be sure the client knows that if he can get the documents from the third party he is required to do so (bank statements, credit card statements, paystubs.) Advise the client NOT to write notes to you on the documents. Discovery, while routine to you, is not routine to the client and can feel burdensome, intrusive, and scary. A little explanation goes a long way. Set a deadline for the client to produce documents to you (sufficiently in advance of the deadline to respond).

F. Provide discovery to others the way you would want it provided to you: organized. Consider utilizing electronic copies as both your means of delivery and means of storage.

G. Review the documents most carefully for records that are privileged or otherwise not required to be produced. Look for handwritten notes. The notes may be standard ("paid on 5/25") OR may be a note to you ("I paid her car payment"). Notes to you are privileged and should be redacted.

H. Consider other means of discovery: request for admissions, subpoenas to third parties, depositions.

V. EXPERTS

A. If experts may be needed in the case, discuss the possibility with your client early including the financial and time constraints.

B. Common experts will include custody and parenting time evaluators, real estate appraisers, business appraisers, forensic accountants, and personal property appraisers. Familiarize yourself with the rates and services available so you can spot appropriate cases and provided needed estimates.

C. If you want to retain an expert, communicate with the expert about fees, documents needed and time needed to complete the services.

D. Seek a court order or stipulation as may be appropriate.

E. Consider the issue of privilege when hiring experts.

VI. SETTLEMENT

A. Most cases will settle without trial. Providing an honest assessment of strengths and weaknesses and potential outcomes throughout the case will aid in resolution.

B. Your assessment of the financial issues will be advanced by securing a USD and other documentation from your client early in the case.

C. Consider keeping a running asset spreadsheet as the case develops including a notation of the date and source of any figures used on your asset spreadsheet. It will allow you to assess the financial considerations as the case develops and consolidate information into an easy reference point.

D. Be mindful of the level of communication your client needs. Most discussions of the terms of settlement should be made by phone, by video conference, or in person. They are huge decisions for the client and require a significant exchange of information.

E. Encourage clients to be mindful of additional considerations including time, stress, conflict, and the opportunity for more creative solutions than if the case proceeds to trial.

F. Remind clients that parties are more likely to comply with a court order that is stipulated than one determined by the court alone.

G. Encourage clients to follow the 3-3-3 rule: how will you feel about this in 3 days? 3 months? 3 years?

H. When drafting an offer, be thorough and be sure to include whether or not attorney fees will be included. Review the pleadings and communications to be sure you are not missing any issues.

I. When drafting an offer, consider your audience (pro se, counsel, personality) and draft accordingly.

J. If an agreement is reached just before trial (which often happens) put it on the record if a written stipulation cannot be prepare and signed before the trial date.

VII. TRIAL AND HEARINGS:

A. Work with opposing counsel/ opposing party to narrow the issues and articulate those remaining issues and any stipulations clearly for the bench.

B. Schedule a hearing prep appointment with the client sufficiently in advance that you can spot any holes in the documents you will present and in time to line up additional witnesses as necessary.

C. Subpoena your witnesses even if they have agreed to appear voluntarily.

D. Screen your witnesses carefully. Ask the questions you want to know as well as the ones you anticipate the other party will inquire. Sometimes a witness cuts both ways. Also assess whether the witness is capable of giving answers to difficult questions at trial. Often your witnesses will be, or at one time were, close to both parties. Make sure they are prepared to give the testimony even when confronted with the other party in court.

E. Be mindful of deadline to submit trial documents and other required forms.

F. Calendar important deadlines backwards from trial to allot yourself enough time.

G. Organize and clearly mark your exhibits and review them with your client in advance.

VIII. PREPARING THE JUDGMENT

A. Promptly and carefully draft the judgment. Carefully review the terms of settlement or the court's decision to be sure that you have included all of the issues.

B. Allow sufficient time for your client to review the judgment for accuracy.

C. Be mindful to include the proper information on real property and vehicles if you intend for the judgment to be self-executing.

D. Draft in language that is clear and precise.

E. Double check that you have attached all exhibits and in the proper order.

F. Include all language required by statute (such as required child support language.)

G. Be open to request for revision when the revisions are for clarity and still consistent with the court's order or stipulation.

IX. CONCLUDING THE REPRESENTATION

A. Provide client with a copy of the entered judgment along with a letter of explanation of any additional steps the client needs to take such as hiring an attorney to complete a QDRO or establishing a collection with Division of Child Support.

