



PHOTO CREDIT: © O.D. Images/Punchstock

The Role of the **Judiciary**  
in Fostering  
**Professionalism  
& Civility**

RECEIVED BY

DEC 06 2011

Akron Bar Association

*By Judge Jesse G. Reyes*

*“And do as adversaries do in law,  
Strive mightily, but eat and drink as friends.”*

—THE TAMING OF THE SHREW

Every day in courtrooms throughout our country judges interpret, apply, and through precedent, develop the laws which we, as a society, are expected to abide by in order to co-exist in a civil manner. Our system of justice was formed and developed by our Founding Fathers in order to form a more perfect union. Our nation's courtrooms were established as the venue where individuals could peacefully and rationally resolve their disputes. However, social commentators have suggested that the public forum where this noble experiment is conducted is far from a civil and professional environment. In fact, the common perception is that the advocacy which takes place in our courthouses is fraught with unprofessional and uncivil behavior. In 2002, the American Bar Association published a study where the public expressed an unflattering view of the legal profession and lawyers. The ABA's report revealed that many of those surveyed perceived lawyers as driven by profit and self-interest rather than the client's interest and as manipulators of both the system and truth.

For many outside of the legal profession, the law has become much more a profit-making business than an honorable profession. A common characterization of the conduct of lawyers is that they are rude, discourteous, and abrasive. For confirmation of this public perception one only need look to popular culture's depiction of the modern-day lawyer in film, television and print. In the movie *The Firm*, a young lawyer, Mitch McDeere, joins a prestigious law firm that turns out to be a front for a crime syndicate and where partners authorize the murders of their own associates. In recent years many fictional novels such as *The Rainmaker*, *A Civil Action*, and *The Runaway Jury* depict lawyers as dishonest and despicable. Perhaps the negative portrayal of lawyers in popular culture is one of the reasons there is such a disgust and distrust of attorneys. These depictions do not positively promote the image of lawyers nor does it serve to enhance the public's confidence in the profession. However, we should be mindful that lawyers in America were not always considered the shysters of society but actually were viewed as dignified members of the community. In fact, during most of America's history, people thought that lawyers could be trusted and that the profession had considerable prestige. Former U.S. Supreme Court Justice Sandra Day O'Connor wrote in her memoirs, "Few Americans can

even recall that our society once sincerely trusted and respected its lawyers." So how do we return to the days of the popular lawyer heroes? How do we return to the era of Atticus Finch, Perry Mason, and Henry Drummond?

One way of accomplishing this goal is for the members of the judiciary to take a more active role in fostering professionalism and civility within the legal profession. Tradition dictates that we as judges have an obligation to participate in this type of endeavor. The English Inns of Court have a time-honored tradition and practice of "pupillage"—the sharing of wisdom, insight, and experience of seasoned judges and lawyers with newer practitioners. Today, this same tradition is carried out in the American Inns of Court in this country. Furthermore, as members of the judiciary we are uniquely positioned to undertake this task. As judges we have a sworn duty to perform this service to the profession and to the public. Because in carrying out this effort, we will be contributing and advancing the administration of justice. We should remember it is our profession that is under attack and we have a responsibility to future generations to protect it. Whether or not the public's perception is entirely accurate, we must acknowledge that it exists. Therefore, we should not idly stand by while the screenwriters, novelists and stand-up comics continue to disparage our profession. The time to act is at hand and passivity is no longer the word of the day.

The best means by which to perform this task is for judges to quite clearly communicate what it is they want. This can be accomplished through their words and by their conduct on and off the bench. Specifically, we should propose adherence to three basic values: Respect, Reliability, and Reputation. We can call them the three "Rs" of the profession.

