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THE ETHICAL PROBLEMS OF THE DIFFICULT TRIAL

By: Richard A. DiLiberto, Jr., Esquire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building, 17th Floor
1000 West Street
P.O. Box 391
Wilmington, DE 19899-0391
(302) 571-6657
rdiliberto@ycst.com
www.youngconaway.com

The “difficult” trial is one in which counsel is faced with challenges from one, or more of the following:

The Difficult Client;
The Difficult Case;
The Difficult Lawyer;
The Difficult Judge;
The Difficult Witness; and
The Difficult Colleague.

Each raises important practical, legal and professional responsibility issues. In the time allotted, it is impossible to discuss the matter in detail, but outlines regarding each “difficult” person or situation referenced above are attached.

In personal injury litigation, plaintiff’s counsel is wise to expect the unexpected, and prepare accordingly. While the outlines focus primarily on situations in personal injury victims’ cases this attorney has encountered over the years, many are transferable to other areas of practice.

The Difficult Client, The Difficult Case – How to Handle Them

By: Richard A. DiLiberto, Jr., Esquire

I. Problem Issues Unique to Personal Injury Plaintiffs' Cases

A. Pre-Case Acceptance Screening “Red Flags”

1. Preexisting conditions;
2. Prior suits/claims;
3. Prior attorney case rejections;
4. Minor impact; Physical evidence which does not match description of events;
5. Lack of contemporaneous treatment;
6. Anger, need for vindication;
7. Failure to show-up for appointment/tardiness (the three strikes rule);
8. Hagglng about fee, requesting “discounts;”
9. Unrealistic damages evaluation expectations;
10. The “Brother-in-law got \$1 million syndrome;”
11. Sporadic job history;
12. “Under the table” compensation with large lost wage claim;
13. Alcohol/drug abuse; spousal/self abuse; Munchausen’s by Proxy Syndrome;
14. Criminal history;
15. “Beauty contest” law firm screening;
16. Racial/ethnic/sexist prejudice, watch for “code words;”
17. The “expert” (medical/scientific/legal/mechanical, etc.) client; the client who casually converses as if he is reading aloud from your college biology textbook;
18. The extended family officious intermeddlers;
19. Playing for principle (with your time and disbursements);
20. The loss of consortium spouse who wants to control the underlying case;
21. Can they look you in the eye?
22. Several passengers whose stories don’t “jibe;”
23. Open containers of alcohol spilled in vehicle – most every client “just had one sip;”
24. The client whose spouse interrupts and answers every one of your questions even though the spouse was not present at the accident;
25. The “hen-pecked” or “rooster-pecked” client;
26. Client who brings “boyfriend” or “girlfriend” to attorney-client meeting;
27. Client who writes long, aimless narratives unnecessarily complicating simple fact patterns;
28. Client who firmly believes all independent witnesses and police officer are wrong and “out to get him.”

B. Post-Case Acceptance “Red Flags”

1. The loss of consortium claim – followed by divorce for unrelated reasons; the loss of consortium claim which overshadows the primary claim;
2. Confirming demand;
3. Sending client copy of demand package?;
4. Trial de novo after Rule 16 arbitrations;
5. Failure to cooperate for IME, depositions, etc.;
6. Lack of flexibility in scheduling arbitration/mediation/trial;
7. Failure to accept your recommendations during settlement negotiations;
8. Surprising behavior at trial;
9. Disrespect for arbitrator, opposing counsel, mediator, judge;
10. Rudeness, abuse of your staff;
11. “Shopping around” for second opinions during your representation;
12. Refusal to pay protections of interest; attempts to defraud creditors, medical providers;
13. Haggling about the settlement sheet;
14. Requesting false notarization;
15. Client being dishonest with you;
16. Surprises about priors/surveillance provided to you by defense counsel;
17. Suicidal tendencies/threats thereof;
18. The child client, with the unscrupulous parent; client who turns 18 during representation;
19. The elderly or infirm client with the unscrupulous child;
20. The client who tries to date your staff (or worse, you);
21. The client who winds up in jail, rehab, etc. during the pendency of the claim;
22. The “golden key” to the totaled vehicle;
23. The hypochondriac;
24. The client whose relative is a lawyer (usually in a remote practice area and/or jurisdiction) who second-guesses your decisions;
25. Bankruptcy after settlement.
26. Client who wants you to loan him money, or give an “advance” on his settlement;
27. Client who “double checks” your opinion with your partner/staff; and
28. The injured client who wants you to make her medical decisions; e.g., “Should I get the surgery?”