B. Withdraw from the case.

C. Send a closing letter.

ADDITIONAL RESOURCES

PLF Practice Aids and Forms: https://osbplf.org/practice-management/forms.html

Oregon State Bar BarBooks Family Law (2021 ed.):
https://www.osbar.org/secured/barbooksapp/#/book?bid=329

Oregon Judicial Department Forms: https://www.courts.oregon.gov/forms/Pages/default.aspx

DOJ Division of Child Support Tools for Professionals (child support calculator, rules, etc.):

https://www.doj.state.or.us/child-support/for-professionals/tools-for-professionals/

Oregon Judicial Department UTCRs, SLRs, and forms:

https://www.courts.oregon.gov/programs/utcr/Pages/default.aspx#:~:text=Supplementary%20Local%20Court%20Rules%20%28SLR%29%20The%20SLR%20are,Oregon%20Rules%20of%20Civil%20Procedure%2C%20and%20state%20law.

Oregon Revised Statutes (see especially chapters 25, 33, 107, and 109):

https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

I strongly recommend the OSB CLE Course: Handling Domestic Relations Cases as a primer on Domestic Relations and an excellent resource of forms and how tos.

https://ebiz.osbar.org/ebusiness/ProductCatalog/Product.aspx?ID=1702

LEARNING THE ROPES DOMESTIC RELATIONS

A HORSE OF A DIFFERENT COLOR

Family law differs from many other forms of civil litigation:

- Highly emotionally charged and sensitive topics
- Statutory priority and expedited timeframes
- Mandatory discovery
- Mandatory mediation
- Quick motion practice
- High client contact and trouble shooting
- "Zero-sum game"
- Unbundled services

Typical Day of a Domestic Relations Attorney

- Review daily calendar of appointments, schedule and deadlines
- Check and respond to emails regarding developments in cases
- Meet with potential clients on new matters (route file to staff)
- Check and respond to emails regarding developments in cases
- Review and revise drafts of initial pleadings or motion practice
- Check and respond to emails
- Follow up with clients on status of drafts, offers, and other correspondence
- Confer with client about an offer, hearing prep or trial prep
- Check and respond to emails
- Draft Judgment or review judgment following decision or settlement/ or prepare documents for upcoming trial/ hearing
- Follow up with staff regarding to do list, calendar and client contact

"Hand Holding"

Yes, Domestic Relations sometimes gets a reputation for being a field requiring extensive "hand holding". However, it is really just a matter of communication and follow up. With a skilled staff, the client is able to communicate well with the office and stay informed, reducing the client's anxiety. Developing a good working relationship with the client, including setting appropriate boundaries, makes the case manageable and mutually beneficial. You do not want to be out of the loop and neither do they.

SCREENING

Your time is precious. Protect it with effective screening and intake processes. Proper procedure save your time and heads off ethical issues. If there is an issue, don't set an appointment. Doing so only wastes the time of the potential client and risks delaying or harming their proceedings.

5

CONSULTATIONS

- Sit in on consults with other attorneys to observe different styles.
- Be prepared, organized and professional.
- It is an exchange of information- not a sales pitch.
- Find the style that works for you.

Yay! They hired you! Now what?

Take care of business

Get organized

Set Deadlines

Be thorough

Research

Communicate

DISCOVERY

ORGANIZATION IS KEY

Assign tasks to staff

- Documents from Client
- Title Requests
- Mandatory Discovery
- Requests for Production
- Requests for Admission
- Subpoenas
- Depositions

EXPERTS

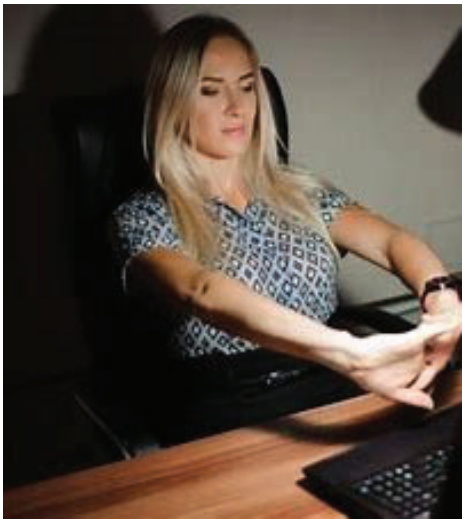
KNOW WHEN TO USE THEM AND HOW BEST TO UTILIZE THEM

SETTLING THE CASE

It's your job but it's the client's life. The ability to resolve a case is a mix of having set reasonable expectations, strong client rapport and case preparedness. Fully advise on possible outcomes and leave room for negotiations. Prepare offers strategically and have the client approve all offers.

