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DEALING WITH DIFFICULT PARTIES

JANINE KIMBLE
Division Manager

JEFF TIMMERMAN
Assistant Attorney General

Roadmap

- The Golden Rule (revisited)
- Categories of difficult parties
- View from the bench
- Ethics
- Strategies

The Golden Rule

- Moral principle: treat others as you want to be treated
 - Ethics/maxim of reciprocity
 - *The Tale of the Eloquent Peasant* (Egypt, c. 2040-1650 BCE)
 - “Do for one who may do for you, that you may cause him thus to do.”
 - *Mahābhārata* (India, c. 400 BCE-400 CE)
 - One should never do something to others what they would consider an injury to themselves
 - Plato & Seneca
 - Arguably the most essential basis for the modern concept of human rights (M. Bornstein & W. Paden)

The Golden Rule

Judaism	That which is hateful to you do not do to another; that is the entire Torah, and the rest is its interpretation. Go study. - Talmud, Shabbat 31a	Buddhism	Hurt not others in ways that you yourself would find hurtful -Udanavarga 5:18
Christianity	In everything, do to others as you would have them do unto you; for this is the law and the Prophets. - New Testament, Matthew 7:12	Jainism	In happiness and suffering, in joy and grief, we should regard all creatures as we regard our own self, and should therefore refrain from inflicting upon others such injury as would appear undesirable to us if inflicted upon ourselves. -Yogasastra
Islam	None of you truly believes until he loves for his brother what he loves for himself. - 40 Hadith 13	Confucianism	Zigong asked, "It there a single saying that one may put into practice all one's life?" The Master said, "That would be 'reciprocity': That which you do not desire, do not do to others." - The Analects of Confucius 15.24
Baha'i Faith	Lay not on any soul a load which ye would not wish to be laid upon you, and desire not for any one the things ye would not desire for yourselves. -Gleanings From the Writings of Bahá'u'lláh, page 128	Taoism	Regard your neighbor's gain as your own gain, and your neighbor's loss as your own loss. - Lao Tse's Treatise on the Response of the Tao
Hinduism	One should never do that to another which one regards as injurious to one's own self. This, in brief, is the rule of dharma. - Brihaspati, Mahabharata 13.113.8 (Critical edition)	Wicca	Ever mind the Rule of Three Three times your acts return to thee This lesson well, thou must learn Thou only gets what thee dost earn - The Rule of Three

The Golden Rule

- “The question of what a lawyer has a *right* to do is not the same as the question of what a lawyer *should* do. This Court expects that members of its bar will treat each other civilly and make every effort to resolve disputes before inflicting costs on their own clients, their opponents, and the Court.”
 - *Bendickson v. Messerli & Kramer, P.A.*, 2016 WL 4408822 (D. Minn. Aug. 16, 2016) (Schiltz, C.J.)
 - *See also* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999)

The Golden Rule

- “[A]n attorney in the employ of the government is not on the same footing as a private attorney. [They have] the august majesty of the sovereign behind [their] every utterance; the economic power in the hands of some individual government lawyers can wreak total devastation on the average citizen. As a result, the attorney representing the government must be held to a higher standard than that of the ordinary lawyer.”
 - *Silverman, For & on Behalf of N.L.R.B. v. Ehrlich Beer Corp.*, 687 F. Supp. 67 (S.D.N.Y. 1987)

Scope

- **Incivility v. Zealous Representation (not equivalent)**
- “The adversary system of justice ... lays the responsibility on each party to advocate its own case and to assault the case of the other party. Since this battle of arguments is conducted by lawyers, they have a heightened duty of partisanship toward their own clients and a diminished duty to respect the interests of their adversaries or third parties. The adversary system thus excuses lawyers from common moral obligations to nonclients.”
 - David Luban, *Lawyers and Justice: An Ethical Study* (1988)
 - *See also* Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics Civility in Litigation*, 67 *FORDHAM L. REV.* 809 (1998)

Types of Difficult Parties

- **Confession:**
 - I've fit into more than one of these categories during my 20 years as a litigator
 - You probably have, too
 - And that's okay!—it's how we grow as lawyers (and people)
- **Vigilance, Self-Awareness, & Self-Reflection**
 - Plus: one part retraining your brain
- **General categories only—not intended to reference any specific professionals or firms**
 - Not mutually exclusive—shapeshifters—each compensates for something