II. Avoiding/Preserving/Rehabilitating (and sometimes) Terminating the Attorney-Client Relationship

A. Rejection Letter

1. Statute of limitations
2. Referral
3. “As we discussed . . .”

- B. Conflicts - DLRPC 1.7-1.12
- C. Client Under a Disability - DLRPC 1.14
- D. Fees - DLRPC 1.5 - Fee Agreement in Writing
- E. Division of Fee to Referring/Subsequent Counsel - DLRPC 1.5(e)
- F. Fee Dispute Resolution
- G. Substitution of Counsel - SCCR 90
- H. Declining or Terminating Representation - DLRPC 1.16
- I. Honesty Is the Best Policy

DEALING WITH THE DIFFICULT LAWYER

By: Richard A. DiLiberto, Jr., Esquire

Dealing with a difficult lawyer requires a nimble balance between two Biblical responses to insult: “an eye for an eye and a tooth for a tooth” and “turn the other cheek.”¹ The secret is knowing what situation demands which response, or even more precisely, which gray area between responses. The professional and ethical challenge is realizing it is ultimately not your eye, tooth or cheek at issue, but rather, your client’s, and that she expects you to protect her.

Here are the “top ten” rules I use to make dealing with a difficult lawyer more bearable.

1. **KNOW THE RULES.**

Master the Rules of Evidence, Procedure and Professional Responsibility. Many times, a difficult lawyer is just a “windbag” who tries to intimidate you with volume and static. A precise, pinpoint citation to the Rule, clarifying why you are right and he is wrong, is often helpful.

2. **PREPARE AND DOCUMENT.**

Know thy opponent. You know what to expect with most lawyers. With most, our word is our bond. With a few, we must confirm every little thing in writing. Bring copies of the documentary correspondence, Rules and controlling authority to proceedings involving the difficult lawyer.

3. **MOVE IN LIMINE.**

File Motions in Limine to prevent prejudicial arguments, improper evidence, and “blurt outs.”

4. **CREATE A RECORD.**

Have a good, qualified Court reporter at arbitrations, depositions, and hearings. Note clearly and concisely your objections on the record. If necessary, telephone the judge for a ruling if your objections do not cure the problem.

5. **VIDEOTAPE.**

Many difficult lawyers are less likely to cause mischief if the deposition is videotaped. The video record tells a different story, with sound, tone, timbre, cadence, volume, and visuals; when compared with the cold written transcript.

6. **BE THE PROFESSIONAL.**

Someone in the room has to be “The Delaware Lawyer.” It should be you. Do not stoop to the level of a “baiting” adversary. A difficult lawyer may be attempting to “knock you off stride” with spurious objections, personal affronts, or distracting rudeness. Focus on the task

¹ Matthew 5.38-41.

at hand. Ignore boorish behavior when possible, after creating the appropriate record. See, Paramount Communications, et al v. QVC Network, Inc., Del. Supr., 637 A.2d 34 (1994).

7. BEWARE OF THE “TAG TEAM” DIFFICULT LAWYER AND CLIENT.

Your opponent may have an uncontrollable client, or even worse, may tacitly or expressly encourage such a client with the lawyer’s own acts or omissions. The lawyer has a duty to “reign in” a vulgar, evasive, or offensive client. State v. Mumford, Del. Super., 731 A.2d 831 (1999).

In addition to being “out numbered” you will probably experience natural human emotions of anger, frustration and embarrassment. However, the wise attorney will control those emotions, make a record, attempt to cure the misbehavior, and eventually, seek court intervention. Mumford, supra; see also Cascella v. GDV, Inc., et al., Del. Ch., C.A. No. 5899, Brown, V.C. (Jan. 15, 1981). Do not permit the difficult lawyer to “cue” his witness during deposition with verbal or non-verbal communication; long, rambling objections; or other impermissible actions. See, e.g. In Re Asbestos Litigation, Del. Super., 492 A.2d 256 (1985).