APPEARING IN COURT

- Prepare effectively
- Be organized
- Be courteous
- Give your client pen and paper
- Be mindful you are being recorded
- Focus on the issues
- Keep your client focused and (if possible) comfortable
- Raise objections thoughtfully



Drafting a Judgment

- Time to bring it all home!
- Be thorough and specific
- Review pleadings and memos to be sure you didn't miss anything.
- If stipulated work from the writing that forms the agreement.
- If working from a decision letter follow the language wherever possible.
- Be mindful that findings are included but if possible not inflammatory.
- Have the client review and also get another set of eyes on it.
- Don't neglect necessary exhibits.

Wrap it up

- Prepare any supplemental documents needed such as deeds (if any).
- Refer on for division of assets such as preparation of QDRO.
- Check to see if client has questions or needs assistance with finalizing exchanges of personal property, etc. (This is mostly needed in high conflict cases.)
- Provide client with information about setting up child support collection.
- Send a closing letter outlining any remaining steps and advising regarding file storage.
- Refund retainer or follow up on balances due
- Withdraw

CHAPTER 9

BUSINESS LAW/ BUSINESS TRANSACTIONS

W. Todd Cleek
Cleek Law Office LLC

Anne E. Koch
Wyse Kadish LLP

Learning the Ropes
Business Transactions

November 8, 2022

Anne E. Koch and W. Todd Cleek

1. Introduction

2. What do Business Lawyers Do?

   a. General Description – 30,000-foot view
      - Entity selection and formation
      - Real estate development (purchase and sale)
      - Financing – equity and debt
      - Mergers & acquisitions
      - Employment advice
      - Compensation and benefits
      - Securities
      - Intellectual property
      - Regulatory compliance
      - Contract review
        - Vendor agreements
        - Service agreements
        - Goods agreements
      - Succession planning
      - Buying and selling of business assets
      - Licensing and other regulatory advice
      - Tax
      - Secured transactions

   b. Specific Examples
      - Mergers and Acquisitions
      - Representing Small Businesses

3. Day in the Life

   a. Negotiating and advising through emails, meetings, conference calls etc
   b. Document drafting and review
      - Nondisclosure agreements
      - Term Sheets/Letters of Intent
      - Purchase and Sale Agreements
        - Real Estate
        - Asset purchases
        - Equity purchases
        - Goods and services
        - Other
      - Leases
        - Real Estate
        - Equipment
      - Licensing and other regulatory documents
      - Entity Documentation
        - Operating Agreements and other formation documents
        - Consent Resolutions
      - Loan Documents
        - Promissory notes
        - Loan agreements
        - Trust deeds

- Guaranties
- Collateral assignments
- Construction contracts
- Other Real Estate-related agreements
  - Easement and licenses
  - Environmental indemnities

c. Lawyer to counselor/strategic advisor

Speakers will take questions at the end of this segment.

4. <u>Characteristics of a Successful Business Attorney</u>
   a. Problem solver/strategic thinker and advisor
   b. Pragmatic – focused on practical solutions
   c. Skilled at listening to the client to determine what they really are trying to accomplish, want, and need.
   d. Organized
   e. Able to analyze risks and articulate them in a way clients can understand
   f. Negotiator
   g. Emotionally intelligent/People skills – ability to relate well with clients and also be able to evaluate what risks your clients present
   h. Initiator/planner/self-motivated and able to pace yourself
   i. Attention to detail
   j. Passion/"Fire in the belly"
   k. What personal characteristics does transaction work draw on for Laura and Todd
5. <u>Advantages of Practicing as a Business Attorney</u>
   a. Common goal
   b. Collaborative
   c. Long-term relationships with clients
   d. Helping clients with an opportunity they want
   e. Allows for efficiencies
   f. Schedule can be flexible
6. <u>Disadvantages of Practicing as a Business Attorney</u>
   a. Risks can be difficult to quantify and analyze
   b. Urgency - this varies depending on the deal and client
   c. Predictability can vary widely

Speakers will take questions at the end of this segment.