Types of Difficult Parties

- **The Pure Aggressor**

- a/k/a the “Litigation Terrorist”
- TV and movie heroes—we idolize “toughness”
 - Battle of “The Hammer” (VA, NY, TX)—“I cannot rip out the hearts of those who hurt you. I cannot hand you their severed heads. But I can hunt them down and settle the score.”
- Will fight about everything, no matter how small
- Must “win” every encounter
- Desires to inflict “pain” on you and your client
- Largely ineffective approach—overcompensating

Types of Difficult Parties

- **The Passive Aggressor**
 - Presents as ambivalent
 - Vague or ambiguous promises
 - Non-committal—constantly changes plans and schedules
 - Assumes you agree unless you correct them
 - Everything is great until it's not
 - And then it's a ten-alarm fire
 - Subtle digs, sarcasm, and blaming
 - Gaslighting—accusations of dishonesty
 - Constantly questions your motives—are you really on parental leave?

Types of Difficult Parties

- **The Non-Responder**

- Waiting for Godot
- Emails to the ether
- Terse responses that often don't address your questions
- I have more important things to do
- Nothing is urgent until it is
 - And then it's somehow your fault for not being more persistent

Types of Difficult Parties

- **This is the Most Important Case in Human History**
 - No regard for your client, workload, or work-life balance
 - You must respond to my inquiries immediately—or else!
 - Bombard with emails and requests
 - Indignation and over-litigating
 - Escalating rhetoric and threats
 - Goal is to pressure you into erring

Types of Difficult Parties

- **The Smartest Person in the Room**
 - Have you seen my CV?
 - Talk more than they listen—interrupt you
 - Intellectually belittling
 - Dismiss your ideas
 - A “win” is making you feel small
 - Always need the last word
 - Low in empathy (masking insecurity)

Types of Difficult Parties

- **Let Me Give You Tasks and Deadlines**
 - Presents as your boss
 - Their timeline dictates yours
 - Complete disregard for your client, workload, and work-life balance
 - Blame-shifting—you take the fall if things go south
 - Wants the credit but not willing to do the work
 - Exaggerated sense of immediacy

Types of Difficult Parties

- **The Confounder**

- Own reality—like you're not operating in the same dimension
- Examples:
 - You can't depose me because work product
 - Let me take this phone call during your deposition
 - Let me depose your 30(b)(6) witness from my car
 - Would you like to be in my movie?
 - Would you like to come over to my place after this deposition?
- Can make you question your judgment and what the reality is
- Difficult to discern any real strategy

The Bench Responds

- *McCullers v. Koch Food of Ala., LLC* (N.D. Ala. 2024)
 - Defendant requested a short extension to respond to complaint due over Thanksgiving
 - Plaintiff agreed, but only if defendant promised not to file a Rule 12 motion
 - **Result:** Extension granted—counsel ordered to have lunch together, with plaintiff’s counsel paying the bill and defendant’s counsel leaving the tip (and filing proof of the same)
 - “The Golden Rule—do unto others as you would have them do unto you—is not just a good rule of thumb for everyday life. It is a critical component of legal professionalism. Sadly, in recent years compliance with the rule is becoming rarer and rarer. It is time to reverse that trend, even if it is only in this case.”

The Bench Responds

- *Whitworth v. Merzano, et al.* (N.D. Ala. 2020)
 - Defendants moved to strike a summary judgment opposition brief filed 15 minutes late
 - **Result:** Motion denied
 - “There are no doubt many other instances when 15 minutes could make a world of difference. But, the electronic filing of an opposition brief in this court on a late Thursday afternoon is not one of them. Except, of course, in some far away, undiscovered parallel universe where a conversation like this may take place in chambers.”

The Bench Responds

- *Johnson v. Everyrealm, Inc.* (S.D.N.Y. 2023)
 - Plaintiff's counsel requested a three-week extension to respond to Rule 12 motion after wife unexpectedly went into labor delivered their child
 - Defense counsel was "only willing" to consent to extension if plaintiff's counsel met five demands, three of which related to entirely different cases
 - **Result**: Extension granted "unconditionally"
 - "The Court reminds defense counsel of the expectation of the judges in this District that counsel will comport themselves with decency. Counsel's attempt to exploit a moment of obvious personal exigency to extract concessions ... in other litigations no less, was unprofessional. The Court expects better."