8. DO NOT ALLOW UNREASONABLE DELAY TO GO UNNOTICED.

Due to the pressure of practice, some lawyers do not respond to written discovery in a timely fashion. Most of us understand the need for flexibility and give reasonable extensions. But, the “difficult lawyer” can abuse such courtesies, or not seek them at all. Document failure to respond to written discovery, and move to compel responses when necessary. See, e.g., Superior Court Civil Rule 37.²

9. RESPECT YOUR OPPONENT’S NEED TO FOLLOW CLIENT DIRECTIVES.

A “Difficult Lawyer” is not one who cannot give an extension, settle a case, stipulate to an obvious fact, etc., due to client directions. Sometimes, more experienced practitioners use language to help us understand, without coming out and saying “I’m sorry, it is not me, but my silly client who will not . . .”

Watch for code phrases such as “My client has directed me to advise you . . .”; “I do not have authority to . . .”; “I am at the limits of my authority . . .”; “The insured has a consent to settle provision . . .”; etc. When you hear these phrases, give your colleague an understanding nod, and some silent sympathy, for she probably has a difficult client.³

² Superior Court Civil Rule 37(e)(1) requires “certification by the moving party detailing the dates, time spent, and method of communication in attempting to reach agreement on the subject of the motion . . .” The Court no longer requires such certification for motions pursuant to Rule 37(d) (Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection).

³ If this occurs too often, the difficult lawyer may be hiding behind his unwitting client. Perceptive counsel will usually know the difference.

10. LOOK IN THE MIRROR.

If it seems that every lawyer you encounter is “difficult,” it may be time for self-evaluation. Or, if judges, partners, colleagues, opponents, family members, staff or friends notice you “have not been yourself lately”, beware, you may be experiencing the dreadful metamorphosis into the “difficult lawyer.” It can begin innocently enough: refusing to give your colleague an extension to answer the Complaint when he is leaving on a family vacation; moving for default judgment on day 31 after your opponents’ interrogatory answers were not received; seeking sanctions when your opponent is two days late in filing a financial report (Lee v. Lee, 193 WL 331914 (Del. Fam. June 28, 1993)),⁴ referring to opposing counsel in “a crude, but graphic, anal term” (In re Ramunno, Del. Supr., 625 A.2d 248 (1993)); being late for court, not apologizing, and being sarcastic with the judge (In the Matter of Hillis, Del. Supr., 858 A.2d 317 (2004)); losing your temper with your clients or your staff; and similar behavior.

We should all have the courage of our convictions when we take a position we believe to be right. Making new law; winning the “unwinnable case;” achieving a large verdict or settlement in the case no one else would accept; convincing the judge your creative theory should survive summary judgment -- are all the things that make for a vibrant, exciting, rewarding practice. But just as important is the grace to accept victory or defeat with elegance; to show mercy; to say “I’m sorry”; and to practice the golden rule. We have all been given a great gift to be able to practice in our Delaware Bar. There is no excuse not to treat our colleagues and judges with dignity and respect. Our tasks are difficult enough, without our members being “difficult.”

The Delaware Supreme Court has issued this warning:

We note a troubling increase in the number of reported incidents of incivility by counsel in the courtroom. Although an attorney’s obligation is to zealously represent his or her clients, “to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil.”

Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process. In other words, “An attorney who exhibits lack of civility, good manners and common courtesy tarnishes the image of the legal profession . . .”

* * *

⁴ “The attorney time and judicial time which have been consumed by this pettiness could have been better spent elsewhere. There is a definitive line between aggressive lawyering and vindictive lawyering. I suggest that in the future, the former be pursued with gusto. I hope the latter will be eradicated.” Lee, supra.

The Delaware Bench and Bar have long been admired for the collegiality among and between its members. Members of the Bench and the Bar will no doubt, even in the sometimes frenetic and intense arena of open court criminal work, continue to work toward exchanges that reflect mutual respect and consideration. When, however, situations present themselves where misunderstandings cause passions to flare, the ultimate focus is and must be to reflect respect and confidence in the Court's authority. Nothing less will suffice for the efficient administration of justice.

Hillis, *supra*, at 324-325.

