

Perils of Non-professionalism

BY GRANT J. GUILLOT

Does being a jerk violate the Rules of Professional Conduct?

As children we are taught to play nice with others, to behave in the sandbox. Our parents instill in us that friendliness, responsibility and common courtesies are characteristics required for one to develop and maintain relationships. Furthermore, we are taught that those children who never learn to play well with others often find themselves estranged from the other children and without any meaningful friends or allies.



These lessons, which most attorneys are taught at an early age, become increasingly relevant as an attorney continues to practice law. For example, an attorney who treats his secretary with respect is more likely to find that treatment reciprocated. This scenario is especially true if the secretary ever leaves the attorney's employment and shares her opinion of her former employer with other members of the legal community. A lawyer with a reputation as a great boss will be more likely to attract and employ a high-quality secretary than will an attorney with a reputation for treating his employees like dirt. The same can be said for the attorney-client relationship. An attorney with a reputation of treating clients professionally will be more likely to appeal to prospective clients than will an attorney known for giving his clients the run-around.

In addition, while there are some lawyers against whom an attorney would welcome the opportunity to litigate, there are also lawyers whose enrollment in a case would immediately fill the attorney with dread. An amicable and professional relationship between the attorneys certainly benefits the opposing parties, as both attorneys can work together to facilitate the progression of the lawsuit and minimize costs for their clients. However, how does an attorney "play nice" while at the same time zealously representing his client? More importantly, do the Rules of Professional Conduct require the attorney to do so? The following vignettes depict scenarios in which a lawyer's decision to be a jerk, whether it be to a client, secretary, or opposing counsel, just might land him a date with the Office of Disciplinary Counsel.

SCENARIO 1: A persistent client calls his attorney for the third time in three days. The attorney has no desire to speak with the client. The attorney instructs his secretary

to lie and tell the client that he is in court and thus unable to talk. Has the lawyer violated the Rules of Professional Conduct?

Pursuant to Rule 1.3, "A lawyer shall act with reasonable diligence and promptness in representing a client." In addition, Rule 1.4(a) requires a lawyer to "keep the client reasonably informed about the status of the matter" and "promptly comply with

reasonable requests for information." By purposefully dodging his client's telephone calls, perhaps to delay telling his client that he has not yet done what he was supposed to do, the attorney risks violating Rules 1.3 and 1.4. Moreover, the attorney may be in violation of Rule 5.3, which pertains to nonlawyer assistants, by ordering his secretary to lie to the client and assist the attorney with his unprofessional actions. The better course of action would be for the attorney to admit his delay to the client or, even better, to immediately execute the task (if practical) before promptly returning the client's call.

SCENARIO 2: An attorney is contacted by her opposing counsel and asked why she has not yet sent the supplemental discovery responses she agreed to send more than three weeks ago. The attorney, having recalled that she never supplemented her responses to opposing counsel's requests for production of documents, first lies and insists that she sent the documents via email. Realizing she will not be able to prove she sent the email three weeks ago, the attorney then blames her secretary for not sending the documents to the opposing counsel.

By failing to follow through with sending opposing counsel the requested documents, the attorney may be in violation of Rule 3.4, which prohibits an attorney from failing to "to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." In addition, by lying to her opposing counsel regarding the submission of the documents, the attorney may have risked violating Rule 4.1, which prohibits a lawyer from making a "false statement of material fact or law to a third person." Furthermore, by throwing her secretary under the bus and using her as a scapegoat, the attorney has placed her reputation as an employer at jeopardy. Should the secretary decide to work at another

law firm, she will take her opinion of her former employer with her and will likely trade “war stories” with other employees in the legal profession. A reputation as a bad boss will severely hinder the attorney’s ability to employ a first-rate secretary.

SCENARIO 3: An attorney has been purposefully playing phone tag with his opposing counsel, whom he deems an annoyance, to avoid having to speak with him. Whenever opposing counsel calls the attorney’s office, regardless of the time of day, the attorney is somehow always unavailable to talk to the opposing counsel. However, the attorney always returns opposing counsel’s calls between noon and 1 P.M., when the attorney knows opposing counsel will be at lunch and unable to take his call.

Rule 3.2 provides that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” While there may not be a rule that specifically prohibits the attorney’s actions in the above scenario, the attorney may be impeding the progression of the litigation by refusing to communicate with his opposing counsel. By speaking with his opposing counsel, the attorney may be able to resolve certain issues without the need for court intervention, thus saving both parties time and money. Therefore, by purposely avoiding communications with his opposing counsel, an attorney

may be compromising his duty to act in his client’s best interests.