The Bench Responds

- *The Security Nation Bank of Sioux City v. Abbott Labs.* (N.D. Iowa 2014)
 - Attorney made 115 “form” objections during two depositions; most did not follow objectionable questions and were coaching (“if you know”)
 - Attorney’s name appeared 92 times in the transcript of one deposition (average of once per page) and 381 times in the transcript of the other deposition (average of three times per page)
 - District court sua sponte filed an order to show cause why attorney should not be sanctioned
 - **Result:** Attorney ordered to **write and produce a training video** addressing impropriety of conduct, and circulate it to other attorneys at their firm
 - *Rev’d* 800 F.3d 936 (8th Cir. 2015) (recognizing district court’s authority to impose sanction, but holding that “[s]o unusual a sanction required the district court to give particularized notice of the nature of the sanction it had in mind so that counsel would have a meaningful opportunity to respond”)

The Bench Responds

- *In re: Facebook, Inc. Consumer Privacy User Profile Litig.* (N.D. Cal. 2023)
 - Facebook stonewalled discovery:
 - Refused to produce relevant records by “contort[ing] various statements made by opposing counsel and the magistrate judge beyond recognition”
 - Instructed a corporate witness not to answer 22 times on topics clearly in-scope
 - Accused opposing counsel of delay while spending “the better part of three years trying to gaslight their opponents, not to mention the Court”
 - **Result:** Facebook *and its counsel* were ordered to pay **\$925,078.51** in sanctions
 - “Sometimes lawyers and their clients engage in conduct of this sort because they are incompetent. Facebook and [BigLaw firm] are not incompetent.”
 - “[T]he Court finds by clear and convincing evidence that Facebook and [BigLaw firm’s] conduct reflected a sustained, concerted, bad-faith effort to throw obstacle after obstacle in front of the plaintiffs, all in an attempt to push the plaintiffs into settling the case for less than they would have gotten otherwise.”

The Bench Responds

- *Doe I v. Exxon Mobile Corp.* (D.D.C. 2022)
 - District court ordered defense attorney to show cause why they should not be sanctioned for impugning opposing counsel's character without support
 - Defense witness "severely, repeatedly, and perversely obstructed his own deposition" by refusing to answer questions; "wast[ed] time" by "repeatedly read[ing] long answers directly from his notes; and provided "inaccurate" and "evasive" answers about whether he was reading from his notes and about who prepared them
 - Plaintiffs moved for sanctions
 - In a move the district court found "astonishing," defense counsel cross-moved for sanctions claiming opposing counsel "impeded his own deposition"
 - **Result: *Defense counsel* sanctioned **\$281,900.78** in attorney's fees and **\$7,461.53** in expenses**

Ethics

- *Sometimes* difficult attorney behavior raises ethical issues.
 - Minnesota Rules of Professional Conduct
 - Professional Aspirations adopted Jan. 11, 2001 (“These standards are not to be used as a basis for litigation, lawyer discipline, or court sanctions.”), available at https://www.revisor.mn.gov/court_rules/rule/prprof-toh/
 - “A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.”
 - Local rules, e.g., in federal court
 - Minnesota Office of Lawyers Professional Responsibility (OLPR)
 - Can submit report, search past discipline, ask for advisory opinion, review LRPB opinions and Director’s Articles from *Bench & Bar* and *Minnesota Lawyer*

Ethics

- Civility is a core part of ethics
 - Civility *is* a behavioral code of decency
 - *It is not*
 - [1] agreement, [2] absence of criticism, [3] liking a person, [4] good manners
 - To be admitted, you must demonstrate good moral character and exemplary conduct that reflects well on the profession. Rules for Admission to the Bar 4(A)(2) (good moral character); 5(A)(1) (honesty and candor); 5(A)(4) (good judgment); 5(A)(6) (don't disregard rights and welfare of others).

Ethics: Your Oath

- Oath, Minn. Stat. Sec. 358.07(9):
 - "You do swear that you will support the Constitution of the United States and that of the state of Minnesota, and will conduct yourself as an attorney and counselor at law in an upright and courteous manner, to the best of your learning and ability, with all good fidelity as well to the court as to the client, and that you will use no falsehood or deceit, nor delay any person's cause for lucre or malice. So help you God."

Ethics: Rules of Prof'l Conduct

- Rules of Professional Conduct, Preamble
 - [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
 - [2] honest dealings with others
 - [5] A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.
 - [9] basic principles underlying these rules include the lawyer's obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Ethics

- Zealous advocacy is required but it is not unbounded.
 - “The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”
Rule 1.3, Comment [1]
- **No lying.** Rule 3.3 (lying to court or submitting false evidence); Rule 4.1 (knowing false statement); Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).
- **Fairness.** Rule 3.4 (fairness to opposing counsel); Rule 8.4(d) (conduct prejudicial to the administration of justice)
- **No harassment or improper purpose.** Rule 3.1 (frivolous claims); Rule 4.4(a) (no substantial purpose other than to embarrass, delay, or burden a third person); Rule 8.4(g) (harassment based on protected status); 8.4(h) (discriminatory acts that violate federal, state or local law)

