

FAMILY FEUD – ETHICS PRESENTATION

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State Bar of Texas
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CHAPTER 6



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Mr. Disiere is a leading practitioner in the area of complex insurance coverage issues and related litigation with over twenty years experience in the field. He is an Adjunct Professor of Property and Casualty Insurance Law at the University of Houston Law Center and holds an Associate in Claims (AIC) designation from the American Institute for Chartered Property Casualty Underwriters. He maintains an active practice developing and shaping Texas insurance jurisprudence involving bad faith, insurance coverage, first and third-party litigation and related issues. In addition to receiving an AV Rating from Martindale-Hubbell, Mr. Disiere was voted a Texas Super Lawyer by *Texas Monthly Magazine* for 2007 and 2008 and was also recognized in *H Texas Magazine* as one of Houston's Top Lawyers in Insurance Coverage and Litigation in 2007 and 2008. Lastly, Mr. Disiere was recognized as one of the leading lawyers in the U.S. in the field of Insurance and Reinsurance – Natural Disasters by *The Legal 500 US: Volume III (Litigation)* 2007 and was selected by his peers for inclusion in the 2009 edition of *The Best Lawyers in America*® in the specialty of Insurance Law.

PRACTICE AREAS:

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HONORS:

- Named "Texas Super Lawyer" by *Texas Monthly Magazine* (2007), (2008).
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- Named as a top Insurance & Reinsurance Attorney by *Who's Who Legal: Texas 2008*.
- Named leading lawyer in the U.S. in the field of Insurance and Reinsurance – Natural Disasters by *The Legal 500 US: Volume III (Litigation)* 2007.
- Named by peers; *Best Lawyers in America – Insurance Law* (2009 edition).
- University of Houston – Clear Lake
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EMPLOYMENT:

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- Assistant Counsel for State Farm, Corporate Law Department, January 1995 – January 2000
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EDUCATION:

- University of Houston Law Center, J.D., 1992
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ARTICLES AND SEMINARS

- “Homeowner’s Policies Liability and Property Coverages: Update on Key Provisions and Case Law”; University of Houston Law Foundation Advanced Insurance and Tort Claims; April 10, 2008 (Dallas), April 17, 2008 (Houston), and May 29, 2008 (Austin)
- “Homeowner’s Litigation & Policy Update”; South Texas College of Law 12th Annual Texas Insurance Law Symposium; Houston, Texas; January 24, 2008
- “Homeowner’s Policies Liability and Property Coverages: Update on Key Provisions”; University of Houston Advanced Insurance and Tort Claims; June 21, 2007 (Houston) and Thursday, June 28, 2007 (Dallas)
- “Basic Insurance”; University of Houston People’s Law School; Houston, Texas; April 7, 2007
- “Homeowner’s Policies Liability and Property Coverages: Update on Key Provisions”; University of Houston Law Foundation Advanced Insurance and Tort Claims; March 22, 2007 (Dallas), March 29, 2007 (Houston) and April 12, 2007 (Austin)
- “Hot Insurance Topics Impacting Texas Consumers”; State Bar of Texas Consumer and Commercial Law Course; Dallas, Texas; October 13, 2006
- “The Necessary Mechanics for Handling Automobile Claims”; State Bar of Texas Insurance Law Section Annual Meeting and CLE; Austin, Texas; June 15, 2006
- “Ethics Jeopardy”; South Texas College of Law Texas Insurance Law Symposium; Houston, Texas; January 27, 2006
- “Everything You Ever Wanted to Know About Discovery in Insurance Cases”; State Bar of Texas Advanced Consumer Law Course; Houston, Texas; November 4, 2005
- “Hot Topics in Property, Liability and Automobile Insurance”; State Bar of Texas Annual Meeting Insurance Law Section CLE Program; Dallas, Texas; June 23, 2005
- “Discovery – Underwriting and Beyond the Claim File; What is There, How You Get It and How and What to Use”; The Insurance Law Section of the State Bar of Texas Second Annual Advanced Insurance Law Course; Dallas, Texas; March 31, 2005
- “What’s New in Personal Lines”; State Bar of Texas Annual Insurance Law Section Meeting & CLE; San Antonio, Texas; June 24, 2004
- “From Tilley to Gandy – Working in Shades of Gray”; The Insurance Law Section of the State Bar of Texas; Dallas, Texas; June 10-11, 2004
- “Hot Topics in Texas Insurance Law”; State Bar of Texas Insurance Law Telephone Seminar Series; May 5, 2004
- “Who is Really Controlling the Defense? The Dilemma of the Litigation and Billing Guidelines and Other Control Devices”; State Bar of Texas First Annual Advanced Insurance Law Course
- “Property Insurance: Annotated Homeowner’s Policy”; Ultimate Insurance Seminar 2000
- “Commercial General Liability Policies and Other Insureds: Watch Your Language”; Government Contracts in Texas Seminar; November, 2000
- “Surf’s Up! Insurance Resources on the Web” Texas Insurance Law Symposium: Coverage and Litigation; South Texas College of Law; November, 2000

**THE COMPLETE PROFESSIONAL:
EFFECTIVE INTERACTION WITH COURTS, CLIENTS,
COUNSEL AND COLLEAGUES**

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BIOGRAPHY

Michael P. Maslanka is the Managing Partner of the Dallas office of Ford & Harrison, a national employment and labor law firm, with offices from New York to Los Angeles. Maslanka works with employers to simplify their issues; to quickly understand their options; and to effectively manage their workforces.