7. Business Development and other Practice Tips
   a. Finding and Developing Clients
      - Where to go and who to network with – industry groups; other professionals
      - How to reach people in a way that encourages them to hire you as their lawyer
      - Presenting yourself in a way that makes your strength and interests clear
   b. Know your own limits - associate other lawyers as co-counsel/get help; establish a network of professionals in various fields; learn what cases to reject
   c. Know your client base and where your money is coming from; have a sufficiently diverse base for law practice sustainability
   d. Find mentors
   e. Attend substantive CLEs

Speakers will take questions at the end of this segment.

8. Resources and Practice Tools:

a. Free resources

- Bar Books
- FastCase
- PLF forms
- Law libraries

b. Other resources

- Practical Law (affiliated with Westlaw)
- Onecle
- Friedman on Leases
- RealDealDocs.com
- American Arbitration Association forms
- JAMS Mediation, Arbitration, ADR services and forms
- National Venture Capital Association (NVCA) forms
- Building Owners and Managers Association (BOMA) forms
- Lexis Nexis Forms and Templates
- Nolo.com
- Podcasts in your industry of interest; podcasts on practice management

PLF LEARNING THE ROPES CLE

November 8, 2022

Anne E. Koch

I. Agreements to Become Familiar With:

- Operating Agreement
- Shareholders Agreement
- Stock Purchase Agreement
- Asset Purchase Agreement
- Security Agreement
- Independent Contractors Agreement
- Master Services Agreement (MSA)
- Non-Disclosure or Confidentiality Agreement
- Employment Agreement
- Commercial Lease
- Loan Agreements & Promissory Notes
- Real Property Purchase & Sale Agreement

II. Some Basics to Know:

- Forming new entities
- Taxation of entities
- Buy-Sell provisions in Operating Agreements & Shareholders Agreements
- Commercial lease review
- Intellectual property basics: trademarks and copyrights
- Difference between a stock sale and an asset sale
- Difference between non-compete and non-solicitation provisions
- Ethical requirements of representing business entities

III. General Tips / Miscellaneous Thoughts:

- Get to know CPAs. Talk with the client's CPA during a transaction. Don't be afraid to ask them questions. Unless you have an LLM or a tax background, you don't need to advise on complicated partnership tax concepts (for example). With that said, in addition to understanding how the different entities are taxed, know specific forms, filing deadlines, and other practical advice (on the federal, state, and county level). This will be helpful for you too if you ever open your own practice.
- Be helpful. You'll need to provide a lot of practical advice and there is value for the client in this. Many questions won't be legal questions. Understand what you can/can't answer. Be prepared to answer basic questions about how to file a form (for example). Keep track (or ask your legal assistant to) of deadlines for clients.
- Draft agreements that clients can read, understand and use.
- Don't worry about sounding like a lawyer. Sometimes it's better to explain things in layperson terms so a client can understand. Most business clients want to work with someone who is approachable.
- Start a documents roster so you can keep track of what you've already drafted and can use these agreements going forward.
- Start a mentor / attorney resources roster. Establish relationships with specialty attorneys you can turn to when an issue is outside of your comfort zone.
- Be an active listener.
- Always be responsive, but also establish boundaries with clients.

CHAPTER 11

TIPS, TRAPS, AND TOOLS FOR SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

The Hon. Angela F. Lucero
Multnomah County Circuit Court Judge
The Hon. Katharine von Ter Stegge
Multnomah County Circuit Court Judge

Chapter 11

TIPS, TRAPS, AND TOOLS for SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

TABLE OF CONTENTS

NEGOTIATION STRATEGIES

By Jane Clark

Timing of Negotiations

There is no right or wrong time to negotiate. Much will depend on the nature, strengths and weaknesses of the case, the attitudes of the parties and or/insurance adjusters and the preferences and personalities of the attorneys. One thing is sure however - there will never be a settlement without at least some disclosure and exchange of information. Cases can potentially settle at any time in the litigation or pre litigation process. The advantages and disadvantages of settling at different points in the life of a case are set out below.