Practicing Before The Difficult Judge, Tactfully

By: Richard A. DiLiberto, Jr., Esquire

Our Delaware Bar now has more than 3,000 members, and almost 2,400 are actively practicing. Our Delaware State Bar Association Past President, Charles S. McDowell, Esquire, reported in the January, 2004 issue of In Re that more than half of these practitioners have been in practice less than 10 years.

Because so many of our colleagues are relatively new to the Bar, we should begin by stressing what most more experienced practitioners know – we are blessed with a superb judiciary, with a national and international reputation for excellence in administering justice. At these types of conferences, we have often heard that Delaware has the finest Courts in the nation. Of course, some may attribute these glowing reviews to “home state” pride, or a lack of experience with other states’ courts. At the risk of seeming immodest, however, I direct your attention to empirical, not just anecdotal, evidence which proves the point.

For the past two years, the U.S. Chamber of Commerce has ranked Delaware first in the nation for “having a litigation environment perceived to be fair and reasonable in its handling of civil cases.” The Harris Poll considered:

- Overall treatment of tort and contract litigation;
- Treatment of class action suits;
- Punitive damages;
- Timeliness of summary judgment/dismissal discovery;
- Scientific and technical evidence;
- Judges’ impartiality;
- Judges’ competence;
- Juries’ predictability; and

- Juries' fairness.

2003 U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report (April 4, 2003).

This honor is rightfully shared by many who contribute to our reputation, including, but not limited to:

- The Governor;
- The members of the General Assembly;
- The members of the Judicial Nominating Commission;
- The judges, their law clerks, case managers, secretaries, and staffs;
- The lawyers, their paralegals, secretaries, and staffs;
- The Court clerks, Prothonotary, Register in Chancery, bailiffs, court reporters, and all administrative staff;
- The members of the Board of Bar Examiners;
- The Court on the Judiciary;
- The Disciplinary Counsel and her staff; and
- The people of Delaware, who demand excellence from their elected and appointed officials, and expect the same from each other when serving as jurors.

But our success is truly a fragile mosaic, which we must continuously strive to critique, and improve. The need for candid, constructive evaluation among and between the Bench and Bar is a vital part of this process.

Thankfully, we have very few, if any, “difficult” judges, as referenced in the seminar topic. However, practitioners, as officers of the Court, have a duty to their clients, to the court, and to themselves, to tactfully and zealously confront any real or perceived judicial action (or inaction) which falls below the superior standards the citizens of our State, and of our nation,

have come to expect from us. Cf. Delaware Lawyers' Rules of Professional Conduct 1.3 (Diligence); 3.2 (Expediting Litigation); 3.5 (Impartiality and Decorum of the Tribunal); 8.2 (Judicial and Legal Officials); 8.4 (Misconduct).

Areas for discussion:

- Chief Justice's Administrative Directive 94 (Ex. "A") – The "90 day list" in Chancery, Superior, and Family Courts; and the "30 day list" in Court of Common Pleas and Justice of the Peace Courts;
- U.S. District Court for District of Delaware Ombudsman Program (Ex. "B");
- American Board of Trial Advocates' Annual Dinner;
- The "does the Court need anything else" gentle letter → The "I have re-Shepardized my cases and they are still good law" letter → The less gentle letter re: specific extraordinary need for decision (e.g. age, infirmity, expert and litigation costs, etc.) → contact with resident judge → contact with president judge/chief judge → contact with chief justice (caveat – no ex parte communications) → extraordinary writ of mandamus. 2 Woolley, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware 1124 et seq. (1906);
- Objections, preserving record for appeal (Del. R. Evid. 103);
- Judge may ask your witness questions, in a dignified, patient and courteous manner. Thomas v. Lagola, Del. Super., C.A. No. 01C-01-096-WCC, Carpenter, J. (October 31, 2003); Price v. Blood Bank of Delaware, Inc., Del. Supr., 740 A.2d 1203 (2002);
- "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Del. R. Evid. 605; see also McCool v. Gehret, Del. Supr., 657 A.2d 269 (1995);
- "Plain error" doctrine (Del. R. Evid. 103(d); Laws v. Webb, Del. Supr., 658 A.2d 1000 (1995));
- "Know thy judge" maxim (Morgan, How Do You Deal with Slow Judges, 29 Litigation News 5 (Nov. 2003);
- N. D. Ill. L.R. 78.5 (Ex. "C") (provides for a method of inquiry on motion's status, while not disclosing requesting attorney);

