Tennessee Commission on Continuing Legal Education & Specialization

# LAWYER TO LAWYER MENTORING PROGRAM

# WORKSHEET II

# INTRODUCTION TO DEALING WITH OTHERS

Worksheet II is intended to facilitate a discussion about appropriate ways (including ethical concerns, etiquette, etc.) for dealing with others on behalf of your client.

## WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

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Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

## ACTIVITIES FOR TODAY

- Discuss a lawyer's particular ethical obligations in dealing with:
  - Opposing party and counsel. See Tennessee Rules of Professional Conduct Rules 1.2 and 3.4; *The Lawyer's Creed.*
  - The tribunal. See Tennessee Rules of Professional Conduct Rules 3.3, 3.5, and 8.2: *The Lawyer's Creed.*
  - The media. See Tennessee Rules of Professional Conduct Rule 3.6.
  - A legislative body or administrative agency in a nonadjudicative hearing. See Tennessee Rules of Professional Conduct Rule 3.9.
  - A person represented by counsel. See Tennessee Rules of Professional Conduct Rule 4.2.
  - A person unrepresented by counsel. See Tennessee Rules of Professional Conduct Rule 4.3.
- Discuss a lawyer's duty to be honest with other parties and the court in all dealings with them. See Tennessee Rules of Professional Conduct Rule 4.1.
- Discuss the importance of dignified, honest, and considerate transactions. Discuss the importance of reputation and how a lawyer's conduct dealing with others in a case affects his or her reputation. See *The Lawyer's Creed.*
- Discuss what to do if you receive a document relating to the representation of other counsel that you should not have received. Tennessee Rules of Professional Conduct

Rule 4.4.

- Share "best practices" with the new lawyer on how to appropriately deal with others on behalf of your client.
- Talk about the importance of civility in communications with others. David J. Abeshouse, *Civility and Negotiations*, GPSOLO MAGAZINE, Oct./Nov. 2005.
- Share with the new lawyer "war" stories of attorneys who have ultimately harmed their client because of their incivility and lack of consideration in dealing with opposing counsel, the judge or the jury.
- If the new lawyer spends time in court, discuss the attached article by G. M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, ABA Journal (April 1, 2012).

## ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

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## RESOURCES

### TENNESSEE RULES OF PROFESSIONAL CONDUCT

### I. CLIENT-LAWYER RELATIONSHIP

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

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. 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.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss

the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

## III. ADVOCATE
## RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or

(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; or

(3) in an ex parte proceeding, fail to 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.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss with the client the consequences of the client's failure to do so.

(f) If a lawyer, after discussion with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the

tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by RPC 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

**Comment**

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

**Representations by a Lawyer**

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare RPC 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in RPC 1.2(d) not to counsel a client to commit, or assist the client in committing a fraud, applies in litigation. Regarding compliance with RPC 1.2(d), see the Comment to that Rule and also Comments [1] and [7] to RPC 8.4.

**Misleading Legal Argument**

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

**Ex Parte Proceedings**

[5] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order or one conducted pursuant to RPC 1.7(c), there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

**Refusing to Offer or Use False Evidence**

[6] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

[7] As provided in paragraph (d), a lawyer has authority to refuse to offer or use testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer or use the testimony of such a client because the lawyer reasonably believes the testimony to be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

**Wrongdoing in Adjudicative Proceedings by Clients and Others**

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury or another offense against the administration of justice, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases, paragraph (e) requires the lawyer to advise the client to desist from or to rectify the crime or fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] Paragraph (f) sets forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under RPC 1.6 prevails over the lawyer's duty of candor to the tribunal. Only if the client is implicated in misconduct by or toward a juror or a member of the jury pool does the lawyer's duty of candor to the tribunal prevail over confidentiality. *See* paragraph (i).

[10] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for to do so without disclosure of the misconduct would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the tribunal that the request for permission to withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by RPC 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers, who in turn will advise them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[11] Once the lawyer has made a request for permission to withdraw, the tribunal may grant or deny the request to withdraw without further inquiry or may seek more information from the lawyer about the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by RPC 1.6, but only to the extent that the lawyer may do so in compliance with RPC 3.1. If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (h) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by RPCs 1.2 and 3.1.

[12] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client, but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense lawyer who complies with these rules acts professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

**False Documentary or Tangible Evidence**

[13] If a lawyer comes to know that tangible items or documents that the lawyer has previously offered into evidence have been altered or falsified, paragraph (g) requires that the lawyer withdraw or disaffirm the evidence, but does not otherwise permit disclosure of information protected by RPC 1.6. Because disaffirmance, like withdrawal, can be accomplished without disclosure of information protected by RPC 1.6, it is required when necessary for the lawyer to avoid assisting a fraud on the tribunal.