Pre litigation settlements

Cases will only likely settle pre litigation where the plaintiff has a strong case on liability, can demonstrate this and the defendant is motivated to avoid a lawsuit. Oftentimes plaintiff's counsel will send a Demand Letter before filing a lawsuit offering the defense an opportunity to evaluate the case and make an offer. In order to evaluate the case, the defense will need information about the plaintiff's case and usually details of the supporting evidence. One disincentive to early settlement is that often, plaintiff's counsel will not have all this evidential information without formal discovery in the case. However, if it appears relatively straightforward in terms of liability e.g. a rear end collision with a police report available, and plaintiff can provide documentation e.g. through medical and employment records of the injuries sustained, the economic loss claims and the current status re both, it should not be too difficult to prepare a formal and detailed demand letter. In clear cut cases of liability, car accident cases are one of the more likely types of cases where pre suit settlement is possible and this often does occur. Oftentimes however, pre suit offers are so low, it is necessary to file the case to pressurize the defense into increasing the offer. Many times these cases will proceed to a trial on damages only, unless information has come to light during discovery that causes either or both parties to change their view of the case.

If however you have a strong case there are clearly advantages to settling pre litigation - the most significant of which is the saving in time and money of having to litigate and possibly try the case. In cases where the expenses will be significant, e.g. medical malpractice cases or other complex cases involving costly experts and requiring more extensive discovery, the cost of litigating can be substantial.

With saving in cost and time being the primary advantage of early settlement, what are the disadvantages? Often in a case, discovery is needed to fully evaluate the strengths and weaknesses and only limited information may be available before litigation - in particular the testimony of opposing witnesses. Sometimes the plaintiff feels strongly that he or she wants their day in court - and this desire may change only after they have been through deposition with a fast approaching trial date and a sense of the risk of loss. Without knowledge of the opposition's case, the attorneys will likely have a one sided and maybe unrealistic view of the case, making it more difficult to settle due to unrealistic expectations.

Another disincentive to settle is a fear of "showing your hand" to your opponent. Oftentimes to obtain a settlement, the defense will need information. Oftentimes the information you have may not be discoverable in litigation before trial e.g. the opinion of a supportive expert. Some attorneys worry that if they reveal key information about their case too early, their opponent will use it against them and they will lose the element of surprise. This is particularly so in states such as OR where there is generally not disclosure of experts. If however you are litigating in Washington, federal courts or a state where there is disclosure of experts, you will have to assess whether tactically it is to your client's advantage or disadvantage to reveal information such as expert opinions too early in the case.

In a clear cut case of liability and damages, early settlement should at least be considered. Whether you achieve a settlement at this stage will depend on the nature and value of the case and the personalities of the parties and attorneys involved. Often you will work with the same opposing attorneys and oftentimes the same insurance adjusters on multiple cases. If you are viewed by your opponent as being reasonable and fair with integrity, and if your credibility is maintained, the likelihood of early settlements will increase.

Settlement during the course of the case

Of course, settlement can occur at any point during the progression of a case. Oftentimes, as discussed above, the parties simply need information that can be obtained from the discovery process to allow them to evaluate the strengths, weaknesses and potential value of the case. Litigation can be a costly business and you should bear this in mind when you develop your discovery and settlement strategies. It can be tempting to take the deposition of everybody even remotely involved in the case and hire multiple experts to testify. This is entirely appropriate and reasonable if the case so justifies You should always bear in mind the potential value of the case when considering what costs should be incurred and be strategic about the timing of discovery. Are you positioning a case for trial or settlement? How you proceed with discovery and even the questions you ask during the discovery process may be influenced by this decision. For example, if you know the case is unlikely to settle, you may want to save those "killer" cross examination questions for trial and not alert or rehearse the witness during the deposition process.

After a case has been filed, give early thought to what discovery is required to give both parties the information they need to at least consider settlement. Identify the key witnesses that need to be deposed and the key documents that need to be obtained and reviewed through discovery to allow that evaluation to occur. After that "key discovery stage" has been concluded, evaluate the case and explore the possibility of a settlement. If attempts are made at settlement and fail, you know that you are in "trial mode" and can prepare the rest of the case accordingly.

When to consider making a demand or offer

Consider doing so when your case it at its strongest and before the weaknesses in your case become apparent during the discovery process. If you have a particularly good

witness or a document that strongly supports your case, following disclosure of that document or deposition of that witness may be a good time to consider trying to engage in settlement negotiations. Similarly if you know you have a witness about to be deposed who will harm your case consider trying to settle before that deposition takes place.

