

P E N N S Y L V A N I A LAW WEEKLY

Monday, April 11, 2005

Vol. XXVIII No. 24

ALM

COMMENTARY

'Professionalism' Revisited

Lawyers and judges talk about it, but what about the client's needs?

BY J. DANIEL HULL
Special to the Law Weekly

Over the past 15 years, it seems like lawyers and judges have written or talked *a lot* about the virtues of lawyer "professionalism."

The idea was both to improve the image of lawyers and address complaints of lawyers themselves, dissatisfied with the increasingly contentious nature of the profession. Decrying "Rambo" pretrial tactics and "scorched earth" discovery, these commentators noted that trial and transactional lawyers alike should strive to be cooperative, amicable and accommodating in their dealings with opposing counsel. They were right, of course – to a point. Professionalism raises the tone and the quality of practice. Lawyers can get to the heart of the matter instead of playing games. In litigation, goals are achieved more cost-efficiently; there is less vindictiveness or posturing. In transactions, too,

there is less bravado and more residual goodwill after a deal is concluded.

and character expected of a highly trained profession."

In litigation, some procedural rules indirectly, but effectively, encourage professionalism through opportunities to be efficient and accommodating. For example, Federal Rule of Civil Procedure 29 and its counterparts in the District of Columbia and several states permit parties in most circumstances to stipulate, without court approval, to modifications of formal discovery procedures. Attorneys may enter into any number of arrangements to make discovery practice less formal, modify deadlines and thereby help keep fees and expenses down. Similarly, in most jurisdictions, attorneys can also extend time periods for responses to formal pleadings.



'Professionalism' – like good crops, the flag and motherhood – is indeed hard to criticize. It's also tough to define.

AN 'ARROGANT AND NASTY' HYPOTHETICAL

But what happens when our best attitudes and creative uses of the rules fail the client? Consider a hypothetical. Your client, Upstart Industries Inc., had your firm bring an action for money damages against one of its competitors, WidgetTech Inc. Negotiations to settle this dispute in the 18 months before you filed the complaint were disastrous. WidgetTech was uncooperative, dilatory and even hostile. After filing the complaint, and three days before a responsive pleading is due, you receive a telephone call from one of WidgetTech's local attorneys. Although he is quite familiar with

'GOOD CROPS, THE FLAG AND MOTHERHOOD'

And so on. "Professionalism" – like good crops, the flag and motherhood – is indeed hard to criticize. It's also tough to define. The term doesn't appear in dictionaries much – but when it does, it seems to mean *both* skill (i.e., technical competence, judgment and zeal) and character (i.e., integrity, cooperation and "niceness"). The *Encarta World English Dictionary* defines professionalism as "professional standard: the skill, competence



J. Daniel Hull is a shareholder in Hull McGuire, which has offices in Pittsburgh, Washington, D.C. and San Diego and practices in the areas of commercial litigation, international law, taxation, transactions,

Hull telecommunications, intellectual property, employment practices, environmental and legislative affairs. Mr. Hull can be reached at jdhill@hullmcguire.com.

the case, he asks for an additional 45 days (the rule allows only 20) to file an answer. Should you grant it in the spirit of "professionalism?" Let's say you do grant it, an extended deadline passes and nothing is served or filed. Should you encourage your client to incur the costs to seek a default judgment — even though you know a judge is likely to ultimately vacate it?

Weeks pass and discovery finally proceeds in earnest. Another one of WidgetTech's attorneys calls you, appealing to your sense of "professionalism." This time, she asks you for an additional 60 days (90 in all, the rule allows 30) to respond to interrogatories and document requests which are straightforward and well below the number allowed. A wrinkle: she's past president of the local bar association and a close, personal friend of the general counsel of one of your best clients. All things being equal, you want her to like you. What do you tell her?

SMART CLIENTS AND THEIR LAWYERS

In the discussion of professionalism, very little has been said about *clients*. Clients are important. In courts and transactional work, we are engaged and paid to represent their interests. Smart clients will refuse to be relegated to mere equipment or props in a game played by their lawyers. My firm's clients understand the role of professionalism — most of their contact people are lawyers (i.e., general counsel) themselves — but our clients pay us to get things done effectively, efficiently and quickly. By way of background, 95 percent of our clients are businesses and they are from all over the globe. If asked about "the rules of professionalism," here is what they would say:

1. *We come first. Be nice — but if in doubt, use the rules.* If you feel you know the lawyers you are dealing with, we will follow your advice and instincts. If you are in doubt about the lawyers, or if it might compromise us to deviate from the formal procedural rules, please stay close to those rules. Frankly, Upstart has been in business long enough to know that practitioners in your city are pretty much like lawyers in New York City, Sioux City, or anywhere else. The main differences lie in degrees of aggression — and generally aggression (i.e., zeal) is not unprofessional. Upstart knows that some lawyers at times transform advocacy and trying to serve the client into inclinations toward over-lawyering, discovery abuse and outright dishonesty. On rare occasions, we have even seen opposing counsel hide a document, or get a witness to lie. It happens. So if you are unclear about how to respond to such tactics, use the rules.

2. *If you can develop an amicable working relationship with opposing counsel, please do so.* If you can do this, it will save us time, money and goodwill. This is also true of your relationship with government attorneys who represent administrative agencies in regulatory matters.

3. *Please move this matter along.* At first, please use the deadlines in the procedural rules. If someone asks you for a two week extension in discovery, and you believe all he or she needs is an extra week to produce the information or witness requested, tell opposing counsel that a week is enough time. (We will consider filing a motion to compel production.) Upstart has an interest in resolving this matter without more delays.

4. *Be timely and substantive; practice "clean hands."* Try to provide timely and good

responses to opposing counsel's discovery requests and other deadlines. Do this whether or not opposing counsel does it.

5. *If you have, or would like to have, a personal relationship with opposing counsel, that's fine, but don't let the relationship hurt us — the client.* We don't care as much as you do about your maintaining or developing collegiality with other lawyers in your jurisdiction; in fact, we could not care less.

6. *If opposing counsel shows animosity toward you for following the procedural rules and keeping things moving, that is tough.* Upstart hired you to represent it. We would like you to get this done. Again, as your client, we seldom think that aggression and persistence are "unprofessional."

7. *Conduct your discussions with opposing counsel as if we were listening.* No, this does not mean Upstart wants you to posture, or fight tooth-and-nail over every point. However, if it's in our interest to reduce a request for an extension of time from forty-five days to fifteen days, please do so. If Upstart is a plaintiff in commercial litigation, we would like to secure our remedies as soon as possible. When Upstart is a defendant, we would like you to obtain information about the plaintiff's case as soon as you can, determine our exposure and resolve it.

8. *If you have followed these rules and opposing counsel starts making noises about "professionalism" and "courtesy," please refer to Rule No. 1.* Occasionally, a lawyer may attempt to turn "professionalism" into a sword. This is nonsense. If you have followed the rules, even aggressively, and opposing counsel whines "hardball tactics," you are doing a good job for Upstart. Don't let your adversary turn your sticking to the rules on our behalf into a red herring. We come first. ■