**Crimes or Frauds by Persons Other than the Client**

[14] Paragraph (h) applies if the lawyer comes to know that a person other than the client has engaged in misconduct in connection with the proceeding. Upon learning prior to the completion of the proceeding that such misconduct has occurred, the lawyer is required by paragraph (e) to promptly reveal the offense to the tribunal. The client's interest in protecting the wrongdoer is not sufficiently important as to override the lawyer's duty of candor to the court and to take affirmative steps to prevent the administration of justice from being tainted by perjury, fraud, or other improper conduct.

**Misconduct By or Toward Jurors or Members of Jury Pool**

[15] Because jury tampering undermines the institutional mechanism that our adversary system of justice uses to determine the truth or falsity of testimony or evidence, paragraph (i) requires a lawyer who learns prior to the completion of the proceeding that there has been misconduct by or directed toward a juror or prospective juror must reveal the misconduct and the identity of the perpetrator to the tribunal, even if so doing requires disclosure of information protected by RPC 1.6. Paragraph (i) does not require that the lawyer seek permission to withdraw from the further representation of the client in the proceeding, but in cases in which the client is implicated in the jury tampering, the lawyer's continued representation of the client may violate RPC 1.7. RPC 1.16(a)(1) would then require the lawyer to seek permission to withdraw from the case.

**Crime or Fraud Discovered After Conclusion of Proceeding**

[16] In cases in which the lawyer learns of the client's misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client's misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client's offense will be deemed completed as of the conclusion of the proceeding. An offense that occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for an appeal has passed.

**RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

(a) 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; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(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; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence; or

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case. 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 that witness's loss of time in attending or testifying; or

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

**RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress, or harassment;

(d) conduct a vexatious or harassing investigation of a juror or prospective juror; or

(e) engage in conduct intended to disrupt a tribunal.

**RULE 3.6: TRIAL PUBLICITY**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii)the fact, time, and place of arrest; and

(iv)the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

### RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a)(1), (a)(2), (b), (c), and (d); RPC 3.4(a), (b), and (c); RPC 3.5(a), (b), and (e); and RPC 4.1.

## IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

### RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

(a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

(b) If, in the course of representing a client in a nonadjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall discuss with the client the consequences of the client's conduct. If after such discussion, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The

lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

(c) If a lawyer who is representing or has represented a client in a nonadjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and discuss with the client the consequences of the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

**Comment**

**Misrepresentation**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts or law. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see RPC 8.4.

## RULE 4.2: COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

## RULE 4.3: DEALING WITH AN UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are, or have a reasonable possibility of being, in conflict with the interests of the client.

### RULE 4.4: RESPECT FOR THE RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or

(2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

(b) A lawyer who receives information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall:

(1) immediately terminate review or use of the information;

(2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

## VII. MAINTAINING THE INTEGRITY OF THE PROFESSION

### RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the following persons:

(1) a judge;

(2) an adjudicatory officer or public legal officer; or

(3) a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

View complete rules and comments at: http://www.tsc.state.tn.us/rules/supreme-court/8.

### A LAWYER'S CREED

**To the opposing parties and their counsel**, I offer fairness, integrity, and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions, and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

**To the courts and other tribunals, and to those who assist them,** I offer respect, candor, and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

**To my colleagues in the practice of law**, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor, and dignity that I expect to be extended to me.

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**GPSolo Magazine - October/November 2005**

# Civility and Negotiations

*By David J. Abeshouse*

Civility is—and should be—a core negotiation issue. The degree to which one employs ordinary civility in negotiations often has a marked effect on the bottom-line result. It also can make life more pleasant, even in fundamentally adversarial situations, essentially the norm for business litigators and transactional lawyers. An example of what *not* to do is the opposing counsel who—instead of working together to resolve a dispute or problem in customized, mutually acceptable fashion—prematurely blurts out, "I'll see you in court." This knee-jerk reaction usually fails as a negotiation tactic, for many reasons:

- It reflects a lack of analytic forethought and a tendency for emotional outbursts, two aspects that make this lawyer a less-than-formidable adversary.
- It essentially obliterates the possibility of counsel working together for the mutual benefit of the clients, who likely could achieve through a tailored settlement a result far better for both sides than any court would order. Because the vast majority of business litigations settle before trial, it is a fair bet that the parties will end up in some sort of settlement negotiations, regardless.
- Over time, this lawyer will develop a reputation as a loose cannon and a temperamental, petulant, unprofessional person to whom others would not refer clients. Opposing counsel often serve as a good referral source for future business because they have seen firsthand what the lawyer can do in the trenches.
- Finally, to the extent that this lawyer's own client learns of his reaction, the client may become dissatisfied with a lawyer who seems out of control and willing to put his own emotional needs ahead of the client's best interests.