Settlement negotiations will often start after the parties have completed the discovery stage of the case and before trial preparation starts. If you have not already considered settlement or started negotiations by this point in the case, you should consider doing so before you spend the hours needed to prepare for trial.

Settlement before or during trial

Some cases are settled at the door of the courtroom or even during trial. There are many reasons for this. Oftentimes discovery is not completed until shortly before trial and parties therefore do not have the information they need prior to this to engage in meaningful negotiations. In other cases, attorneys for the parties are not fully engaged and realistically evaluating the strengths and weaknesses of the case until they start to prepare it for trial. In other cases, the procedures of the insurer may delay settlement until close to the trial date.

Of course settlement can and often does occur during trial as counsel continue to assess the strengths and weaknesses of each side of the case as the trial progresses. Cases even settle while the jury if out - a time when parties and their attorneys become anxious and may second guess their earlier evaluation of the case. Even after a verdict and pending appeal cases may settle. Better the certainty of a settlement than the uncertainty and possibility of an adverse ruing on appeal and possible retrial.

Negotiation tips and tactics

Credibility and Integrity

The first rule in negotiation is maintain your credibility and integrity. Aa soon as you lose your credibility you lose your ability to negotiate effectively from a position of strength. Therefore throughout the case and even before you reach the point of starting negotiations, do not make promises or threats you cannot follow through on. Of course it can and does sometimes happen that witnesses do not testify as you expect them to testify and the face of your case can change during the litigation process. However, if you make representations to your opponent that you cannot fulfil they will not trust you in negotiations and any information you communicate as part of the negotiation process will be regarded with suspicion. This makes it very difficult to argue a strong case and maximize your client's position in settlement negotiations. Cases are far more likely to settle when the opposing attorneys trust and respect each other and are willing to listen to each other's positions.

Listen and advocate

The key to successful negotiations is listening and advocating. You must listen to what your opponent is saying about his case, evaluate that information and then advocate your client's position. Your opposing attorney may give you information during settlement

negotiations that could impact your view of the case and its settlement value. Therefore hear what he is saying and acknowledge that you have done so. If your opponent believes that you have heard and understood his position and you have maintained your credibility during the case in terms of exchange of information and representations of facts and evidence, he is more likely to listen to and understand your position when you advocate for your client. The more credible you have been during the case, the more credible will be your arguments supporting your offer or demand.

You must also be prepared to advocate your client's position - in much the same way as you would do during a closing argument. If you represent a plaintiff and want the defendants to increase their offer, you have to be able to explain and justify why you believe the case has a higher value with reference to the facts and the evidence.

Sometimes attorneys are unprepared for settlement negotiations. If you are not prepared, do not be afraid to delay discussions until you are. If for example you get a call out of the blue one day from your opposing counsel wanting to discuss settlement and making a demand or an offer and asking for your evaluation of the case and reaction to the offer, do not be afraid to put off such a discussion until you have had time to formulate a response. Of course, you generally cannot respond to any demand immediately without consulting with your client (unless you already have authority to settle up to a certain amount). However, without giving the matter some thought, you likely will not do your case justice. Before calling your opponent back, consider making a list of all the points you want to make regarding your case and your response to the points he made to ensure that you do not forget anything.

When making your counter demand or offer - be prepared to justify your response by reference to your evaluation of the strengths and weaknesses of the case.

Disclosure of authority

The defense will typically have a limit of authority placed on the case by the insurer. Oftentimes the insurer will give the attorney authority to negotiate a settlement up to a certain amount. Sometimes additional funds are available in addition to that authority or the adjuster may need to seek an increase in the authority. If you are defense counsel and are asked the limit of your authority -how do you respond? Oftentimes you will not want to give this away early in the settlement negotiations. Just because you have authority up to a certain amount does not mean that you have to offer the complete amount of your authority. However, you cannot lie to your opponent and advise that you have authority less than you do - this would be wrong ethically and goes to the issue of credibility discussed earlier. Be prepared for this question and know how you will respond. An answer such as "I am not at liberty to disclose that at this time" or " that information is confidential at this stage of the negotiation" will usually suffice. Your opponent cannot force you to disclose your authority.