### **Respect**

*"People seldom improve when they have no other model but themselves to copy after."*

—OLIVER GOLDSMITH

As jurists we should set the standard and example for the lawyers to follow. As a young lawyer I would arrive early to court and observe the various judges in our courthouse while they were on the bench. I would take note of how they would conduct themselves and how they ran their courtrooms. We

*Continued on next page.*

should keep in mind that there are young lawyers who are now observing us and we should conduct ourselves accordingly. We should demonstrate and communicate respect by treating the litigants and the lawyers with civility and personal courtesy. We should maintain control of all proceedings which are conducted before the bench. We should define civility in the courtroom with leadership marked by a deep commitment and respect of the law. Accordingly, we should encourage lawyers in our courtrooms to adhere to these same standards. Through our own conduct and words, we should encourage lawyers to always be cordial, courteous, and civil to one another. In stressing respect of the process we should emphasize that we will not permit personal attacks of any kind. Nor will we allow disparaging remarks to be made regardless of the context. The lawyers who appear before us must realize we will not allow counsels to interrupt each other unless to make an appropriate objection. One of the best opportunities for lawyers to either shine or tarnish their image before the court is in their choice of language and use of tone. Therefore, lawyers should refrain from using words that will most likely elicit an emotional response or reaction from opposing counsel. By doing so the lawyer has definitely taken the high road and not the bait. "The character of every act depends upon the circumstances in which it is done."—Oliver Wendell Holmes. In showing respect to the court lawyers should also strive to be courteous to the judge's staff being mindful to remember that they are an extension of the court.

As jurists we need to communicate through our actions and words that civility is not a sign of weakness but an indication of strength. Justice Anthony Kennedy remarked "civility is the mark of an accomplished and superb professional." Judge Rhesa Hawkins of the Fifth Circuit has stated "civility is the mark of a true lawyer, a true professional." Thus, conducting oneself through civility does not mean a lawyer cannot be an advocate. In fact, an attorney has an ethical obligation to represent their clients zealously. Thus, through our communications to counsels we must remind them that the essence of advocacy is persuading someone to alter their view or perception through effective persuasion. The use of civility will not only serve to enhance the advocate's effectiveness, it will also serve to restore the public's trust in the profession.

### Reputation

*"Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial."*

—CASSIO IN *OTHELLO*

One of the repercussions from uncivil behavior is the damage to the lawyer's reputation. Here, judges as well can pave the way to a sound reputation through words and action. A judge establishes a reputation over time by communicating, directly or indirectly, the conduct that will be tolerated. Many judges have standing orders that set forth the procedures lawyers are to follow in court. Prior to trial some judges will provide verbal and written instructions on how counsels are to handle exhibits, witnesses, and themselves during the proceedings. By being clear in their communication, judges can establish a reputation of professionalism and civility and also outline what will be expected of the lawyers who appear in their courtrooms. Reputation is how counsels will be known in the legal community. Before entering the courtroom a judge will know by the lawyer's reputation who will be stepping up to the bench. What type of reputation it will be is entirely within the lawyer's control. We determine what our reputation will be in the community. When necessary the court should remind counsel that it is the lawyer and not the client who conducts the matter in court.

### Reliability

*"Watch your words, for they become actions."*

—UNKNOWN

As judges we should set the standard for reliability by being prepared to preside over and commence the matter as scheduled. We must punctually and diligently hear all cases assigned and be thoroughly prepared to render judgment. Judges should act prudently but decisively and render rulings efficiently and without delay. Hearings, conferences, and trials should be scheduled with appropriate consideration to the schedules of lawyers, parties, and witnesses. Jurists should act judicially in the granting of continuances because unnecessary delays only add to the anxiety and cost of litigation. Lawyers should arrange their work schedules in order to achieve the maximum productivity. The pressures of the practice of law can be overwhelming but lawyers must find the means by which to complete their time sensitive work product. Otherwise, the lawyer's day before the judge may prove to be a very long one if the court imposed deadline has not been met. To avoid this dilemma stay with the task until it is completed. Judges learn very quickly upon whom they can rely. Along those lines lawyers should be reliable in their communications. If you make a commitment verbally or in writing to provide a document or produce a witness by a certain date then do so. In essence, reliability means following through on our commitments and doing what we say we will do. When we

*Continued on page 14.*

---

**The Judiciary's Role** *continued from page 10.*

are reliable, others can count on us, and by conducting ourselves accordingly we can count on each other to improve the image of our profession.

Justice Oliver Wendell Holmes once remarked, "Greatness is not in where we stand, but in what direction we are moving. We must sail sometimes with the wind, and sometimes against it—but sail we must. And not drift, nor lie at anchor."