In a hearing before an arbitrator, the less civil party often merely is endeavoring to overcompensate for unfavorable facts or law, whereas the more civil party in a dispute often feels no need to descend into incivility. Indeed, obstreperous counsel thus inadvertently acknowledges implicitly that he or she likely has a less than wholly legitimate case on the facts and/or law—not something a lawyer seeks to communicate to the one who is judging the case and will issue the final determination.

Don't lose your temper. Rather, lose the temper, yelling, and foul language. Although "venting" might improve your mood, it rarely works to your advantage in negotiations. Yes, occasionally it may tend to intimidate; however, the same result likely could be achieved in those instances without the expletive-laden, high-decibel diatribe. Most often, it will cause a diminution in credibility and respect.

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And that's a price not worth paying for the occasional negotiation advantage it arguably might afford. Indeed, a prompt apology for an emotional outburst might gain more ground toward a good working relationship and achieving the negotiated goal.

Employ common courtesy and civility as a matter of routine.Make it a part of your natural way of dealing with others, and you will see how effective it is, both in terms of results and in your quality of life. Sure, there are times when the need for some more forceful language and volume may be indicated, but this should be the exception rather than the rule. (The rarity of your outbursts will also increase their impact.) And by refusing to respond in kind when someone personally offends you by words or actions, you refrain from lowering yourself to their level, and that in itself is a laudable goal. Even the matter of responding to e-mails and telephone voice mail messages encompasses these tenets of common courtesy and civility—prompt response by you encourages similar treatment by your counterpart. The more the enlightened use these means of conducting legal and business negotiations, the more likely their use will spread. How much better things would be if this became the usual mode for the majority.

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**Ethics**

# Be Nice: More States Are Treating Incivility as a Possible Ethics Violation

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By G. M. Filisko

Illustration by Stuart Bradford

Incivility among lawyers is not a new concern. But as the general tone of public discourse in the United States becomes more heated, the issue of civility—or lack thereof—within the legal profession appears to be moving to the front burner.

“Civility used to be inherent in public discourse. Where did we go wrong?” said then-ABA President Stephen N. Zack in a speech during the 2011 ABA Annual Meeting in Toronto. “As lawyers, we must honor civility,” said Zack, the administrative partner at Boies, Schiller & Flexner in Miami. “Words matter. How we treat others matters.”

The ABA’s policymaking House of Delegates also endorsed (PDF) a renewed commitment to civility during last year’s annual meeting, but it wasn’t the first time the House has addressed the issue. In 1995, the House adopted a resolution (PDF) encouraging bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges.

But aspirations may not be enough in an increasingly competitive environment that doesn’t always seem to reward courtesy and cooperation.

“There are more pleadings, and there’s more discovery, which provides more opportunities for attorneys to lose their cool and snap,” says Jimmie L. McMillian, a partner at Barnes & Thornburg in Indianapolis who was a panelist for a recent ABA-sponsored CLE webinar about the impact of lawyer incivility on clients. “Lawyers are operating under more pressure in terms of billable hours, getting clients and being a lawyer who’s different. TV also plays a role. Just as clients are susceptible to thinking their lawyer has to act like that, you have lawyers who feel they have to perform—and I do use the word *perform*—like that.”

Moreover, there is no clear consensus on what defines incivility. Brian S. Heslin, another panelist on the program, draws the line at personal attacks. “You’re not crossing the line when you’re belittling the other side’s position or facts,” says Heslin, a member of Moore & Van Allen in Charlotte, N.C. “But when that type of communication is

directed at the individuals themselves—say their training, personality, color, ethnicity or age—that's when we saw people cross the line."

Lawyers engaging in uncivil behavior run the risk of court sanctions, but in a growing number of jurisdictions, incivility also may land them in front of their state disciplinary bodies on charges of violating ethics rules.

The ABA Model Rules of Professional Conduct don't specifically address civility. Nevertheless, a lawyer's alleged incivility may implicate the competence provisions in Model Rule 1.1 or, more often, Rule 8.4, which contains broad provisions covering misconduct—including dishonesty, fraud, deceit or misrepresentation—and, as stated in Rule 8.4(d), conduct "that is prejudicial to the administration of justice."

"Rule 8.4(d) is where most people are likely to land," says Wallace E. "Gene" Shipp Jr., bar counsel at the District of Columbia Bar. "Let's say you're in a deposition and behave badly by throwing papers at your opponent or causing objections because you treat the witness so badly. That impacts on the administration of justice."

**BE CIVIL—OR ELSE**

The District of Columbia Bar has voluntary rules of civility for lawyers, but some states are addressing the problem with more forceful measures.