"Bottom line' representations

Attorneys commonly represent an amount as being the "bottom line" and then go beyond the bottom line. Sometimes this is not unreasonable. Bottom lines can of course change as the litigation proceeds and information comes to light that changes the evaluation of

the case. Sometimes a client will refuse to go beyond a certain figure and represent that as the bottom line but change their mind after further consideration.

Again - from a credibility perspective, be wary of consistently going beyond your bottom line - if you do this you will lose credibility in future negotiations. Your opponent may well say "Oh Jo always says $100,000 is his bottom line but always end up settling for 50% of that". If you do so, and on the day you have that case where $1000,00 really is your bottom line, you may be unable to settle it!

Initial demands and offers - how to position them

Most cases have a settlement range. That is a figure within a range that the defense will be prepared to pay and the plaintiff will be prepared to accept to avoid the risk of trial. If the case has such a range, the case will likely settle within it irrespective of the opening demand and offer amount. However, how long it takes to reach that figure in settlement negotiations and how much credibility the attorneys maintain during the process will depend on the amounts of the opening demand and offer.

As a general rule, if the opening demand is excessively high the opening offer will be unreasonably low. That is because the defense will want to leave sufficient room to increase offers during the negotiation process but still ending up in the settlement range. For example, if the settlement range on a case is $50-$60,000, parties will likely reach that range much more quickly if the opening demands and offers are realistic and closer to that range.

However, the risk of making a demand close to that range - particularly if you have not worked previously with your opposing counsel, is that your opponent will believe that as you have made a demand of $80,000, you probably value it at around $20,000. It is only with experience and ongoing relationships with your opponent can you reach a point where you have sufficient credibility to be able to make a demand close to the settlement range and know that it will settle within this range, as your opponent knows from experience that you are credible and realistic in your negotiations. Until you reach that type of relationship, make initial demands sufficiently high to give yourself plenty of room for negotiation but not so high that the defense is not even willing to engage in discussions believing there is no possibility of settlement. You also lose credibility if you demand $500,000 and ultimately settle the case for $30,000.

On the defense side - the same rules generally apply. As the defense holds the purse strings, their position it a little easier. When you are at your authority and there is no more money, the plaintiff must then take it or leave it. If that take it or leave it offer is in the settlement range the case will likely settle. If however your opening offer is unreasonably low plaintiff may be reluctant to engage in negotiations and simply prefer to take his chances and spend his time preparing for trial.

Direct Negotiation or Mediation?

There are advantages and disadvantages to direct negotiation versus mediation. One advantage is that it is cheaper - you avoid the mediator's fee, which is more of a factor in smaller value case. Oftentimes, defense counsel will put the authority out there on the

table and it will be a take it or leave it situation with mediation unlikely to be effective in changing what the insurer will pay. There are cases however where mediation is justified both in terms of the value of the case and efficiency of the process. Oftentimes during direct negotiation, parties will go back and forth over a number of weeks, sometimes even months. That whole process can take place with a mediator over the course of a few hours.

Another advantage of mediation is that many mediators are "evaluative" mediators. This means that they evaluate the case and give feedback to the parties during the course of the mediation process. Oftentimes, having a neutral party with experience in the relevant legal field mediate and evaluate the case can help to change the positions of the parties and reach a faster settlement. This is particularly so where the parties and/or the attorneys perhaps have an unrealistic view of the case in terms of its strengths or valuation. A mediator who has experience in handling personal injury cases either as an attorney or judge, may be useful in helping to educate a plaintiff who has unrealistic expectations regarding the value of the case and what they will likely recover at trial. The same may be true of an insurance adjuster who is taking an unrealistic position and failing to understand the issues in the case.

The parties must agree on the identity of the mediator and the personality of the mediator will often be a factor in the selection process. Some mediators are very "let's get down to it and move this forward", others like to talk about other cases and their other experiences and others are willing to listen. Many good mediators will do some or all of these things depending on the case. If however you have a case where you represent a plaintiff who really wants to tell her story and you know a particular mediator wants to get down to business- that person may not be the best mediator in the case. The case is more likely to settle if the parties trust the mediator and feel that their side of the case has been heard and communicated by the mediator to the other side.

Typically the cost of mediation is split between the parties - although sometimes one party is willing to pay the cost. Sharing the cost typically engages both parties in the process - rather than just coming along for the ride because the other side is paying with no real willingness to settle the case.