- The Florida Supreme Court recently scolded a judge for “rudeness,” after he told a lawyer in court “Do you know what I think of your argument?” and then activated an audio toilet – flushing device. 26 Nat’l L. J. 3 (Jan. 5, 2004);
- In Federal Court, the Civil Justice Reform Act of 1990 requires a semi-annual report identifying any motions pending for more than six months, and any case pending for more than three years (the so called “Biden Report”) 28 U.S.C. § 476;
- A “difficult judge” is not one who requires lawyers to be prepared, be on time, know the Rules of Evidence and the Rules of Procedure, comply with court orders, avoid unprofessional behavior, etc. “Toughness or firmness” of the judge does not equate with “difficultness” of the judge. Most lawyers respect judges who require the lawyers to do their best work. Most lawyers respect judges who are willing to admit when they made a mistake, and take steps to fix it so it does not effect the trial.
- McElhaney, Bite Your Tongue, 22 A.B.A. J. (January 2004) (“[T]here are times when you have to correct a judge who makes a serious mistake that could cost you your case ... But the important thing is to argue to the judge, not with the judge. You talk to the judge, but you attack your opponent’s reasoning – not the judge’s.”).
- Welcome, do not fear, a “hot” court, which has read the submissions and tests your position with pointed and difficult questions. A seemingly unfavorable judge may actually agree with your position while attempting to reconcile weakness in your argument.
- Lawyers should realize that our judges are human, and have good days and bad days, personally and professionally. They face a steady input of emotionally and intellectually challenging criminal and civil matters ranging from (in alphabetical order) abandoned motor vehicles to zoning, and everything in between. Their workload exceeds the time available, and the cost of administration of justice exceeds the funds appropriated. We lawyers should doubt a bit of our own infallibility and recognize that we, too, can sometimes be “difficult.” We must never lose sight of the fact that the citizens who come to the Bar of justice are the most important people in the Courtroom.

DEALING WITH THE DIFFICULT WITNESS

By: Richard A. DiLiberto, Jr., Esquire

I. THE DIFFICULT WITNESS PRE-SUIT

- A. The witness that “does not want to get involved”
- B. The police officer witness who made errors on the police report
- C. The “eyewitness” who has something to prove
- D. Use of investigators
- E. Use of written statements
- F. Use of affidavits
- G. Telephone vs. in-person interviews
- H. The doctor witness who will not produce medical records. See 10 Del. C. § 3926, prompt production of records within 45 days, civil penalty \$25 per business day.

II. THE DIFFICULT WITNESS DURING DISCOVERY

- A. Interrogatories (only to parties). Superior Court Civil Rule 33.
 - B. Rule 30(b)(6) designee
 - C. Entry upon land for inspection and other purposes. Superior Court Civil Rule 34.
 - D. Requests for Admissions (only to parties). Superior Court Civil Rule 36.
 - E. Failure to make discovery; sanctions; Superior Court Civil Rule 37. “For purposes of this subdivision an evasive or incomplete answer or response to be treated as a failure to answer or respond.” SCCR 37(a)(3)
 - F. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. See SCCR 37(d). Note: certification detailing the dates, time spent, and method of communication in attempting to reach agreement on the subject of the motion is not required for motions filed pursuant to Rule 37(d). SCCR 37(e)(1).
 - G. Use (and abuse) of the errata sheet. SCCR 30(e). How do you respond when the court reporter asks if you want to waive reading and signing? Can you make such a determination for a non-party? What changes can be made on the errata sheet? What is the time period during which changes can be made? May a witness change form and substance of testimony?
 - H. The expert witness
 - 1. Reasonable medical probability
 - 2. Causation
 - 3. Changing opinions at trialSee *Sammons v. Doctors For Emergency Services, PA.*, (Del. Supr., Dec. 6, 2006) (The Delaware Supreme Court upheld the trial court’s restriction of an expert’s trial testimony to the scope of the expert report that was previously produced by the expert in discovery and pursuant to the Rule 16 scheduling order.)
- I. The uncontrollable witness.
 - 1. The “tag team” difficult lawyer and difficult witness. See *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999).