SCENARIO 4: An attorney is told by her secretary that opposing counsel has called the office asking why the attorney has not shown up for an out-of-town deposition set for that morning, which was scheduled three months ago and about which the attorney has forgotten. The attorney instructs her secretary to lie and tell opposing counsel that the deposition was not on the attorney’s calendar, but that the attorney is on her way.

As in Scenario 1, the attorney in the instant scenario risks violating Rule 5.3 by instructing her secretary to lie to opposing counsel. Furthermore, Rule 1.1 mandates that an attorney provide competent representation, which requires, among other things, “thoroughness and preparation reasonably necessary for the representation.” By failing to prepare for the deposition and by deciding to just “wing it,” the attorney may be in violation of Rule 1.1 because the attorney has failed to provide competent representation.

SCENARIO 5: While discussing a case over the phone, an opposing counsel tells an attorney, “Now, you listen to me!” in a very antagonistic manner. What can the attorney do to prevent the downhill slide that is about to occur?



Everyone counts, every day. Bill Potter, CPA, JD is a Senior Tax Director at P&N with a vast knowledge and understanding of taxation and business planning. He regularly consults with lawyers and law firms in the areas of taxation, accounting, legislative and regulatory issues, succession and usufruct accounting and valuation. Bill has provided expert witness testimony in numerous courts throughout Louisiana and is often requested to consult with and testify before various legislative committees in the areas of taxation.

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Sadly, there is no Rule of Professional Conduct that simply prohibits opposing attorneys from being jerks to each other. As stated above, the Rules require the attorney to provide competent, diligent, and zealous representation to his client and to make reasonable efforts to expedite the litigation in accordance with his client's interests. But how can the attorney fulfill these obligations when opposing counsel is acting like a tyrant? Perhaps the best approach would be to allow opposing counsel a couple of days to "cool off" and then to reopen communications with the preface that doing so would ultimately be in the best interests of all parties involved.

SCENARIO 6: An attorney is retained by a client after promising the client that she will do everything she can to obstruct the resolution of the case and to delay the matter whenever possible in order to "stick it" to the other side.

Rule 4.4 provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." By setting out to "play dirty" against her opposing counsel and promising to make things as difficult as possible for the other party, the attorney has risked violating Rule 4.4. In addition, the attorney may be found to have violated Rule 3.2 for

failing to make reasonable efforts to expedite the litigation consistent with her client's interests.

Finally, Rule 8.4 provides a catch-all regulation that can be applied to each of the above scenarios. That Rule declares that it is professional misconduct for a lawyer to "[v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;" to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation"; or to "[e]ngage in conduct that is prejudicial to the administration of justice."

In summary, professionalism is not just an ideal standard to which the Louisiana Supreme Court holds the members of its bar; it is also a powerful mechanism that can be utilized by an attorney to ensure that he complies with his duty to competently, diligently, and zealously represent his clients. The simple courtesies an attorney shows his clients, employees, and opposing counsel will contribute to the molding of the attorney's reputation in the legal community. Therefore, even without the imposition of the Rules of Professional Conduct, attorneys should safeguard their reputations and relationships with others by treating one another with courtesy and respect. Doing so will only serve the interests of all parties involved. As for those lawyers who choose not to abide by these standards, the message is simple: play nice or get out of the sandbox! 

GAIL'S GRAMMAR

If you're still looking for New Year's resolutions, I have three suggestions. First, resolve to stop relying on spellcheck and actually proofread your documents. Doing so will save you from embarrassments such as, "The purpose off the statue is two protect pubic health and safety," which the spellchecker thinks is a perfectly fine sentence.

Second, resolve that you will not blindly accept the spellchecker's suggestions. If you agree with the computer without paying attention, you may end up like the attorney in California who complained in brief about the judge's "sea sponge" actions. The phrase sua sponte was not in the word processor's dictionary, so it changed "sua" to "sea" and "sponte" to "sponge."

Third, resolve to pay attention to what your auto corrector is changing. It's nice when the computer automatically changes "teh" to "the." However, unless you add the words "peremption" and "tortious" to your word processor's dictionary, the auto corrector will change them to "preemption" and "tortuous." Southern Third is full of Louisiana cases ruling on "exceptions of preemption or prescription," and nationwide you'll find reported cases penalizing "tortuous conduct."

Thanks to Vince Fornias for suggesting this topic. Send suggestions for future Gail's Grammar columns to Gail Stephenson at GStephenson@sulc.edu, or call Gail at 225.771-4900 x 216.

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