

**Ethics-Professionalism,
Civil Virtue,
And the Art of
Motorcycle Maintenance**

**Troy Booher &
Michael Zimmerman**
Snell & Wilmer

Utah Standards of Professionalism and Civility

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.
2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.
3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.
4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.
5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.
6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.
8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.
10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible *ex parte* communications.
12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.
13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.
14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.
15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.
16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.
17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.
18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.
19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Utah Bar Journal

« Outsourcing - for Easy, Effective Data Protection | Main | Why Don't They Like Us? »

Standards for Standards' Sake

Standards for Standards' Sake:

by Eric K. Johnson

On October 16, 2003, the Utah Supreme Court approved Rule 23 of the Utah Supreme Court Rules of Judicial Administration (itself comprised of twenty new rules), entitled "Standards of Professionalism and Civility" "[t]o enhance the daily experience of lawyers and the reputation of the Bar as a whole." I am all for satisfying daily experiences and for burnishing the Bar's reputation, but I submit that the passage of twenty new rules over and above those that already apply to the profession do little to achieve either goal. This is not to state that the motives for Standards are somehow wrongheaded. The Preamble to the Standards of Professionalism and Civility, which has no normative force, is, for the most part, as sensible as it is aspirational. It reads, in part:

In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism.

No one can seriously argue with promoting courtesy, integrity, reason, peace, and efficiency; but in its aspirations lie the flaws in the Standards of Professionalism and Civility. First, the Standards are well meaning, but idealistic in the negative sense of the word (i.e., inherently unattainable in the real world). Second, the Standards are undefined, ambiguous and duplicative of pre-existing rules. Third, while the Standards are intended as a shield, they can be just as much a sword for hacks to use offensively against the virtuous attorneys.

For example, Standard 1 provides in pertinent part that "lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." Is it discourteous or undignified to express to opposing counsel your honest belief that his case is frivolous? Is it discourteous or undignified to tell opposing counsel that if he does not withdraw the false representations in his pleadings you will seek Rule 11 sanctions? Arguably, it is. If so, when did litigators, who chose a profession based on an adversarial system of conflict resolution, become so thin-skinned that arguing - even heated arguing - between them became unprofessional? Litigators are, after all, professional arguers (in a venerable tradition at that). How does one address the misconduct of the opposing side without either risking running afoul of Standard 1 or being a wimp? As experience quickly teaches lawyers (persons not generally known for humility or small egos), one man's honesty and candor is the other man's incivility and offensiveness, especially if the ostensibly "offended" party can make hay out of it. Standard 1 provides a fertile field ripe for harvest.

Along the same lines Standard 2 provides "civility, courtesy, and fair dealing . . . are tools for effective advocacy and not signs of weakness."

Sure, tell that to the attorney on the opposing side who delights in grandstanding for his client in front of civil, courteous, and fair doormats. I'm not advocating fighting fire with fire or the law of the jungle as a guiding principle, but come on; sometimes the only way to stop bad behavior is by giving the other guy a taste of his own medicine. Take that away (as Standard 2 appears to do) and it's open season on nice guys, period.

Standard 3 provides: Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Search

Search

powered by Google™

About

This page contains a single entry from the blog posted on **June 11, 2005 10:31 PM**.

The previous post in this blog was [Outsourcing - for Easy, Effective Data Protection](#).

The next post in this blog is [Why Don't They Like Us?](#).

Many more can be found on the [main index page](#) or by looking through the [archives](#).

[Subscribe to this feed](#)

So, if opposing counsel is, in your honest, (but merely) professional opinion, filing improper motions, delaying his responses in discovery, writing you unsolicited nastygrams, and generally misbehaving, what are you to do? If he accuses you of being unethical or unprofessional, can you no longer label him "the pot calling the kettle black" for fear of being labeled a Standard 3 violator? Can't you even blow off steam with a terse response for fear that you have "demeaned, humiliated, or disparaged" the guy who has demeaned, humiliated, and disparaged you? Now, where do you turn for relief? The judge? Please (see infra). Why can't we just do as we've done in the past and call or write to the opposing attorney and express yourself? An exchange of words does no real or lasting harm. If a lawyer goes too far in exercising his or her free speech rights, there are laws against harassment and defamation already on the books to provide protection.

