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BAR ASSOCIATION

The Magazine For The Legal Professional

"Despite the encouraging and wonderful gains and the changes for women which have occurred in my lifetime, there is still room to advance and to promote correction of the remaining deficiencies and imbalances"

- Sandra Day O'Connor -

ST. PETERSBURG BAR ASSOCIATION

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Professionalism - The Lawyer's Duty To Mediate[1]

By Justin Zinzow

New lawsuit filing has continued to steadily increase in this state in the last decade.[2] While the state court system is certainly doing its part to timely administer justice,[3] the increasing case loads can create a very unfortunate impact on the timely resolution of our clients' matters and their view of our profession. As professionals, we have an obligation to ensure that our profession and our esteemed judges are viewed with respect. Perhaps one of the best ways to earn this respect is to alter the "pit bull" image the public has conjured about the profession. All lawyers have a duty to conduct themselves in a manner that "assure[s] the just, speedy and inexpensive determination of every action and resolution of every controversy."[4] Simply stated, all lawyers have a duty to mediate every dispute; not mediation in the formal sense, but rather, through good faith consistent communications with our opponents concerning the "heart" of the case.[5]

While one cannot simply cast off the notion that providing legal services is a business, which, in theory, should be as profitable as possible, those services and our goal of maximization of wealth must be consistent with the spirit of professional responsibility. This last point should give us great pause and will certainly give us all great difficulty. The mathematic and financial aspects of business are simple, as they boil down to quantitative analysis, with all other things being held constant, increased motions and hearings, plus a low and constant cost of production, equal increased profitability. Professionalism, however, is not so easily evaluated or computed. While the rules set forth in the Code of Professional Responsibility can act, in some fashion, as quantitative constants that must be attained and maintained, the remainder of "Professionalism," perhaps the supermajority of its core, is entirely qualitative and subjective.

For example, it is clearly improper to financially benefit from improper delay.[6] But what precisely is improper delay? Perhaps the simplest way to begin is to review the mandatory minimum set forth in rule 4-3.2: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Consistent with that rule, the Florida Bar, Center for Professionalism suggests that "[a] lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible."[7] The Center has also argued that "[a] lawyer should counsel the client to consider and explore settlement in good faith."[8] In the context of hearings, for example, the Center advocates that "A lawyer should respect the time and commitments of others . . . Before scheduling a hearing on any motion or discovery objection, a lawyer should endeavor to resolve or narrow the issue at hand."[9]

So then, we ask, what precisely is improper delay as contemplated by the Rules Regulating the Florida Bar? While the forgoing question is important, the answer is dependent upon the colloquial term "facts and circumstances" often used by lawyers. Perhaps, then the better question is what actions can be taken to shun any appearance of "improper delay."

The answer can be simply stated as good faith consistent communications with our opponent concerning the "heart" of the case. The service of pleadings and motions alone is not communication with the other side in the real sense. After all, we are always posturing in our pleadings and motions. Our pleadings and motions set forth our client's best legal position,

1 Special thanks to my legal assistant, Marilyn H. Laughlin, for her encouragement and support in preparing this article.

2 FY 2003 Statistical Reference Guide, 3-1 (Florida Office of the State Courts Administrator 2003). For example, new lawsuit filings increased by 54,786, or 42%, between 1993 and 2003. Id.

3 For example, since at least 1996, the Judicial Management Council has carefully and regularly studied the goals, infrastructure, and performance of the courts. See e.g. Taking Bearings, Setting Course, the Long-Range Strategic Plan for the Florida Judicial Branch (Judicial Management Council); Report and Recommendations, Committee on Trial Court Performance and Accountability (Judicial Management Council, December 1999).

4 Florida Bar Creed of Professionalism.

5 Clearly not all cases can or should be settled. However, prudence lends support to the argument that lawyers should advise their clients of alternatives, and fully explain the length, expense, and unpredictability of litigation, and the likelihood of judgment enforcement. Such factors may weigh heavily in a client's decision to litigate.

6 Rules Regulating the Florida Bar, 4-3.2, Comment.

7 Ideals and Goals of Professionalism, 4.1 (Fla. Bar Board of Governors., Center for Professionalism, May 16, 1990).

8 Id. at 4.3.

9 Id. at 6.1.

or even possibly, a simple position of leverage. Such positions often do not coincide with what our clients actually want. Many lawyers and judges have advocated for meeting with opposing counsel over lunch to discuss the case. Often, even just one phone call can have an enormous impact on the speedy resolution of the matter. Of course, not all disputes can be resolved by mediation. As one judge put it, notwithstanding the efforts of all parties to a dispute, we cannot discount "the courthouse steps phenomenon." But judges and juries are limited resources, and must be treated as such at all times during the dispute resolution process.

The courts are in perhaps the best position to encourage and ensure lawyer mediation. The Sixth Judicial Circuit, and all circuits throughout the state, should adopt a local rule, similar to that of Broward county,[10] which requires lawyer certification of an attempt to resolve and narrow any disputed matter prior to setting it for hearing on the motion calendar. The courts must then, of course, as Theodore Roosevelt so eloquently stated with respect to enforcing policy, "speak softly and carry a big stick."[11]

The effective means and methods of settling legal battles is the subject of an entirely different article, and certainly has been written about by many authors over the decades. The focus of this article is more philosophical. Before an opponent can be convinced that the means and methods of settling legal battles should be studied, the opponent must first be convinced that a general duty to mediate disputes exists. While this article is not steeped in Aristotelian syllogisms, this author's principal goal is to supply at least one major premise in the chain: The Lawyer's Duty to Mediate.

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If you would like to respond to Justin Zinzow's opinion or any other portion of Paraclete, please e-mail your comments to the Editor at erisa@andersontucker.com.

10 Local Rule 10A, Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida.

11 At least one of our local judges takes this philosophy to an artful but appropriate level. Practioners who do not follow the letter of the Code of Professional Responsibility and the spirit of dispute mediation will find themselves in the crosshairs and will leave the courtroom with a bruise to their ego, having learned an invaluable lesson the hard way. We should applaud, and support by vote, such judges who are willing to eschew popularity for the greater good of the profession.