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## Pit Bulls, Pikes, and Pitchforks

### Rendering the Service of Practicing Professionalism

by Ron Ward, WSBA President

The pit-bull litigators and law firms — those who think that to be obnoxious, or abusive, or intimidating is to be effective — are an anachronism in our profession. They lack professionalism, and that is all too often accompanied by a complete absence of ethics. The overwhelming majority of us — those who love the law, who love the profession, who love justice, our reputations, and our image — are committed to either changing the ways of these outlaws, or removing them. One sign is the increasing tightening of the Rules of Professional Conduct and discipline sanctions, and the manner in which the courts and judges are beginning to deal with this type of conduct.

#### **Pit Bulls and Junkyard Dogs Belong in a Kennel, NOT in the Justice System**

The pit-bull lawyer or law firm's lack of professionalism is counterproductive to any concept of justice, it is a poor example to the citizens we serve, and it besmirches each and every one of us. It is also a dangerous phenomenon that contains the seeds of the destruction of our profession. Anyone who believes that this is hyperbole or overstatement on my part has obviously not been following recent news accounts. Recent media reports range from a client shooting of a lawyer; to lawyer fisticuffs in the courtroom; to an armed, near-fatal assault by one lawyer on another. The conduct of some lawyers in depositions is reprehensible. These incidents are becoming too frequent to be blithely categorized as aberrational. Rather, they are the present manifestation of a culture in the practice of law that none of us can afford to continue to tolerate.

Most of us came into the law envisioning it as what it is: a noble profession that improves people's lives. Law is designed to resolve disputes peaceably, hopefully to improve the quality of life, and definitely to heal the community. It is thus with dismay that we watch the evolution of a legal system that a small minority of lawyers and law firms threatens to turn into something which brutalizes everyone it touches: clients, judges, and other lawyers. Our societal role as problem-solvers, advocates, guardians, teachers, counselors, and leaders requires us to seek justice and find reasonable solutions to conflict. The practice of law was never meant to be about lawyers focusing on destroying their opponents by any means necessary — including outright dishonesty and fraud, nasty fights, vicious and unfounded accusations, and twisting of the truth.

In our society, no one is really winning in the "win-at-any cost" or "win-lose" model. Divorce litigation that drives families further apart and runs up astronomical legal bills only further destroys our societal foundation. Civil litigation that becomes so nasty and prohibitively expensive that grievously injured (or dead) victims of negligence cannot afford redress, or cannot endure the ordeal of obtaining it, only undermines respect for the orderly adjudication and resolution of disputes. Transactional practice that values might over right ultimately breeds only contempt for our legal system.

#### **Lawyer Misconduct, Lack of Professionalism, and the "Quality of Life" Cost to Lawyers**

Lawyer misconduct and lack of professionalism include most notably:

1. Lying (including material omissions verbally and in pleadings directed to the court and to opposing counsel).
2. Engaging in intimidation tactics and abuse of the discovery process (including badgering and attempted intimidation of witnesses and opposing parties and other "Rambo" techniques; name-calling; threatening CR 11 sanctions; brow-beating pro se litigants; failing to timely file responsive pleadings; failing to submit responsive pleadings; concealing and destroying evidence; and engaging in cost-prohibitive litigation intended not to resolve the dispute, but to force opponents from the fray because of their inability to afford justice).

3. Abandoning clients.
4. Abusing court staff.
5. Appearing in court drunk, or under the influence.

There is a great deal of palaver about why all of this has come about. Some blame the so-called litigation machine and a "scorched earth" modus operandi that continues to dominate the legal world. Some point the finger at the dominant pedagogy in legal education, known as legal formalism, in which law students are trained to ignore messy concepts of justice and morality, in favor of strict rules and doctrines. Even though lawyers deal with people in serious distress, they get no training or support for integrating emotional intelligence or human values into their practice. Clients begin to look like walking legal problems instead of complex human beings.

Lack of professionalism involves a high personal cost for lawyers. Lawyers have the highest rate of depression among 105 professions, according to a 1991 Johns Hopkins University study. Too many hours spent at work, increased competition for clients, and shrinking revenues don't really explain the phenomenon of what has become an epidemic of professional dissatisfaction. Some of the most satisfied practitioners — public-interest lawyers, for example — work the hardest, but earn the least. Lack of professionalism results in a personal cost to clients, sullies the public image of the legal system, and disrupts its orderly operation.<sup>1</sup> I believe that increasing alienation in the legal system, a lack of consciousness with regard to our image in society, and not enough emphasis on a "service to others" ethic are responsible for professional dissatisfaction. How should we go about dealing with the harm to our image caused by public alienation resulting from a lack of professionalism?

#### **What Other States Are Doing**

We resist efforts to make adherence to standards of professionalism mandatory, but without doing so, there is no means to enforce compliance. Professional incivility and discovery abuse are focal points for lack of professionalism that other states are moving to address. In Arizona, applicants to become lawyers must pass a one-day professionalism course before they may obtain a license to practice. A Justice of the Arizona Supreme Court teaches the course. Professionalism is a mandatory part of continuing legal education. Every bar gathering has a professionalism offering. The thrust of this is to tell the truth, keep your word, and don't tolerate those who do not. Arizona has mandatory "lay down" discovery within the first 40 days of filing of the complaint and the answer. Clark County, Utah, considers the need for professionalism so serious that it has established a "discovery commissioner," whose decisions are published on the Internet. These decisions become guidelines for other practitioners. The Utah State Bar is now studying this idea with an eye toward implementing special discovery masters for litigation throughout the state. These special discovery masters will have the authority to administer fines and sanctions. A side benefit of this approach should be lightening of the motion dockets of trial court judges. In Connecticut and North Carolina, trial judges have significant influence on the ability to disbar.