He is editor of the *Texas Employment Law Letter*, founded in 1990, and subscribed to monthly by over 1,800 Texas employers. Chambers USA, a rating guide for lawyers, describes him as "intellectually fertile" and notes his "holistic" approach to clients and their needs. Maslanka has tried a number of cases to verdict ranging from employee raiding to fraudulent inducement, and has tried 10 age discrimination cases to verdict.

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THE COMPLETE PROFESSIONAL: EFFECTIVE INTERACTION WITH COURTS, CLIENTS, COUNSEL AND COLLEAGUES

Being a lawyer requires multi-faceted dealings with several groups; each with its own needs. So, let's talk about the constituencies we service, and how best to professionally interact with each.

A. COLLEAGUES; YOU ALWAYS HURT THE ONES YOU LOVE

Lawyers can be jerks, even with their fellow firm lawyers. Why? Lawyers believe in hierarchy. Now hierarchy can be a good thing. We all need lines of reporting authority. We all need to be accountable. But, I am not talking about an org chart.

When someone thinks he is superior to someone else, you get – in the memorable phrase of Philip Zimbardo – the Lucifer effect. The phrase comes from Zimbardo's famous study at Stanford University. Students were divided into two groups: guards and prisoners. They were given their roles, and then put into a prison-like facility in the basement of a university building. Guess what? The guards, with the power of hierarchy behind them, became abusive to their once-fellow students but now subjects. In fact, Zimbardo recalls in his book (*The Lucifer Effect*) that things were getting so out of hand that his then-girlfriend, and now wife, told him to stop the experiment ASAP, or they were over as a couple.

Lawyers love hierarchy. Why? I think it comes, in part, from the false dichotomy of partners and associates. "By God, I am a partner. I rose up to be one. You must obey me." Maybe in your firm it is not that extreme, but it is there. Watch an associate sometime around partners. Notice how tentative they are (even the more senior associates). It is fear. Fear, driven by a hierarchy. What's to be done? A few ideas:

- *Mandate Free Expression*
Those lawyers on the receiving end of abuse or, at a minimum made to feel small, learn to keep quiet – certainly, not what you pay them six-figure salaries for. They often end-up saying only what they think the abusive partner wants them to say or they end up saying nothing.

Here is what I do. Whenever I work with a new lawyer for the first time, I tell them they only need to know the answer to one question: why do airplanes crash? Usually, I get answers based on physics. But, no – airplanes crash because the junior co-pilot sees a

blinking red light on the console, thinks that if anything was amiss surely the senior pilot would say something or act accordingly, and, just as surely, thinks to himself that he will not say anything that harms his career or gets him yelled at. So, the co-pilot says nothing and that's why airplanes crash.

- *Talk – Don't Email*
It is easier to disrespect someone when there is no face-to-face contact.

Communicating via technology creates low trust. Got something to say, do it in person or over the telephone. True story. At another firm, I got an abrupt email from a lawyer in management. "Where are your bills? Get them in now!" What a jerk. I had a good record of getting them in but, that month, had a problem. It is not professional to be a bully with your colleagues. I, of course, snapped to. But, here's the point: I did what he said because he had authority over me on the org chart. This is "org chart authority." And, it works in the short term.

But, to have a truly professional workplace, partners must develop and exercise moral authority. The appeal to a transcendent value, tying lawyer to lawyer. "Mike, I know you care about the firm, and I wanted to see why your bills were not in." Over the phone; person-to-person. Which would you better respond to?

- *Remind, Remind, Remind!*

Are people naturally honest, or do we conform our behavior to the good only under the threat of sanctions? These are all good questions. M.I.T. professor Dan Ariely illuminates them all in *Predictably Irrational: The Hidden Forces that Shape Our Decisions*. Here is an experiment he ran: three groups each take the same test, which involves taking a group of numbers and finding how many add up to 10. The subjects have five minutes. Their answers then go into a lottery drawing. If their answers are picked, the lottery winner gets \$10 for each correct match.

But, there are different constraints for the three groups.

- Group No.1: these subjects submitted their answer directly to the test takers – no chance to cheat.
- Group No.2: these subjects were on the honor system; they simply wrote down on a piece of paper the number of correct matches they found and were allowed to destroy their work sheets – chance to cheat.
- Group No.3: these subjects had a chance to

cheat like group No. 2, but before taking the test, they were asked to write down as many of the Ten Commandments as they could remember.

So, what happened? The group that could not cheat got 3.1 correct. The group that could cheat got 4.1. But, the group that could cheat, but had written down as many of the Commandments as they could recall, got 3.1 correct. When the experiment was repeated with a secular reminder of honesty – having the students acknowledge in writing that the study was governed by the M.I.T. Honor System – the results were the same. Those who could cheat did not.