Geoffrey Nels Fieger—famous for his defense of Dr. Jack Kevorkian on murder charges stemming from an assisted suicide case—came up against Michigan's mandatory civility rules after lambasting several state appellate judges in conjunction with a malpractice case (that did not involve Kevorkian). On Aug. 23, 1999, during a broadcast of his popular radio show three days after a three-judge panel of the Michigan Court of Appeals overturned a $15 million jury verdict for his client, Fieger said, "I declare war on you," identifying the judges by name, according to a Jan. 20, 2009, opinion in the case by the 6th U.S. Circuit Court of Appeals at Cincinnati.

In a broadcast two days later, Fieger upped the ante, calling them "three jackass court of appeals judges." When someone else on the broadcast mentioned the possibility of "innuendo," Fieger said, "I know the only thing that's in their 'endo' should be a large, you know, plunger about the size of, you know, my fist." He also compared them to Adolf Hitler and other Nazis.

The state Attorney Grievance Commission filed a complaint alleging that Fieger, who is lead attorney at Fieger Law in Southfield, Mich., violated Michigan Rule of Professional Conduct 3.5(d), which prohibits lawyers from engaging in undignified or discourteous conduct toward a tribunal; and Rule 6.5(a), which states, "A lawyer shall treat with courtesy and respect all persons involved in the legal process."

Fieger stipulated to a disciplinary reprimand while reserving his right to bring a separate challenge to the rules on First Amendment grounds. In that challenge, a federal district court decided that the rules were unconstitutionally broad and vague, and enjoined their enforcement. But the 6th Circuit vacated that decision, holding that Fieger lacked standing to bring his challenge.

"Partly because of MRPC 6.5, Michigan has had a string of cases involving lawyers' conduct or statements toward other lawyers in the hallway of a courtroom, in a courtroom, in depositions, or against security officers as lawyers are going through the metal detector," says John F. Van Bolt, executive director and general counsel for the Michigan Attorney Discipline Board.

"If there's actual physical touching, that's one thing. We had a case in which the lawyer, in the course of words with another attorney at a deposition, grabbed the attorney's tie. One witness said he yanked it violently, and another said he touched it briefly. In those cases, there tends to be a finding of misconduct. But if it's a single incident without physical contact, the sanction tends to be not too severe."

However, even Michigan disciplinary hearing panels disagree on how to address alleged incivility. "If there's only been pure speech—someone saying, 'You're an asshole' or 'You're a lying bastard' in a private phone conversation—at least one hearing panel said that, while it didn't condone the behavior, it declined to be the language police," Van Bolt says.

**THE PERSONAL APPROACH**

Florida recently changed its oath of admission to include a duty of civility in oral and written communications, says John T. Berry, director of the legal division of the Florida Bar. But its complaint against one attorney, decided by the Florida Supreme Court in 2010, alleged that the attorney's conduct violated the prohibition against "conduct prejudicial to the administration of justice" in the state ethics rules for lawyers.

The incident giving rise in the complaint against Robert J. Ratiner is described in the supreme court opinion (PDF). During a deposition in 2007, Ratiner's opposing counsel tried to affix an exhibit sticker on his laptop computer. Ratiner briefly touched his opponent's hand and then attempted to run around the table toward him. The deponent said she was very scared by Ratiner's behavior, and the court reporter said, "I can't work like this!" Ratiner's own consultant tried to calm him down, telling him to "take a Xanax."

While finding that Ratiner's "behavior during the laptop incident was unacceptable and unbecoming of any member of the bar," the Florida Supreme Court declined to accept the referee's recommendation that he be disbarred or have his license suspended for two years.

Instead, the court imposed a 60-day suspension and a two-year probationary period, required him to undergo mental health counseling, and directed him to bring bar-approved co-counsel to all depositions during the probationary period or arrange to have them videotaped.

A growing number of state supreme courts and bar associations are joining states like Florida and Michigan in taking up the civility mantle. The Pennsylvania Supreme Court and the state's bar association both adopted civility codes. And the Utah Supreme Court implemented standards of professionalism and civility in 2003, according to the ABA Center for Professional Responsibility.

But until court rules and ethics codes catch up with the problem, some practitioners say a personal approach is the best way to counter incivility.

Charles R. Gallagher III, the managing partner at Gallagher & Associates Law Firm in St. Petersburg, Fla., uses food to soothe opposing counsel. "I send a letter asking to break bread. I'll say, 'I don't know how we got off on this path, but I apologize and I want to start anew.' Often, they'll say, 'I must have had a bad day when we started. I apologize, too, and let's break bread.' Others say, 'Go to hell.' "

When he made the gesture to one opposing counsel, Gallagher says, she responded, " 'You've got a shit case, I have no respect for you, and you've got to be prepared for the ire of me and my firm.' To this day, the case has been rancorous."