There are effectively no rules if only one side to the dispute follows and/or is held to them. Why set standards that cannot be objectively met and that cannot be objectively enforced? Standards 1 through 3 neither raise the bar nor level the playing field and are neither a means nor an end. Sadly (though not unexpectedly), this is why the Standards generally are less an effective prescription for improved lawyer behavior than they are an inarticulate acknowledgment of the chronic bad behaviors of some lawyers. Surely I am not the only lawyer who sees that these twenty (20) new rules serve as much (if not more) to fetter the good guys and give the scalawags a new source of nuisance and guilt-mongering than to usher in a new era of good behavior.

Standard 4 provides: Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

How can one ever effectively prove that opposing counsel "knowingly" attributed to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference? For you very young lawyers, just try to call opposing counsel on this during a hearing or in a memorandum and see how the judge reacts, you arrogant, whiney, upstart. And even if you were to prove such misconduct, what are the odds of that attorney being effectively sanctioned for it? After all, you now have Standards 3 and 5 to contend with yourself.

Standard 5 provides: Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

It's hard enough to earnestly seek and obtain sanctions for any proper purpose without Standard 5 throwing up additional barriers. Now add to the sorry state of doormat attorneys the new rule of Standard 5 and you provide but more defenses for the hacks: "Your Honor, opposing counsel's request for sanctions on the ground that I counseled my client to lie under oath are lightly sought and for an improper purpose, in violation of Standard 5. Unless he can prove otherwise, I ask that the request for sanctions be dismissed and opposing counsel admonished for disparaging and humiliating me in violation of Standard 3." Heaven help us.

Standard 9 provides: Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

No new rule or combination of rules will ever do away with this time-tested trick. No savvy attorney would suggest that an offer of settlement was used against him to hold up discovery or delay trial. If you did, can't you just hear that weasel on the other end of the phone now?:

WEASEL: I am shocked that you'd see my making repeated settlement inquiries (every time you ask for the production of discovery responses or seek to certify the case for trial) as a delay tactic; after all, if we settle, we spare our client's time, money [voice cracks] and trauma. Why would I seek a settlement, of all things, to cause delays? It's ludicrous, and I've never been so offended in my 20 months of practice. I'd seek sanctions against you under the Standards of Professionalism and Civility, if I thought it would do any good.

The potential for a legitimate settlement - no matter how remote it may be - always exists. Thus, even in the most hotly contested matters it is virtually impossible to show whether a lawyer held out the potential of settlement for legitimate purposes or not. Standard 9, like the other Standards, is on a practical basis impossible to enforce.

Standard 10 provides: Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Can you find the "obvious" flaw in this rule that renders it all but completely impotent? Moreover, if you ever find yourself confronted with what you believe is an undisputed and indisputable fact, you've likely been in practice two years or less (and if you've been practicing longer, but still think

there's such a thing as an indisputable fact, your practice must be limited to administrative law, representing the government).

Standard 11 provides: Lawyers shall avoid impermissible ex parte communications.

As if having more rules about ex parte communications makes any difference in curtailing the problem. Did we need a new rule to inform us that impermissible ex parte communications aren't permitted? Aside from Standard 11's utter lack of guidance as to what constitutes "impermissible ex parte communications," we already have a rule against impermissible ex parte communications, a definition of the term, and a means for sanctioning it (See Rules of Professional Conduct, Rule 3.5).

Standard 12 provides: Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Isn't this a problem whose most elegant solution is already in practice and is adequately functioning? If the judge wants to read such correspondence, she will. If she deems it inappropriate or potentially prejudicial, she will throw it out and may or may not admonish the offending lawyer. Some courts go so far as to tell counsel that they will not forward any correspondence between counsel to the court if it is not captioned or otherwise part of a pleading. Why did we need a rule for a problem that's not all that pervasive to codify what is already being adequately enforced at the receiving end?