Ariely notes some ramifications. Professions, like lawyers, should be required periodically to reaffirm their oaths verbally and in writing. (He mentions that the word "profession" is from the Latin "professus," which means "to affirm publicly." Lawyers need this.) As Ariely notes, one study found two-thirds of attorneys believe that lawyers today compromise their professionalism as a result of economic pressure. But, occasional re-upping to the rules doesn't work. There has to be an ethical reminder in close temporal proximity to the moment of temptation. So, what should law firms do? Here are a few modest suggestions to create a workplace permeated by ethical conduct:

- Like couples who renew their marriage vows on their anniversary, have employees agree again to codes of conduct on their work anniversary date; or, perhaps the date of bar admission. That date, like one's wedding date, is an important one. People remember it. And, having the re-upping on that date makes the recommitment more vivid and thus cognitively significant.
- Identify those employees who are most likely to be tempted because of their position, such as those who might be open to a conflict-of-interest. Train them in worst-case scenarios, not in best practices. Firefighters' training involves what can go wrong in their dangerous profession and how to avoid it. The lessons sink-in when presented starkly in life or death terms. Learn the same lesson regarding ethics training. For more on this idea, check out Michael Useem's *The Go Point: Knowing What To Do and When To Do It*.
- Be forgiving. If an employee errs and self reports, use this as a way to train, not to punish. Make sure employees understand this policy. It nips things in the bud.

Lawyers want to do the right thing. Law firms need to help them get there.

B. PROFESSIONALISM TOWARD STAFF

I could be a jerk, once upon a time. Ok, here is the truth, I still can be. There is no one who reads these words who can, hand-to-heart, say otherwise. And, it is the staff who often deal with the worst parts of hierarchy. Professionalism does not mean that you say "thanks" or "please." It means more.

In his book, *How Starbucks Saved My Life*, Michael Gates tells how he went from big time ad agency exec to Starbucks employee. Post-power, he realized that being merely polite to those behind the counter (as he did when in the clover) is not the same as understanding their value, appreciating their skills, and recognizing their humanity. "Please" and "thank you" are good places to start - if sincerely meant, not sprinkled about like air fresheners at the landfill - but they do not and cannot substitute for authentic respect. May I ask a favor? Next time someone does something for you, actually stop and think about the skill it takes to do the task. As I write this, I am in a bar and I wonder just how the bartender got the foam so right in my beer.

By the way, professionalism is good business, not just the right thing to do. Check out Robert Sutton's book, *The No Asshole Rule: Building a Civilized Workplace and Surviving One That Isn't*. He cites study after study that demonstrates that 25% of employees treated badly at work leave and, get this, 20% who simply watch the bad treatment also leave. The average replacement cost of a departing employee is \$20,000. You do the math in your firm.

This result was confirmed in a March 2008 article in *Harvard Business Review*, by Christine Porath and Amir Erez, entitled *Rudeness And Its Noxious Effects*. There were three groups: two were insulted in varying degrees, the other simply asked to watch and imagine they were the object of the rudeness. Both groups were then asked to perform simple cognitive tasks. Both insulted groups had difficulty, but so did the group that was asked to only empathize. Why? The participants were unable to use their cognitive processing power to perform the tasks, using their brain wattage on ruminating upon the rudeness or parsing the comments and figuring out how they should have responded. Check out more of the latest research; the April issue of the *Harvard Business Review* has a short piece, *How Toxic Colleagues Corrode Performance*, by Christine Porath and Christine Pearson. They set-out their research: a direct connection between berating bosses and backstabbing co-workers and workplace performance. Here is how employees, subjected to this type of incivility, reacted according to their research:

- √ 48% decreased their work effort;
- √ 47% decreased their time at work;
- √ 38% decreased their work quality;
- √ 68% said their performance declined;
- √ 80% lost work time worrying about the incivility incident;
- √ 63% lost time avoiding the offender; and,
- √ 75% said their commitment to the organization declined.

Porath and Pearson nail it: "As companies slash workforces and depend on the staff left behind to do more, they can't afford to let a few noxious employees corrode everyone else's performance." Well said. I look forward to reading their book, *The Cost of Bad Behavior: How Incivility is Damaging Your Business and What To Do About It*.

(1) Side Trip: Yes You Can Be A Bad Person

Let me take a moment to tell you that everyone who reads this piece, or who hears my voice, can be a bad person, including yours truly. Don't believe me? Science says otherwise. Here is a study that has been done all over the world. Always the same result.

People are recruited to participate in an experiment. They are told it is to test how electric shocks help or don't in learning and retention. They are told that a person in another room is hooked-up to electrodes. They will be asked a question, and if they get it wrong, they must hit a button that gives a small electric charge. Here, they are told, let me try it out on you. See, not so bad.

But, if the person in the other room gets yet another answer wrong, the subject must give them another, more powerful shock. And, if another one wrong, a higher level of shock; again and again, until the voltage has pretty much a skull and crossbones. The person in the other room is not really hooked-up, is just acting, but pounds the wall and begs for mercy. How many participants give the full electric dose? It is 68%. They are told you agreed to the experiment, and told so by an authority figure in a white coat. The participants rationalize that those being "shocked" are getting what they deserve. If they are too weak to fight back, whose fault is that?

Why do we go all the way? Cognitive dissonance. We can't hold two opposing thoughts in our brains at the same time - impossible. We think we are a good person. This conflicts with a wrong we have done. Most of us, rather than admit the wrong, seek to justify it by committing yet another. The

dissonance is thus resolved. The moral: always understand your capacity to be a bad person. When you do, you can rise above it. And, come clean when you made a mistake or acted poorly. Just do it!

C. PROFESSIONALISM TOWARDS OPPOSING (AND, SOMETIMES SEVERELY DYSFUNCTIONAL) COUNSEL

What have we come to, really? I worry. It was always hard to make a living as a lawyer. More so, now. Be aggressive, show the other side you mean business, win at all costs. I collect cases which seem over the top, but, trust me, they are common.