Ethics: Discipline & Civility

- As of 2014, a lack of common courtesy is often one of the reasons someone files an OLPR complaint against an attorney.
 - Alone, it would not necessarily violate a Rule, but the complaints usually involve other allegations as well.
- *In re Disciplinary Action against Torgerson*, 870 N.W.2d 602, 615 (Minn.), reinstatement granted, 872 N.W.2d 887 (Minn. 2015)
 - 60-day suspension where lawyer accused of yelling at court staffers and wrongly claiming a judge was trying to set her up
 - Not just lack of civility, but the Court observed, “The bulk of the referee’s findings of misconduct follow a central theme: Torgerson lacked professionalism in dealing with judges, court staff and other attorneys[.]”

Ethics: Discipline & Civility

- *In re Disciplinary Action Against Nickitas*, 984 N.W.2d 232 (Minn. 2023)
 - During a phone call with court staff, the attorney became belligerent and used obscene and offensive language while describing his frustrations with the court's process for considering and granting IFP applications.
 - While on the phone with the civil division lead worker regarding an IFP application, the attorney screamed loudly and used the word "f***" multiple times, also told her to shut up, repeatedly and loudly interrupted the staff member, in effect preventing her from speaking
 - The attorney also stated, "You people do not know what the f*** you are doing."
 - "The attorney's use of abusive and obscene language and his belligerent behavior to court staff—characterized as the worst the staff ever experienced—is serious. Litigation is a forum where parties will often disagree, sometimes quite profoundly. But there is a line between vigorous and spirited—yet civil—disagreement on the one hand, and impermissible lack of restraint and respect for others and lack of control over one's emotions amounting to harassment of others on the other."
 - The attorney was indefinitely suspended, with the right to petition for reinstatement after 120 days.

Strategies

- **Trust yourself**
 - Their end goal often is to sow self-doubt—that only happens if you let it
 - Stay grounded and keep your compass pointed north
 - Keep your word
- **Assess your opponent**
 - Early on and consistently
 - Do they fit in a “difficult” category?
 - What can you learn about them from your colleagues and connections?
 - What can you learn about them from their other cases?

Strategies

- **Lawyer with kindness and compassion**
 - Set the tone early—and maintain it
 - Take the high road—always—it’s what you’ll be remembered for
 - Extend professional courtesies—even if they won’t
 - Come in “hot” only when circumstances warrant—be deliberate
- **Don’t reciprocate or take the bait**
 - Be calm and stay calm
 - Find your headspace—wait to read and respond
 - Send emails to no one
 - Have a sounding board

Strategies

- **Focus your energy on the endgame**
 - Channel your frustration into getting the best result for your client
 - See the forest—admire the trees
 - Pick your battles—let them have “wins” and feel in charge
- **Show your work**
 - Recap your discussions in letters or email—especially the nasty ones
 - Document the chronology of disputes
 - Send pro se parties copies of relevant rules—be helpful
 - **Remember**: everything you write could end up before a judge

Strategies

- **Set boundaries and stick to them**
 - Be vigilant—know your limits and speak up then they've been reached
 - Insist on communicating in writing only
 - Ask a colleague to sit in on verbal conversations
 - Treat yourself after difficult encounters
- **Don't take it personally**
 - It's a them thing, not a you thing
 - Separate the person from the action—try to find a redeeming quality or something on common—assume it's their worst day

Strategies

- **Deescalate**
 - Use humor or self-deprecation to inject levity
 - Give them (and you) space to cool down
 - Look for patterns—predictability
- **Change your approach**
 - Intentional v. spontaneous
 - Embrace empathy
 - Example: difficult deponent

Strategies

- **Report out**
 - Show the court
 - Find a natural injection point
 - Rely on your chronology of documented communications
 - Let the court see what you've been dealing with—but be complete
 - Contact OLPR
 - Hotline—resource for working through difficult ethics scenarios
 - Ethics complaint—option of last resort

Strategies

- **Practice Self-Care**
 - Mindset—assume the best
 - Mindfulness meditation
 - Exercise
 - Phone a friend/colleague—and pay it forward
 - Respect your headspace
 - Take a mental health day (yes, those are a thing)
 - Lawyers Concerned for Lawyers

Questions?

- 26,065 licensed lawyers in Minnesota (2024)
- Yet the legal community feels small
- See that same lawyers over-and-over
 - Your approach today shapes how you will be treated in the future—won't always have the upper hand
- Civility is core to our professional—and personal—obligations
 - Collective effort is needed to turn the tide
 - You might just be a happier, healthier, and more satisfied lawyer, too