2. The “queued” or prompted witness. *In Re: Asbestos Litigation*, 492 A.2d 256 (Del. Super. 1985)
- J. The Elderly Witness
- K. The infirm witness
 1. Is the witness so ill that he probably will not be able to be present at trial?
 2. Might the witness die prior to trial?
 3. Videotaped testimony?
- L. The laughing witness or cocky witness
Note: Put it on the record
- M. The witness who cannot remember anything
- N. The argumentative witness. *Paramount Communications, et al. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994).
- O. The child witness

III.. THE DIFFICULT WITNESS AT TRIAL

- A. Be careful of “street angel/house devil.” Is the difficult deposition witness a perfect gentleman at trial? Does the examining attorney then appear to be bullying this witness at trial?
- B. Use of leading questions. Delaware Uniform Rule of Evidence 611(c). “Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination.”
- C. The hostile witness called on direct examination. “When a party calls a hostile witness, an adverse party or a witness identified with adverse party, interrogation may be by leading questions.” D.U.R.E. 611(c).
- D. The forgetful witness. Use writing or other objects to refresh recollection. D.U.R.E. 612.
 1. Prior statements of witnesses.
 2. What is a prior statement?
 3. Deposition, recorded statement to insurance adjuster, statement in police accident report, affidavit, personal injury protection application? Application for other benefits? Transcript of arbitration hearing? Prior trial testimony (particularly of expert witness)? D.U.R.E. 613. Must you show the witness the prior statement?
- E. Attack the credibility of the difficult witness with evidence of bias, prejudice or interest. D.U.R.E. 616. Exclude him from courtroom during other’s testimony. D.U.R.E. 615.
- F. Can you prevent the expert witness from testifying pursuant to a Daubert motion?

1. The expert witness may testify in the form of an opinion or inference on an ultimate issue to be decided by the trier of fact. D.U.R.E. 704.
- G. The timid trial witness
1. Dress/demeanor;
 2. Non-verbal communication impairment; language barrier;
 3. Visit to courtroom, familiarity;
 4. Joking;
 5. Chewing gum, other annoying habits;
 6. “To tell you the truth;”
 7. Inadvertent contact with jurors before, during, or after testimony;
 8. Directions, timing, security;
 9. Remind all witnesses to leave cell phones, PDA’s, and other electronic devices at home or in the vehicle or they will not be admitted to the courthouse. Allow extra time for security check.
 10. Subpoena even your own mother
 11. Can they take an oath? Swear or affirm?
- H. Use of commission for out-of-state witnesses
- I. Impeachment. “The credibility of a witness may be attacked by any party, including the party calling him.” D.U.R.E. 607.
- J. Do not limit use of impeachment to only criminal cases
1. Evidence of character and conduct of witness. D.U.R.E. 608.
 2. Impeachment by evidence of conviction of crime. D.U.R.E. 609.
 - a. Was it a felony?
 - b. Does the probative value outweigh the prejudicial effect?
 - c. Did it involve dishonesty or false statement, regardless of the punishment?
 - d. Has more than ten years elapsed since the date of the conviction or the release of the witness from confinement imposed for that conviction?
 - e. If more than ten years has elapsed, do the interests of justice still permit the evidence because the probative value substantially outweighs the prejudicial effect?
 - f. If more than ten years have elapsed, make sure to give the adverse party sufficient notice of intent to use the evidence. D.U.R.E. 609(b).
- K. Effect of pardon, annulment or certificate of rehabilitation, and juvenile adjudications. D.U.R.E. 609(c),(d). Also, the pendency of an appeal does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. D.U.R.E. 609(e).
- L. Religious beliefs or opinion immaterial (e.g., the Wicken witness). D.U.R.E. 610.
- M. Privilege to refuse to disclose vote by secret ballot at political election. D.U.R.E. 506.

THE ETHICAL PROBLEMS OF THE DIFFICULT COLLEAGUE

By: Richard A. DiLiberto, Jr., Esquire

The “Difficult” Colleague can come from different places, including: within your law firm; outside your law firm, but within the State of Delaware; and outside your law firm and outside the State of Delaware. Each brings unique professional and ethical challenges.