Preparing your clients for settlement negotiations.

Preparing Plaintiffs

Preparing your client for settlement negotiations can be a challenging process, particularly when representing plaintiffs. On the one hand you want to maintain your role as being a strong advocate for and believing in the case. On the other hand you need to be realistic with your client regarding what the likely outcome is of the trial and what lies in store if the case does not settle. One thing that is certain is that the outcome of a trial is uncertain. Clients need to understand this and all you can do is give them your considered opinion as to the likely range of outcomes if the case does not resolve. It is then for the client to decide whether they want to "roll the dice".

Attorneys often have problems with clients who have unrealistic expectation with regard to outcome. Some clients simply do not want to accept or acknowledge that they may get

less than $200,000 on a whiplash case or that the failed root canal and need for 4 other procedures is not worth $500,000 because they could not eat for three months. All you can do is to educate and advise your client as to likely value with a plaintiff verdict at trial and represent the percentage risk of a loss at trial with no recovery, explaining that this has to be factored into the settlement process.

It is a useful tool, before discussing settlement with your client to have formed an opinion as to the likely verdict range in the event of a plaintiff verdict with an evaluation of the percentage likelihood of prevailing at trial. As a starting point, if it is a case with a likely value of $40-$50,000 with a 50/50 change of prevailing at trial, you may represent a reasonable settlement range to be $20-$25,000. Be prepared to discuss your rationale with your client.

Having discussed the acceptable settlement range, you should then discuss with your client, what demand you should make to allow sufficient room to negotiate down to your range. Oftentimes, this will depend on the nature and value of the case and the nature of your relationship and prior dealings with opposing counsel.

If you have not agreed the settlement range with your client before making a demand and explained to them the reason for making a demand higher than the settlement range you run the risk of having a client who is upset with you for having "sold them short" in settlement. You want to avoid a situation where, having achieved what you consider to be a great settlement for your client, they are unhappy because "you told the defense in the demand that my case was worth $100,000 so why did we end up settling for $50,000?". This can be avoided if you communicate your reasoning to the client ahead of time.

In situations where your valuation of the case is different to that of your client and you consider your client to have unrealistic expectations, you may want to consider brining in a mediator whose role in part will be to educate your client. An attorney with a lot of experience in the relevant field of law involved in the case or a retired judge will make excellent mediators in this kind of situation.

When you get into the negotiation process - whether it be direct negotiation or mediation - warn your client to expect low offers at the beginning and not to be offended. I will never let my client walk out of a mediation until at least 4 or 5 exchanges have taken place. Early on in the negotiations the parties are testing the waters and to disengage from the process at this stage is not to be recommended. Tell your client "you will likely be offended by the first offer". That way when they are offended they are expecting it and are not so offended by it.

Preparing Defendants and Insurers

Where there is insurance available, the defendant is often not involved or engaged in the negotiation process. Remember however that the defendant is still your client and entitled to be involved and consulted if they so wish. In some case e.g. medical malpractice cases, the defendant will have a say in whether the case settles and therefore should be involved

in the process. Of course, in cases where the restitution sought is something other than monetary compensation e.g. reinstatement in an employment case, the defendant will be very actively involved in the process as will the parties in a divorce case.

The primary rule again is to ensure that your client is educated as to what to expect, the possible outcomes at trial and the percentage chance of a favorable verdict at trial. If you are dealing primarily with an insurance company - ensure that you have followed all their procedures and provided to them the information and documentation they need to come up with appropriate authority. If you fail to provide key information and authority is granted not having taken that information into account, the case may not settle and the client and insurer may be compromised at trial.

If you are engaged in direct negotiations, consider asking the insurer to give you authority up to a certain amount so you do not have to go back to them with each offer. Whether the adjuster will do this will depend on the nature and size of the case and your previous dealings and relationship with them. Some adjusters want to take more control over the negotiations than others. Some may even prefer to do the negotiation direct with plaintiff's counsel. If the case proceeds to mediation, it is preferable that the adjuster or person with authority is present. If they are only available by phone-they are not getting the benefit of the communication of information that may impact how they view and evaluate the case.

Conclusion

Negotiation is a skill that comes with practice. Do not be afraid of it. Remember the basic rules:

1. Be prepared;
2. Have integrity and credibility
3. Listen to your opponent
4. Advocate for your client
5. Be realistic