ETHICS COLUMN: Francis G.X. Pileggi

Recent Court Decisions Enforce Minimum Standards of Attorney Behavior

Several recent decisions from around the country indicate that some courts do take seriously the need to enforce minimum standards of attorney behavior. In this short column, I highlight briefly only two of those recent court opinions. The issues addressed are not matters of competence, but rather deal with the behavior of lawyers towards others, regardless of the substantive ability of the lawyer.

For example, the Delaware Supreme Court recently found violations of Rule 3.5(d) and Rule 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct in connection with statements that were made in an opening brief and a reply brief filed in the Delaware Superior Court. Rule 3.5(d) provides that a lawyer shall not engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal. Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The court found that the conduct went beyond "merely" unprofessional and that the rules were violated because the pleadings filed with the court contained "unnecessary invective and rhetoric and were obnoxious [as well as] unnecessarily sarcastic and strident in tone." The court noted that the duty to the tribunal takes precedence over the interests of a client because officers of the court are obligated to represent clients within the bounds of the Rules of Ethics. The opinion quotes former U.S. Supreme Court Justice Sandra Day O'Connor where she stated that "incivility disserves the client because it wastes time and energy - - time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent." The Delaware Supreme Court also cited one of its prior opinions of 15 years ago when it stated: "simply put, insulting conduct toward opposing counsel, and disparaging a court's integrity are unacceptable by any standard."

The court further reasoned that: "zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyers' Rules of Professional Conduct."

Thus, the Delaware Supreme Court is now on record as ruling that disrespectful, degrading or disparaging rhetoric violates the ethical rules that apply to lawyers. What is not entirely clear because it was not addressed by the court, is whether disrespectful, disparaging or degrading behavior by one lawyer to another, in face to face meetings or in written and oral exchanges outside of court, would also be considered unethical conduct. Although also beyond the scope of the opinion, I mention as an aside, the truism incorporated in the rules that a lawyers' staff are not permitted to violate the standards that the lawyers themselves are required to uphold. See ***In Re Abbott***, (Del. Supr., May 2, 2007).

In ***Redwood v. Dobson***, (7th Cir., Feb. 7, 2007), lawyers' behavior during depositions was analyzed. It is not always easy to draw the line between what has become part of the "rough and tumble" of a deposition, as opposed to abusive behavior that rises to the level justifying an attorney walking out of the deposition. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has now added to the case law that helps litigators answer that question. The Court in Redwood severely criticized not only the lawyer taking the deposition, but also the lawyer defending it for, inter alia, not stopping the deposition to file a motion for protective order - - instead of instructing the deponent not to answer a question which was clearly meant only to harass and annoy but which was not within the limited scope of questions the rule allows an attorney to instruct the deponent not to answer.

Though not condoning boorish behavior, Carolyn Elefant wrote respectfully in a recent law.com article available at the following link, http://legalblogwatch.typepad.com/legal_blog_watch/2007/05/lawyer_behaving.html#comments, that the panel deciding the ***Redwood*** case, while undoubtedly smart, fair and exemplary jurists, did not appear to give any consideration to the practical rough and tumble schoolyard-like realities of some depositions, and the increased (and perhaps prohibitive) cost if a deposition were stopped in order to file a motion to compel, or the havoc wreaked on scheduling deadlines if the deponent and his counsel walked out so as to file a motion for a protective order, under Rule 30(d), every time a lawyer taking or defending a

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deposition violated the rules (along with the uncertainty of when the motion would be heard and how long it would be before the deposition were rescheduled--as it is not always possible to get a judge on the phone during the deposition.) For Delaware cases on point regarding deposition practice, see the Delaware Supreme Court's famous decision in ***Paramount Communications, Inc. v. QVC Network, Inc.***, 637 A.2d 34, n.28 (Del. 1994) (condemning ***ad hominem*** attacks by counsel), and also a Delaware Superior Court decision in ***State v. Mumford***, 731 A.2d 831, 835 (Del. Super. 1999) (revoking pro hac vice status because of abusive deposition behavior).

Steven Lubet, writing in ***The American Lawyer***, on May 1, 2007, suggests that the ***Redwood*** decision may embolden bullies to pursue improper lines of inquiry in a deposition, knowing that their opponents will either need to answer every question, no matter how obnoxious, or adjourn the deposition, thus incurring the added cost and delay of filing a motion with the court. This approach may engender a new game of chicken, which may inure to the benefit of the more well-heeled party who can more easily afford the cost and delay of not finishing the deposition in the most efficient manner.

The almost-Hobson's choice presented by this situation is made more difficult based on my experience that even after a judge addresses the issue created by the unruly opposing counsel, there is no certainty that the time and effort spent to bring the issue before the court will be worth the extra time and cost (which is never fully reimbursed).

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My partner, Sheldon K. Rennie, deserves public praise for his comments on a draft of this article.★