I. WITHIN YOUR LAW FIRM

A. The Difficult Associate

- See DLRPC 5.1 responsibilities of partners, managers, and supervisory lawyers

B. The Difficult Partner

- See DLRPC 5.2 responsibilities of a subordinate;

C. The Difficult Paralegal

- See DLRPC 5.3 responsibilities regarding non-lawyer assistants.
- See DLRPC 5.4 professional independence of a lawyer - Can you share a legal fee with a non-lawyer?

II. OUTSIDE YOUR LAW FIRM BUT WITHIN THE STATE

A. REFERRAL COUNSEL

1. Why doesn't he want the case?
 - a. Competence?
 - b. Warts and all? Honesty in case description?
 - c. Eve of statutes?
2. What are our respective responsibilities?
3. May we divide fee?
 - a. Is client advising in writing?
 - b. Any objection to participation of all lawyers involved?
 - c. Is total fee reasonable? See DLRPC 1.5(e)
 - d. Have we agreed to fee division at time of referral?
 - e. Will we agree at conclusion of matter based upon time involved or some other measure?
 - f. Is our fee division agreement in writing?
 - g. Who controls the case? Too many cooks...

- h. Who decides settlement, trial strategy?
- i. Who pays expenses?
- j. Is referring lawyer “related” to client?
- k. Does their State’s ethical rule permit your agreement?

B. CO-COUNSEL

1. Will he help or harm my client’s case?
2. Cross-claims?
3. Unified theories or defenses?
4. Divide and conquer?
5. Issues of consolidation and/or bifurcation.
6. If you want something done...(you know the rest).
7. Jurisdictional limits with multiple claimants.
8. Policy limits problems.

C. AMICUS CURIAE COUNSEL

1. Will she help or hurt my client’s case?
 2. Does she have something different to contribute?
- See Supr. Ct. R. 28; *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407 (Del. 1994); *Turnbull v. Fink*, 644 A.2d 1322 (Del. 1994).

D. FRIENDS AND FAMILY (WHO HAPPEN TO BE LAWYERS, TOO)

III. OUTSIDE YOUR LAW FIRM AND OUTSIDE THE STATE

A. PRO HAC VICE ADMITTED COUNSEL

1. Good standing in another State?
2. Bound by Delaware Lawyers’ Rules of Professional Conduct and has reviewed Statement of Principles of Lawyer Conduct?
3. Attorney and all attorneys of her firm bound by all

Rules of the Court?

4. Appointment of Prothonotary for service?
5. Number of actions in any Delaware Court of record in preceding 12 months?
6. \$300.00 payment?
7. Disbarred, suspended, subject of pending discipline?
8. All states or jurisdictions where admitted?
 - See Super. Ct. Civ. R. 90.1.
9. Must local counsel be at depositions? Super. Ct. Civ. R. 90.1(d). Any other proceedings before Court? Participate in discovery? *Hoechst Celanese Corp. v. National Fire Ins. Co.*, 623 A.2d 1099 (Del. Super. 1991).
10. Must counsel control his client's behavior during a deposition? *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999).

B. UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW, DLRPC 5.5

C. REFERRAL COUNSEL

- See II. A., *supra*.

D. COLLEAGUES OUTSIDE THE U.S.

EXHIBIT "C"

U.S. District Court for the Northern District of Illinois LR 78.5 Motions:

Request for Decision; Request for Status Report.

Any party may on notice provided for by LR 5.3 call a motion to the attention of the court for decision.

Any party may also request the clerk to report on the status of any motion on file for at least seven months without a ruling or on file and fully briefed for at least sixty days. Such requests will be in writing. On receipt of a request the clerk will promptly verify that the motion is pending and meets the criteria fixed by this section. If it is not pending or does not meet the criteria, the clerk will so notify the person making the request. If it is pending and does meet the criteria, the clerk will thereupon notify the judge before whom the motion is pending that a request has been received for a status report on the motion. The clerk will not disclose the name of the requesting party to the judge. (emphasis added). If the judge provides information on the status of the motion, the clerk will notify all parties. If the judge does not provide any information within ten days of the clerk's notice to the judge, the clerk will notify all parties that the motion is pending and that it has been called to the judge's attention.