Look at *Landcap Value Partners v. Lowenstein Sandler*, from the Supreme Court of the State of New York, Part 35, Commercial Dispute. A young lawyer, female, is deposing a key witness of the defendant. The defendant's lawyer and his client bait and provoke the female lawyer. From the deposition:

Male Lawyer: What I want to do is get you mad enough so I can try this case.

The Witness: She won't be at trial.

Male Lawyer: Promise you'll let me try this case.

Female Lawyer: You should look me up, man.

Male Lawyer: I did...we're interested as to why you don't wear your wedding ring.

Trust me, it gets worse. The lawyer and client continue to attack her, telling her she is inexperienced and she "better get somebody else to try this case." The young lawyer files a motion to have the deposition supervised by a court-appointed referee and requests that the deposition be held at the courthouse. The response filed by the other lawyer: "**I am not aware of any rule or law which requires civility between counsel.**"

What's to be done? I tell you, I get frustrated at judges who fail to enforce professional conduct. They always seem to want the easy way out: "Well, you two lawyers go into the conference room and work it out." Judges are paid to judge. (Thanks for letting me vent.) So, what do we do to deal with a lack of professionalism? Know this. Judges and courts cannot fundamentally change a dysfunctional lawyer. No reprimand will change his conduct. No amount of ethics training will bring her wisdom. No amount of yelling will bring him wisdom. Instead, as my mom used to say, "always talk to people in a language they can understand." (And, for more of Mom's advice on professionalism, see the attached article.) So, first,

know the law.

- *Cadorna v. City and County of Denver*, 245 F.R.D. 490 CD.Colo. 2007)

Judge Robert Blackburn is a 19-year veteran of the Federal Bench in Denver. He presided over this age discrimination case, during which the plaintiff's lawyer insulted a witness on the stand, ignored objections and rolled his eyes upon receiving an adverse ruling from the court. There was more, but that's the gist of it. A big verdict was returned. What did the judge do? In September 2007, he tossed-out the verdict and granted the City's motion for new trial, lamenting in his order that the plaintiff perversely made it seem as if it were the judge trying to stop the truth from getting to the jury. Listen to the judge's frustration in his order granting a new trial:

Short of...incarcerating counsel for contempt, I exhausted [all] traditional means . . . I have never seen nothing comparable...[to the] disrespectful cockalorum, grandstanding, bombast, bullying and hyperbole [as exhibited] by plaintiff's counsel.

In keeping with my Mom's advice, he decided that the conduct deprived the employer of a fair trial and gave the employer a new one. Bet that got the lawyers' attention. What about zealous advocacy (which I'll talk more about in a minute)? The plaintiff's lawyer argued that's all he engaged in. The court:

Zealous advocacy is not a license to run roughshod over the search for truth that the concept is designed to ensure...instead of letting the justice of plaintiff's case speak for itself, [plaintiff's counsel] chose to delay and debate the very mechanism through which he sought relief.

- *Lee v. American Eagle Airlines*, 93 F.Supp.2d 1322 (S.D.Fla. 2000)

Or, be creative. Let's say a lawyer engages in unprofessional conduct, such as:

- Telling an African-American defense lawyer she was on the discrimination case only because she's black.
- Calling local counsel a "second-rate loser."
- Greeting opposing counsel in front of his client each day with "let's kick some ass" and "let the pounding begin."

The employer loses at trial. The dysfunctional lawyer seeks all of his attorney's fees, arguing that fees are awarded, at least in part, on a lawyer's "professional competence." Conduct unbecoming a member of the bar is a far cry from competence. Or, ask, as some cases permit, for an award of no attorney's fees whatsoever in these circumstances. In the *Lee* case, the fees were reduced from \$1.6 million to \$312,000. (By the way, the plaintiff binged-out with \$300,000 in compensatory damages and \$650,000 in punitive damages.) Is there anything we can do, aside from undertaking legally-based arguments?

Yes, *also* know human nature: dysfunctional people love causing an uproar; just love it. They float on a cloud when generating anxiety. They get high on embracing controversy. So, we all need to know what at first looks like an offbeat pairing – Mohammad Ali and the Buddha. The ultimate "buddy" movie.

First, Ali. Recall the rumble in the jungle, where a fearsome-looking George Foreman was fighting Ali, who was on the come-back trail. Ali did the rope-a-dope, letting Foreman punch himself out. Same in the law: sooner or later the sheer effort of being difficult ends up exhausting the dysfunctional. The trick is not to respond, which just feeds the dysfunction.

Now, the Buddha. A man, upon hearing of the Buddha's equanimity, set out to anger him. So, he verbally abused him every day, in every way. Nothing worked, and the man exclaimed to the Buddha, "how can you be so peaceful when I've been so offensive?" Buddha replied, "you've offered me a gift of anger, and if someone offers you a gift you do not accept, it still belongs to the giver." Buddha then smiled and walked off.

Remember this: *dysfunction cannot be cured; it can only be managed.*

Oh, one other thing: why is it that some lawyers believe that acting this way, whether the lawyer insulting the female attorney or the ones being a headache to the judges, can get away with it? Wayne S. Hyatt, a lawyer in Atlanta, wrote an interesting article in the *Vanderbilt Law Review*, *A Lawyer's Lament: Law Schools and The Profession of Law* (Vol. 60). He makes a good point in his article. I liked it so much that I'm going to quote it:

There is a significant difference between ethics and professionalism. The simplest, yet most descriptive, distinction is as follows. *Ethics* set-out how we are to act – what we are to be – because there are rules telling us how to do so. *Professionalism*, on the other hand, defines how we should act even when no one is watching, or more importantly, when no one is enforcing the rule. Professionalism rejects the myth that the "client comes first" [there are those who

interpret that] aphorism to mean "first and only." Professionalism redefines winning so that it does not mean "winning at all costs." And, winning does not mean that the other party must lose....

