

PROFESSIONALISM AND MODERN LITIGATION TECHNIQUE

While reviewing a file for another attorney, I recently came across the following statement in a brief:

"Counsel personally believes that the Courts of Texas would be well served by taking the general approach of liberal pleading, amendment and process as is shown in *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668 (Tex. 1989). The current hodge podge of general liberality sprinkled with death traps (e.g. Rule 169 deadlines) does nothing to increase collegiality and makes every extension of professional courtesy grounds for a professional malpractice claim by a client.

The aggressive advocacy required by the Code of Professional Responsibility should not be turned into a mandatory distasteful game of "gotcha" -- the law should resolve the legitimate conflicts and procedural and jurisdictional rules should be crafted to lead to such resolutions. However, until the Court changes the rules and the law, Counsel will be forced to fight cases every procedural step of the way."

As I reflected on that statement, three changes in the Rules came to mind that would improve the practice of law.

The first was changing the law so that the extension of professional courtesy is not legal malpractice. **The second** was allowing the Courts to impose professional courtesy -- i.e. giving the Courts the power to impose the same result that professional courtesy would have created. **Finally**, there should be clarification and formalization of the entire sanctions issue.

The current law often makes the extension of professional courtesy legal malpractice means. For example, if an opponent misses the 30 day deadline of Rule 169 there is no way that an attorney can grant an after-the-fact extension without harming her client. There are a number of similar situations in the rules where missing a deadline or a typo in pleading can destroy a case.

Most deadlines are missed in good faith. That is especially true in several lead cases discussing the draconian deadlines that apply in Requests for Admissions.

For example, *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380, 383-384 (Tex.App. -- Dallas 1987).

as summarized in headnote 6 at 381 "Insured's failure to respond to insurer's request for an admission that insured's claim was not covered by policy constituted an admission that insured was not covered, even if insured's answer was only a day late and even though request involved application of law to facts."

In a normal world, no one could confuse being a day late with intentional bad faith sufficient to justify granting judgment on the pleadings against a party. However, the rules impose such a result and probably expose an attorney to liability if he or she fails to press home the advantage gained and instead acts out of professional courtesy.

After all, what else but malpractice can one call giving up a secure verdict in favor of extended litigation and the possibility of an adverse verdict? Until the rules change, counsel will be forced to extend professional discourtesy.

After making it safe to extend professional courtesy, the next change that is necessary is to allow the Courts to impose professional courtesy -- i.e. giving the Courts the power to impose the same result that professional courtesy would have created.

This change creates two results. First, it takes the profit out of not extending professional courtesy. If a court will impose professional courtesy, an attorney might as well act that way voluntarily.

Second, it allows an attorney to extend professional courtesy without having to justify it to the client. i.e. "Why did you let him up when he missed that deadline -- I had to, the Court would have done so and making a fuss about it would have only damaged your case's credibility." Currently, extending professional courtesy looks to many clients suspiciously like "if we win the case now, I don't get to bill you for any more fees."

Having practiced in a jurisdiction with this rule in effect, I know it works to the benefit of the courts and justice.

The last change that would increase professionalism is clarification and formalization of the entire sanctions issue. Currently the courts are reaching a slow consensus by looking at the sanctions cases that are appealed and at how the appellate review is proceeding.

As I look at the speed at which opinions are issuing, and with the assumption that there will be no changes in the rules, there should be a relatively uniform application of sanctions in about twelve to fifteen years -- a time span that seems too long to encourage professional courtesy now.

It would benefit both bench and bar to have formal guidelines for sanctions imposition. Such guidelines should cover prior abuse by the client, prior abuse by the attorney or law firms involved, length of abuse and whether or not steps have been taken to cure the problem prior to the hearing date. Every sanction issued and/or order compelling, including consent orders, would be registered on a central bulletin board.

The first class of information, subsequent abuse by the client, is what the many judicial opinions seem to indicate needs to be stopped by means of the law. Some clients have problems complying with the law. Everyone has a client, who upon being called in to explain why he had just violated a settlement not even an hour old, states "I don't have to keep my promises -- that's why I hire attorneys."

Intentional abuse of the process by individuals deserves no consideration and abusers of the courts should be followed just as closely as those guilty of any other type of abuse. Registering sanctions and/or orders by the name of the clients involved would insure that intentional abusers of the system would be remembered and forced to comply.

Prior abuse by the attorney or law firm is the current definition of the trendy and uncourteous "Rambo" litigator. Sanctions are intended to deter future abuse as well as current abuse. Some firms are more likely to abuse the process than others. A formal factoring in of the prior abuses by a firm or an attorney is very useful in preventing future abuse -- especially as attorneys tend to control what really happens in litigation.

Third, length or amount of abuse is important to equity. Some discovery abuse is short, simple and over long before any hearing. Some abuse occurs as a part of a long standing pattern. When a court is granting a seventh or eighth motion for sanctions in a case, the penalties should be steeper than for an isolated set of interrogatories answers that arrived a week late.

The degree of cure is important as it reflects intent. The courts should treat a party who has "made good" or "cured" with greater leeway than a party who has failed to cure through the date of the hearing. I find it especially irritating to give opposing counsel twenty or thirty days between my motion and the hearing date -- still to find the Requests for Admission unanswered or the Interrogatories not responded to.

Finally, centralized recording is essential. Opposing counsel, the court and the parties are entitled to know whether or not the abuse they are suffering is part of a pattern or way of doing business or whether it is an isolated event. A centralized recording system would provide for all of these factors. In addition, centralized recording would be a great deterrent to future abuse.

All in all, changing the law so that the extension of professional courtesy is not legal malpractice, changing the rules so that the Courts can impose professional courtesy and clarification and formalization of the entire sanctions issue -- especially including centralized public records -- all of these would increase professionalism and reduce the amount of friction present in the practice of law by changing the rules so that friction and vicious litigation behavior are no longer rewarded by the rules.

We owe it to ourselves and our profession to take common sense steps to create a workable solution. Let's do it.

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