#### **What We Can Do**

Judges — A more assertive role by judges is the single most important factor in fostering professionalism. Judges are the referees in the justice process. There is no way to abrogate that responsibility. It is clear that in many cases the litigants are not just going to work it out among themselves. Breaches of professionalism and flouting of the rules are akin to corporate policy in some firms. Unfortunately, it is their culture.

Judges need to confront unprofessional lawyers privately and in open court. Admonishments, where warranted and necessary, should be made via written opinion. Imposition of personal monetary sanctions against firms and lawyers should be utilized with greater frequency, where it is clear other methods of communication are not being heeded. Judges should report breaches of professionalism to the Bar's Office of Disciplinary Counsel. The judge need not be listed as the complainant. In response to the usually spurious charge of selective enforcement, or the fear of election-year retaliation, judges should adopt a jurisdiction-wide collective zero-tolerance policy with regard to "junkyard dog" lawyers and firms, incivility, and abusive practices. Healthy sanctions assessed at the outset of the implementation of such a policy will go a long way toward quickly eradicating unprofessional practices and the apprehension of "retaliation."

Lawyers — For those who engage in the unprofessional practice that is the focus of this article: knock it off or suffer the consequences. Stop hiding behind the obligation to engage in "zealous advocacy" and twisting it to fit your purposes. Stop engaging in lies and deception that you justify to yourselves as a part of the practice of law, with rationalizations about billing, postponements, settlement discussions, the client, ad infinitum, ad nauseam. It is said that some lawyers know all of the written rules, but they're totally oblivious to the unwritten rules. DON'T BE ONE OF THOSE. Stop engaging in rudeness, mean spiritedness, lack of professional courtesy, and incivility to other lawyers, judges, and the public. Stop destroying our image as a profession.

You are a member of a profession FIRST. And if you don't already know that professionalism is the standard to which your fellow citizens hold you, if you are not committed to fulfilling that standard, you're in the wrong line of work.

Learn the difference between advocacy and partisanship. You can practice in the service of the general welfare, as well as in the service of your particular side in a legal action. Don't let anyone tell you that you can't — and look at their

motives, if they do.

When lawyers place partisanship ahead of service and virtue, our society's ideals and the people within it wither. If you decide that your only role is to do what your clients tell you to do, you will be part of the destruction of a great nation, which is dying already from our stubborn refusal to look at life as more than an opportunity to get what we want.

When a corporation or a business concern retains you, you have been entrusted with a certain responsibility for the lawful conduct of that business, its adherence to the law, and its ethics or lack thereof, to the degree it transgresses the law. Recognition of this fact is why Sarbanes-Oxley is now a reality of law practice in America. There is no such thing as "business ethics" as opposed to regular ethics; theft is theft.

### **The Perception of the Profession**

The practice of law is changing. Because of the antics of a small minority, it may be changing for the worse. We are a profession in denial. We need to "get a grip" before it is too late. The public could well start to abandon us. The lawyer's mental model of self is very different from the public's perception. Lawyers think in terms of precedent, stare decisis, getting a corner on legal information and winning — above all winning. Some segments of the public see lawyers as manipulative, scheming, sneaky, and (in some cases) abusive. Zealous advocacy is seen as a euphemism for dishonesty, coercion, and abuse. Lawyers are seen as money-oriented. The public wants a product; not process, but results. They don't want a lot of hours and high bills, but results. The profession needs to replace an image as manipulators and schemers with the notion that we understand your situation and genuinely want to help you get to a solution. The public is searching for alternatives to us because we are in danger of losing our way and our image as society's problem-solvers. That explains the tremendous movement toward collaborative law, mediation, and other alternatives for resolving disputes. I don't know whether it has occurred to the profession, but lawyers are not absolutely necessary to bring disputes to successful conclusion in these mediums. This is particularly true if we prove to be more obstacle than instrument.

All of this goes back to basics. Lawyers are leaders in this society and will continue to be, to the degree we focus on our role as problem-solvers, on serving our clients and society, and on the core values of the profession. Those core values are truth, integrity, and honesty. We have an obligation to our clients and to the justice system to search for justice. We must use professionalism and truth to find it. In short, we can get rid of the pit bulls and the entire syndrome they represent, or the public is going to be out in front of our house with pikes and pitchforks. If and when they arrive, they'll be there to make us obsolete. It's past time for a change. Let's get to it.

The question is not whether we can; it is whether we will. We can and we will because, working together, there is nothing we cannot change for the better.

Ron Ward may be reached at 206-624-8844 or [rrw@admiralty.com](mailto:rrw@admiralty.com).

### **NOTE**

1 "From Ballistic to Holistic," Elaine McArdle, The Boston Globe, 1/11/2004.