Here, he goes on to make a point that is important because it provides cover, so to speak, for lawyers who abuse opposing attorneys and their clients. Here's what he says:

To cater to the client is all about roles and relationships. It is often complicated by the troublesome word "zealous," and it is too often misapplied as a standard for representation of clients. Zeal means eager interest, and zealous means diligent. It calls for "hard work not hard ball," as Professor Geoffrey Hazard has pointed out. *Commitment to the client essentially requires a lawyer to place a client's interest before that lawyer's self-interest.*

This nails it. Let's go back to zealous advocacy and talk a little bit about how "zealous advocacy" can, as my mother told me in explaining the facts of life, lead from a moment's pleasure to a lifetime of regret.

D. PROFESSIONALISM TOWARD THE OPPOSING LITIGANT

While in Tulsa on business, I decided to take a busman's holiday, and dropped in on the closing arguments of an age discrimination case being tried in federal court. The plaintiff was a distinguished looking gentleman, and his war bride from England was in attendance. The defense lawyer began his summation. Here are "high points" of the closing:

- The plaintiff was a terrorist (this was pre 9-11), who had been harassing Corporate America for a number of years with this lawsuit, and the jury could bring this lawsuit to an end.
- Defense counsel was sure that the jury, like him, was sick and tired of hearing the plaintiff testify about his war record. Defense counsel's rationale for bringing this up: he talked about his war record because he did not have anything factual to say about his lawsuit.
- The plaintiff was a thief. The evidence? The plaintiff was a corporate bureaucrat who, at the end of one year, had a surplus in his budget, decided to spend it on company-related matters, all in an effort to make sure

that he received at least the same amount in his budget next year.

- The plaintiff was like a little wind-up toy that you put on the floor and, when it hits an obstacle like a wall, falls over and does not know what to do. Defense attorney analyzed this to the way the plaintiff handled operational problems at work.

During the closing argument, the company representative had an almost orgasmic look of delight on his face. Well, a \$400,000 verdict later, this look evaporated. Here's the moral: the defense lawyer was doing something which made the client happy for a moment, but was not what was needed in the case. We owe it to our clients to be effective and zealous advocates. But, we also owe it to our clients to protect them from themselves.

E. PROFESSIONALISM TOWARD CLIENTS

(1) Provide Concrete Action Consistent With the Lofty Poetry

Every law firm embraces certain values – some good, others bad. Lawyers prioritize one thing over another. So, in thinking about professionalism, think about whether your internal values are aligned with your external professions. Two ways to look at this: the clients you accept and the way you compensate your lawyers.

First, the clients you accept says a lot about your values. A few years ago, I met with a potential client. Guy owned an ad agency, and wanted to explore non-competes for his employees. Talking to him, he mentioned that he didn't see the need because his employees loved him; true, he threw things at them, but they knew that was just the creative process. (Treat his employees that way; how would he treat me?) As salesmen like to say, the best sale you make is often the sale you didn't make. Walt Buchman, in the great book *Law v. Life*, observes that when we take on a case or a client we don't like, we end-up ignoring the file. It moves from our desk, to our credenza, to the floor. We then start making up falsehoods to the client about the status of the case because nothing has been done on it, and nothing has been done because you don't like the client and (like any human) push-off doing what you don't like.

Now, compensation and professionalism. You look at a law firm website. It colorfully proclaims that the firm puts clients first; brochures bang the drum about clients being the focus of attention; mission statements extol firm virtues. All this is fine, but do the actions of the firm conform to its promises?

The best way to tell this: firm compensation systems. Are partners compensated by brute numbers or client care? Are associate bonuses determined by

exceeding billable hour requirements or a fruit salad of factors?

There's a fundamental principle (yes, from Mom) that applies in employment law and which applies with equal force to professionalism: if someone says something is important, then he or she should treat it as if it's important. Or, as Charles Colson famously remarked during the Nixon Administration: "Don't listen to what we say. Watch what we do."

(2) Embrace Capitalism

Here's another fundamental truth that is easier to embrace in theory than to put into practice: everything has a free market value, attorneys fees included. There are matters that warrant, if not demand, hourly rates of \$500 or more. Is there a multi-million dollar deal on the line? Like the astronaut, a client doesn't want to be sitting atop a rocket pasted together by the lowest bidders.

Law firms don't always believe this. They often act as if capitalism applies to everyone else but, when it comes to them, it's socialism. I believe that professionalism demands that the economic value of a matter determine its legal budget. If a top executive leaves, violating her non-compete, action is needed now and hourly rate is irrelevant.

Let's shift gears. Two \$15-per-hour employees get in a fight in the company parking lot. One gets fired, and the other doesn't. The fired one brings a discrimination suit. Same value? No. Different price points? Yes. What a company pays in attorney's fees must be proportionate to the importance of the matter. Price points must be driven by what is really at stake.

(3) Fair Is As Fair Does

Clients use this phrase every day with one another: be fair with me, and I'll be fair with you. And, I think it should be the same with companies and the firms they hire. Why is that so hard for us to do? The challenges wrought by the billable hour. It is the alpha/omega of a firm life: at times, tilting work-product toward less efficient means of delivery.