We also should be cognizant of the fact that an individual judge can only address the unprofessional conduct that occurs in the jurist's courtroom. If we make a difference in the professional life of one attorney then there is one less attorney that the public can criticize. However, away from the bench a judge can have a significant impact by participating in outreach programs for the community at large and for the young people attending schools in the various communities in which we reside. Ultimately,

the responsibility for fostering professionalism and civility can not solely be conducted by the members of the judiciary. This effort must be shared by the various institutions and entities that comprise the practice of law. Therefore, to enhance the image of our profession through professionalism and civility we must look to the law schools, law firms, bar associations, and the American Inns of Court, which make up the fabric of our profession. Together we may be able to stem the tide of public's negative view of our profession. Together we should strive to heed the words of William Shakespeare "And do as adversaries do in law, Strive mightily, but eat and drink as friends." The sooner we do so, the sooner the public may take notice and change their perception of our profession. ♦

*The Honorable Jesse G. Reyes of Chicago, Illinois, is a judge in the Circuit Court of Cook County, currently assigned to the Chancery Division's Mortgage Foreclosure/Mechanics Lien Section. He is also a Master of the Bench in the Chicago AIC.*

# Judges Know Who's Been Naughty, But ...

By Raymond T. (Tom) Elligett, Jr., Esquire and Mark P. Buell, Esquire

Some lawyers are a lot like children—if they can get away with it, they will misbehave. To those who might pause at this claim, we're probably not talking about you—after all you are reading this in *The Bench*. But you no doubt have encountered badly behaved lawyers.

If lawyers think their bad behavior is going unnoticed, they are generally wrong. Judges have an opportunity to view first hand the way attorneys in hearings and trials act and interact. Even though most parts of most cases proceed out of the judge's first-hand view, judges can get a flavor from the tenor of motions and memoranda.

If judges see repeat offenders in disputes with various lawyers, they can deduce who the problem child is. And just like lawyers talk about judges, judges talk about lawyers. Judge Marvin Aspen observed in a 1984 *ABA Journal* article that judges discuss lawyers and share stories of unprofessional conduct.

Some lawyers may assume they enjoy anonymity in larger metropolitan areas where there are many judges, and the lawyer is unlikely to appear before the same judge often. Judges, like all of us, tend to remember unusually good and bad conduct. Just as a judge is likely to remember a lawyer who fulfilled the ethical requirement to bring adverse controlling authority to the court's attention, they will remember those who approached or crossed ethical and professional lines. And as noted, judges share. Lawyers also know the offenders, and share that information—for example, they may cite hearing or deposition transcripts reflecting unprofessional conduct in a motion in limine, or for sanctions.

So, judges know who's been naughty...but will they do anything about it. It depends on the judge. At one of our Inn meetings, which included a mix of state and federal judges, our state court chief trial judge, Manuel Menendez, asked federal district court Judge William Castagna why some people think lawyers tend to misbehave more in front of state judges than federal judges. Judge Castagna's simple response: "because you let them."

Judge Castagna is soft-spoken, highly respected, and known to require all who appear and litigate in his court to be professional. Those who might not have heard what is expected receive a polite, firm, admonishment the first time they stray. We're not aware of anyone requiring a second warning.

Judge Castagna's observation that some lawyers perceive they can get away with more in state court may stem in part from the difference between the lifetime tenure federal judges enjoy, compared to state judges who typically must stand for retention, or face the prospect of drawing an election opponent, depending on the state system.

There are differences in dealing with unprofessional conduct, of course, among judges who sit in the same court, and even the same division in a court. There are differences in how judges deal with repeat offenders—lawyers whose bad conduct was not simply an inadvertent lapse, but reflects a course of conduct.

It can help that judges who do not enjoy lifetime tenure know they have the support of their local lawyers when they require lawyers to behave. American Inns of Court chapters, bar associations, and other lawyer organizations need to let it be known they will support judges who require professional conduct. The Tampa chapter of the American Board of Trial Advocates gives each new judge a sign to display on their bench that says "professionalism, nothing less will be tolerated."

As Judge Castagna's approach shows, judges need not be unpleasant or rude to command decorum in their courts and a professional approach by counsel in dealing with each other.