Standard 13 provides: Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Attorneys should eschew sharp practices, but no one should be formally sanctioned for following the letter of the law. Even Thomas More, I submit, would agree with that. More importantly, how can one fairly be punished for following the letter of the law? Furthermore, if compliance with rules constitutes "incivility" there goes the rule of law. If you struggle with whether "maliciously" obeying the rules of court is worse than otherwise being uncivil in relationships with opposing counsel, become a mediator. Besides, it's not as though attorneys victimized by punctilious rule followers have no recourse. The odds are better than even that if you complain to the judge about being served with a proposed order that was hand-delivered to your office after 5:00 p.m. on the Wednesday prior to Thanksgiving, you'll get your extension. The system does generally work.

Standards 14 and 15 provide: Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately.

And throwing cigarette butts on the ground is littering. Which of these offenses is likely to be prosecuted and/or punished first? Don't starve making this Hobson's choice. People who don't know me may not believe this, but when an ethically-challenged attorney asked me for a continuance by claiming he had a conflicting engagement, I asked that attorney for the court and the case number so that I could confirm his story. He harrumphed and refused to disclose what the supposed "conflict" was, but he didn't get his continuance. I manage to handle such situations to my satisfaction without the assistance of Standard 14 or 15. Besides, unless a lawyer is willing to ferret out false claims of need for extensions or schedule changes, Standards 14 and 15 are of no practical benefit anyway.

Standard 16 provides: Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

To its credit, here's a rule that if violated has at least a better than even chance of being proven it was violated. Even so, what's so terribly wrong about defaulting a party worthy of default, and doing so without flagging the inattentive opposing attorney? Besides, Rule 4 of the Utah Rules of Procedure already provides, in Subparagraph (c)(1):

The summons . . . shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant.
(emphasis added).

Why, when Rule 4 already mandates notice to the defendant of the possibility of default, was it necessary to create essentially another notice requirement with Standard 16? We all know or should know that defaulting a fellow attorney without warning causes more trouble for the attorney seeking default than it's worth to him. Additionally, does Standard 16 create a possible conflict

The Utah State Bar presents this web site as a service to our members and to the public. Information presented in this site is NOT legal advice. Please review the Terms of Use for more policy, disclaimer & liability information - ©Utah State Bar
email: info@utahbar.org

between it and Utah Rules of Civil Procedure, Rule 55, which contains no requirement that notice be given to opposing counsel in advance of seeking default? If so, why not repeal Standard 16 and amend Rule 55 to include a notice provision? Moreover, wouldn't obeying Standard 16 basically allow the opposing side to delay proceedings by failing to participate in the case and relying on the opposing attorney's Rule 16 obligation of "notifying other counsel," in advance, at which point the scheming "lazy" attorney finally files his responsive pleading so that the case is decided on the precious merits? Rule 55 is already honored in the breach. Did we really need to eviscerate it even more with Standard 16?

Standard 17 provides: Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Standard 18 provides: During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Standard 19 provides: In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

With respect to Standards 17 through 19, lawyers are already subject to provisions of the Utah Rules of Civil Procedure and the Utah Rules of Evidence when engaging in the discovery process, and they already arguably prescribe the same conduct sought by Standards 17 through 19. Moreover, Standards 17 through 19, like the rules of civil procedure and evidence, are so vulnerable to self-serving interpretation and construction that promulgating even more subjective rules will do nothing more to curtail discovery abuses than the Rules of Civil Procedure and the Rules of Evidence already do (or don't, as the case may be).

Victor Cousin, the 19th century philosopher stated, "We need . . . art for art's sake."¹ W. Somerset Maugham who wrote, "Art for art's sake makes no more sense than gin for gin's sake." Standards for standards' sake are no more sensible. In reviewing the Standards of Professionalism and Civility, I see no pre-existing need that is filled by their passage, no flaw in the existing rules of professional conduct that the Standards remedy. The Standards are prone to subjective interpretation and construction to the point of being meaningless, thus, unenforceable, and thus irrelevant to a lawyer's daily practice. Most, if not all, of the Standards as currently constituted, do little to lead good lawyers or bad lawyers to be any better than they would have been in their absence. In this regard the Standards of Professionalism and Civility do little to address or cure any lack of professionalism and civility in the profession.

1. The full quotation is, "We need religion for religion's sake, morality for morality's sake, and art for art's sake." Surprisingly, the work of Cousin fell into obscurity.

Posted on June 11, 2005 10:31 PM | Permalink