Before we get to the solution, let's look at the problem of the billable hour. *The Hours: The Short, Unhappy History of How Lawyers Bill Their Clients* by Niki Cuckes, which appeared in the September/October 2002 issue of *Legal Affairs* magazine, is a great article. She touches upon a key point: while billing 2,000 hours may not seem onerous, she notes that studies show that a lawyer must spend 3 hours in the office for every 2 hours of billable work. Lawyers can't simply bill time. Their administrative tasks associated with coming to the law office and trying to squeeze out 8 hours means that you have to be at work for 12-13 hours.

You are tempted to exaggerate. In fact, many lawyers do exaggerate. They write down hours they

didn't work or exaggerate the hours they did. An excellent article that appeared in the *Vanderbilt Law Review*, entitled *On Being A Happy, Healthy And Ethical Member Or An Unhappy, Unhealthy And Unethical Profession*, by Professor Patrick I. Schlitz talks about how slippery a slope it is.

You don't start out trying to be unprofessional or unethical. But, one day you're not going to meet your hours and you bill a client for 90 minutes for a task that really took you only 60 minutes. The mind rationalizes to himself (remember "cognitive dissonance?") that you'll repay the client by doing 30 minutes of work for the client for free. The rationalization is that you are borrowing time from the client, and not stealing it. But then, you stop paying back the "little loans," convincing yourself that your good work deserves a little time bonus.

It then infects the rest of your practice. Missed a deadline? Tell a "white lie" for why you missed it. Find an inconvenient document no one else knows about? Slip it into the trash can.

Here's the bottom line according to Professor Schlitz (now, Judge Schlitz):

Do you see what will happen? After a couple of years of this, you won't even notice that you are lying and cheating and stealing every day that you practice law. None of these things will seem like a big deal in itself – an extra 15 minutes added to a time sheet here, a little white lie to cover a missed deadline there. But, after a while, your entire frame of reference will change.

You will still be making dozens of quick, calm, instinctive decisions every day, but those decisions, instead of reflecting the notions of right and wrong by which you conduct your personal life, will instead reflect the set of values by which you will conduct your professional life – a set of values that embodies not what is right or wrong, but what is profitable, what you can get away with. The system will have succeeded in replacing your values with the system's value, and the system will be profiting as a result.

An article from *Law 360 Reporter* Anne Unda, *Billable Hour Is Vulnerable to Attack* bears this out. She quotes a survey showing that 54.6% of lawyers "copped to performing unnecessary tasks just to puff-up their billable figure, an increase from previous years." And, get this, two-thirds of lawyers indicated they had "specific knowledge of bill-pumping." Her piece notes that it isn't so much time recorded that isn't really worked, but giving the client more lawyering

than it really needs: "there is more of a temptation to leave fewer stones unturned or do a little extra research", she quotes the author of the survey. So, what's to be done?

- √ Create a compensation system reflective of true professional values. This means (gasp!) that you might make less this year than last year. But, after all, we took an oath, just like the Mafia. (Although enforcement of the oath may be different: as Tony Soprano might say, "We don't send letters. We make visits.")
- √ Be willing to offer alternatives to the billable hour. But, before you do that, understand that most clients seem comfortable with the billable hour, it's just that they want the billable hour aligned with their needs – not yours. Make sure that budgets are made and budget updates provided. And, reconfigure the billable hour to reward efficiency. A law firm wants hourly rates of "X," company says "Y," split the difference if the firm delivers certain metrics. Or, reward a firm beyond "X" if they meet certain agreed upon benchmarks or milestones. Or, simply manage the billable hour differently: with an eye towards value and efficiency.
- √ There are some interesting books on professionalism. Here's one: *Strategy and The Fat Smoker: Doing What's Obvious But Not Easy*. David Maister relates that having a collection of great lawyers is not the same as having a great and effective organization. Rather, he writes that firms are made up of roaming bands of fighting warlords, each of which have their followers, ruling over a group of cowed citizens in a temporary alliance – until a better opportunity comes along. Avoid Maister's description.

F. MAISTER HAS A GREAT POINT

Firms that want to earn professionalism props need to structure their firm so that it insists upon efficiency and value delivered, not by a random collection of stars, but by a firm. Firms need to institutionalize their knowledge through knowledge management, aggregating its knowledge of the M.O. of plaintiffs lawyers, the proclivities of judges, winning arguments and more. Lawyers should volunteer After-Action Reports, detailing what happened and why, what went right and how the company can do more of that, and what went wrong and how the company can fix that. Lawyers should be able to look their clients in the eye at the end of the engagement and say, "here's

what we learned: I hope you can fix it and that you never see me again." A truly professional lawyer is one that provides light, not just heat. In the long run, it costs a lot less.

I leave you in this section with two thoughts. One, from the General Counsel of Cisco, Mark Chandler; and, the other from Tony Soprano. First, Chandler:

Put most bluntly, the most fundamental misalignment of interests is between clients who are driven to manage expenses and law firms which are compensated by the hour...if the economic system of the firm is frustrating to associates and even some partners, I can tell you from the standpoint of a metric-driven general counsel, it is even more incomprehensible. It is the last vestige of the Medieval guild system to survive into the 21st century.