For more egregious conduct, judges can report offenders to the disciplinary authority. A 1997 Florida Supreme Court opinion held such a referral by appellate judges did not provide a basis for the lawyer to seek to disqualify the judges in a subsequent related appeal. *S-H Corp. v. Padovano*, 708 So. 2d 244 (Fla. 1997). Other state court opinions have reached the same result, as have federal courts, for example denying motions to disqualify in subsequent cases where the court had imposed a Rule 11 sanction. *E.g., Conklin v. Warrington Township*, 476 F.2d 458 (M.D. Pa. 2007).

As Justice Lemons' article points out, all of us—judges included—must share in ensuring professionalism. And when judges step up to meet that call, they need to know they will have our support. ♦

*Raymond T. (Tom) Elligett Jr., Esq. and Mark P. Buell are partners at Buell & Elligett, P.A., in Tampa, Florida. They are both Masters in the Honorable Clifford J. Cheatwood AIC.*



PHOTO CREDIT: © iStockphoto.com/Nikolay Marnichev

# The Economics of Civility

*By Justice Donald W. Lemons*

**W**hile I advocate that proper exercise of judicial power should be restrained in substance, a trial judge's role in procedure and management needs to be much more active.

There are four things trial judges can do that, in my judgment, would reap extraordinary improvements in the administration of justice and the promotion of civility:

1. Trial judges need to clearly articulate what is expected of lawyers and litigants, particularly in the pretrial discovery stage of litigation;
2. Trial judges need to be accessible for the resolution of disputes;
3. Trial judges need to rule promptly; and
4. Trial judges must respond in a proportionate manner to infractions and violations of the rules.

Basic economic theory explains why the judge's active involvement is absolutely necessary to obtain optimum results. Perhaps you are familiar with the economic game theory popularly known as the "prisoner's dilemma." Two men are arrested for the same breaking and entering. The prosecutor places them in separate cells without the ability to communicate. The prosecutor is concerned about matters of proof. She knows that if neither one of the accused confesses she will likely be able to prove only trespass. But with a confession, she can prove breaking and entering. She offers the same deal to both of them. If you both remain quiet, you will be convicted of trespassing and receive one year in

prison. If only one of you confesses and the other does not, the one who confesses will get no jail time and the one who does not confess will be convicted of breaking and entering and will receive a sentence of ten years. Now, if you both confess, each of you will get three years for breaking and entering.

Each has two choices, confess or do not confess. What is the safest decision for each prisoner? Consider Prisoner A: He determines that there are only two decisions that Prisoner B could make, confess or not confess. If B confesses and A does not, then A gets ten years; if B confesses and A also confesses, then A gets three years. If B does not confess and A also does not confess, then A gets one year; if B does not confess and A confesses, then A gets no prison time. So no matter what decision Prisoner B makes, A is always safer if he confesses. In the meantime, B is going through the same decision-making process and will ultimately come to the same conclusion: that he is always safer if he confesses.

Accordingly, because there is no ability to know, with certainty, how the other will behave, each will opt for confession because, although it may not lead to the absolutely ideal result, which is no jail time at all, confession is nonetheless, the optimal decision because it avoids potential disaster.

We have also seen this theory at work in urban renewal, where a single landowner without cooperation from other landowners or enforcement from a neutral source is unwilling to invest in improvement of property. The landowner may engage in modest improvements but it is too risky to do more. Consequently, the landowner chooses less than the best to avoid the worst.

How does this theory apply to the courtrooms of America? It is simple. Without cooperation or enforcement from a neutral source, lawyers choose less than optimal behavior in order to avoid disaster. In the rough and tumble world of litigation, it is not uncommon for a lawyer to feel compelled to respond in kind in order to protect a substantive position or dispel the appearance of weakness. Obstructive tactics and discovery abuse may have some marginal benefit if allowed to continue unchecked. And so, lawyers acknowledge that sometimes they reciprocate and act in a manner less than optimal because they wish to avoid consequences that are potentially worse. The solution is active involvement from the neutral source—the judge.