...[Law firm] winners will be those who are able to standardize services to meet clients' costs management and predictability needs where very good is good enough...the greatest vulnerability in the legal industry today is a failure to make information more accessible to clients, to drive models based on value and efficiency.

I agree with this. Yet, there need not be a collision between the interest of firms and interests of Corporate America. And, for this lesson, I go to Tony Soprano. Recall during the last episodes of *The Sopranos*. Tony visits Phil Leotardo in the hospital. Phil is recovering from a heart attack and can't speak. They are at odds, but Tony smiles and says, "Phil, there's plenty for everybody. It doesn't have to be like this." Well, things didn't quite work out for Phil. But, Tony was right. There is plenty for everybody.

Firms and companies just need to have a reality check on the hows and whys of buying legal services; to make them more accessible and to align values. Until then, those sending the legal bills and those paying them will all wake up with a blue moon in their eyes.

G. PROFESSIONALISM TOWARD YOURSELF

You are going to make mistakes in the practice of law. We are paid to exercise judgment and sometimes our judgments will be wrong. This does not mean we must expunge our sins by languishing in a purgatory of our own making. Learning from your mistakes is worthwhile; punishing yourself for them is not. Unfortunately, lawyers have a difficult time distinguishing between the two. As a lawyer, the best you can do is to prepare, provide an honest assessment

of the case to your client, attempt a negotiated settlement, and then try the best case that you can.

Here is a warning sign that you should not take lightly: when you get an adverse verdict or ruling, and you feel as bad or worse about it than your client, then something is wrong. In that event, you have become too close to the case and the client, and need to pull back.

As Professor David Crump of the University of Houston Law Center has astutely pointed out, a good lawyer's personal commitment to his or her client works against him or her when he or she loses. Often, the commitment for excellence elevates the defeat to a personal rejection. Crump notes that after losing a trial, many lawyers actually experience the stages of grief; denial ("the judge will give me a new trial"); anger ("the other side's witnesses did not tell the truth and the judge did not let me show that"); self-negotiation (I could have hired a metallurgy expert but then, maybe that would not have made any difference either"); and, finally acceptance ("well, I will take it as a learning experience").

The danger is when a lawyer becomes stuck in the stages of denial and anger. The bottom line: learn to let go. I know it's tough. We are wired to accept responsibility. Bachman talks about an experiment with two monkeys. Both are hooked-up to electrodes and given shocks. But, one monkey has a lever that he can push that stops the shocks to him and to the other monkey. The other monkey does not. The "lever" monkey figures out that he can help both, and furiously hits the lever in an effort to stop the shocks. The other helplessly takes it. Which one has the ulcers? That's right: lever monkey.

H. PROFESSIONALISM TOWARD THE PUBLIC: DO WELL BY DOING GOOD

Do well by doing good. Listen to this from the gospel of St. Luke:

*Woe unto you also, you lawyers!,
For you lade,
Men with burdens grievous to be borne,
And you yourself touch not one of the
burdens,
With one of your fingers. St. Luke 14:46.*

Lawyers. What are we good for? We know that the public wonders and we sometimes wonder. We do not increase the size of the economic pie, but only argue over how to divide an ever-shrinking pie. The public perceives us as writing the laws, making them vague, arguing over what the vagueness means, all the while billing, billing, billing. Plaintiffs lawyers try to make themselves wealthy through contingency fees hoping to hit the big one. Defense lawyers charge by the hour spending substantial time preparing a case for trial to

avoid the big ticket verdict.

What can lawyers do to combat this perception? Many lawyers engage in pro bono activities. Others become active in their communities, sitting on the school board, chairing a PTA committee, or serving on the board of directors of a charity. But, there are equally effective, albeit sometimes less obvious, ways of doing well by doing good. I once took on the case of a woman who claimed she was terminated for blowing the whistle on sexual harassment at her company. She was out of a job, her husband was laid off, and they had a child with Down's Syndrome. I told her I would develop the facts of her case and write her employer a letter in an attempt to get her job back or, at the least, some money. I elected to charge her \$250 for the entire project. Well, I ultimately got her job back, but she did not want it. She never said thank you, never sent me a Christmas card, nor any note of appreciation. Still, I was glad to do what I did, if only to prove the admonition of St. Luke wrong. Doing well by doing good does not have to involve discounting your fee to help someone. It can be something as simple as spending a few extra minutes explaining why you cannot take on a case, or as easy as telling a guilt-ridden client that hindsight is truly 20/20, or as basic as taking the time to refer potential clients to an attorney better suited to help them. Try it, you will like it.

I. PROFESSIONALISM: DO THE RIGHT THING

The late Vincent Foster delivered a commencement speech. It is one of the best statements I have ever read on professionalism. Listen to what he had to say:

But [here is a] point that [I cannot make] too strongly nor too often. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. Nothing travels faster than an accusation that another lawyer's word is no good. A judge who catches you in a disingenuous argument or mischaracterizing of a case will turn hard of hearing when you next show up to argue. Dents to the reputation in the legal profession are irreparable. You will have failures and disappointments...and sometimes doing the right thing will be very unpopular with your other clients or with the pundits at the local coffee shop. When the heat of controversy swarms around you, conviction that you did the right thing will be the best salve and the best sleeping medicine.

Or, as President Kennedy said in his Inaugural

Address, "the only sure reward in life is a clean conscience."

J. FINAL THOUGHTS: PROFESSIONALS PUT IT IN CONTEXT

In an episode of the *Honeymooners*, Jackie Gleason gets his medical test results mixed-up with those of Alice's pet. Jackie is fine, but the pet is terminal. Naturally, he is distraught until, at the end of the episode, he realizes the mix-up.