From my discussions with members of the bar, it is clear to me that:

1. Lawyers want judges to clearly articulate what is expected of lawyers and litigants and to make absolutely clear that unprofessional

| <b>THE PRISONER'S DILEMMA</b> |                  | <b>PRISONER B</b>   |   |
|-------------------------------|------------------|---|---|
|                               |                  | Confesses   | Does Not Confess  |
| <b>PRISONER A</b>             | Confesses        | <b>PRISONER A</b><br>Gets 3 Years<br><b>PRISONER B</b><br>Gets 3 Years    | <b>PRISONER A</b><br>No Prison Time<br><b>PRISONER B</b><br>Gets 10 Years |
|                               | Does Not Confess | <b>PRISONER A</b><br>Gets 10 Years<br><b>PRISONER B</b><br>No Prison Time | <b>PRISONER A</b><br>Gets 1 Year<br><b>PRISONER B</b><br>Gets 1 Year      |

conduct will not be tolerated. Much of the unpleasant behavior happens outside the presence of the judge. It includes:

- a. Lack of cooperation in providing available dates for hearings and depositions.
  - b. Lack of responsiveness to correspondence and phone calls.
  - c. Delayed amendment of discovery responses when required.
  - d. Demeaning or abusive comments to counsel, litigants, or deponents. A judge should make it clear that if the conduct would not be permitted before her in person, it would not be permitted in depositions. The bar wants unequivocal articulation from the bench that such behavior will not be tolerated. The communication alone may prevent some undesirable conduct.
2. Lawyers want judges to be available to resolve discovery disputes and pretrial motions. Access to the neutral arbiter alone may prevent some undesirable conduct. Some trial judges adopt a laissez faire attitude when it comes to discovery disputes. Some have told me that they believe that, left to their own devices, the lawyers will work it out somehow, and that it is a waste of judicial resources to be engaged in pretrial discovery disputes. My experience as a lawyer, trial judge, and appellate judge rejects this view. Not only does such an attitude promote less than desirable conduct on the part of lawyers, it is inefficient, costly to the litigants, and ultimately results in greater expenditure of judicial resources sorting out the problems at trial or on appeal.
  3. Lawyers want judges to decide matters promptly. When a judge takes a matter under advisement for an unreasonable period of

*Continued on next page.*

time, anxiety as well as the cost of litigation rises. It is a fertile breeding ground for undesirable conduct. One of the ways a trial judge can assure prompt decision making is to place the matter on the docket on a specific date for a ruling. A more aggressive suggestion would be to require a trial judge, after the passage of 30 days, to give an explanation to the litigants for the failure to rule on motions.

4. Lawyers want judges to render sanctions that are proportionate to the offensive conduct, including monetary sanctions or dismissal of claims as an ultimate sanction. Ultimate sanctions should be saved for ultimate circumstances. Sanctions include private or in-court admonishment. They include award of costs for discovery violations. They include referral to the disciplinary system of the State Bar. They include dismissal of claims and monetary awards. But the response of the court must be graduated and proportionate to the offense. I am aware that some trial judges make the losing party pay attorney's fees and costs in practically every discovery dispute. I think this is unwise. It suggests that no disputes are legitimate and it further suggests that all lawyers are unreasonable. Neither is true. Most lawyers do not want to open up the collateral battleground of sanctions motions. What they want is an administration of justice that reduces the need for such motions; and when they are

necessary, lawyers want measured, proportionate responses to improper or offensive conduct.

Of course, judicial restraint is fundamentally about substance, while involvement in discovery disputes and motions practice is about process. So, why have I been talking primarily to lawyers about when judges should avoid activism and exercise judicial restraint on the one hand, and when judges should be actively involved in the process on the other? It is because I believe the bar must be heard on these matters. The bar must be actively involved in the judicial selection process in the first instance, and the bar must continue to have its voice heard concerning the proper role of judges.

I truly enjoyed my years as a trial lawyer. I have been privileged to sit as a judge at every level of the judiciary in Virginia. From my personal experience and from carefully listening to the lawyers throughout the nation, I have come to the conclusion that most lawyers believe that the judge's role is to be restrained in substance and active in process. If I am right, then the bar has a duty to speak to those who select our judges and to the judges who are selected, and explain that this is the proper role for a judge.

Let the dialogue continue. ♦

Reprinted with permission of *Trial* (July 2011). ©American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®)

*Justice Donald W. Lemons of the Supreme Court of Virginia, is president of the American Inns of Court. He is a Master of the Bench in the John Marshall AIC in Richmond, Virginia.*