When he does, he storms over to Norton, grabs him by the shoulders, and exclaims: "Norton, Norton, I'm not going to die! I'm not going to die!" Norton gives him a quizzical look, his eyes opening wide and says, "You mean never, Ralphie? No Norton, not never."

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MOVIES THAT HOLD LESSONS FOR LAWYERS

by MICHAEL P. MASLANKA

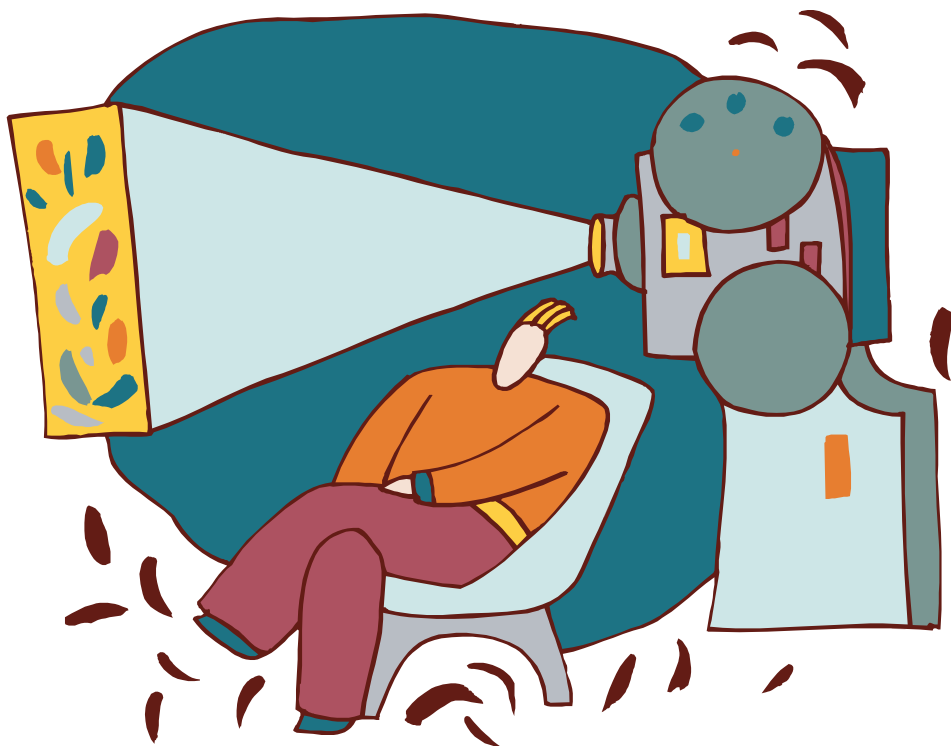
I was sitting at the bar of a Mexican restaurant in my Dallas neighborhood. A bar mate, hearing I was a lawyer, asked, “So, what are your favorite lawyer movies?” I thought about it and answered. My choices were not necessarily movies about lawyers, but movies that teach us how to be better lawyers.

Here’s a fundamental truth: Being a lawyer is about being a human being. The practice of law, like the art of making movies, deals with archetypal themes: failing and forgiving, the dangers and rewards of idealism, the search for meaning through justice, and losing and finding our way.

Look first at failing and forgiving. “Hoosiers” is set in the early 1950s. Norman Dale, played by Gene Hackman, comes to the remote village of Hickory, Ind., as the high school’s new basketball coach. The principal, an old friend, hired him. A fellow teacher dispassionately tells him, “A man your age comes to a place like this, either he’s running away from something or he has no place to go.”

Actually, she is right on both counts. Dale is barred for life from coaching college basketball for hitting one of his players. But to say “Hoosiers” is a movie about basketball is like saying “Moby Dick” is a novel about a whale.

The principal’s job offer, a singular act of decency, ripples out in multiple and



unexpected ways: a teacher — resigned to Hickory’s isolation — receives another chance at life. Shooter, a Hickory player 30 years ago but now an alcoholic, is offered an assistant coaching gig if he stays clean. The team’s worst player, a wreck in every game, gets the opportunity to win a key game by just being himself. And, in a karmic moment at a town meeting on whether to vote Dale out as coach, the teacher who so correctly sized Dale up decides not to reveal his secret past that she dug out of library records at the county seat. She says to the unruly assemblage, “Let’s give coach a chance.”

What does this mean for lawyers? Clients mess up. They zig when they should zag. Bad stuff happens. Lawyers can teach their clients the value of forgiveness. Doesn’t everyone deserve a second chance at the free throw line?

Yet beware the second chance we bestow on ourselves. Roll “The Verdict,” in which Paul Newman plays Frank Galvin, a once-prominent lawyer now reduced to pressing his business card into the hands of the bereaved at funeral homes. He stumbles onto a dream case: a young woman in a coma, a botched procedure by arrogant doctors. He goes one morning to see his client in the hospital,

to snap a few photos as leverage in that afternoon's settlement conference. You hear only the hiss of the client's respirator and see only the gleam in Galvin's eyes. He thinks, "I can win this case big time, make up for my wasted life, my lost opportunities." He rejects a good offer.

In closing arguments, Galvin ostensibly talks about the case, but he is really talking about himself: "So much of the time, we are just lost. We say, 'Please, God, tell us what is right, what is true . . . after a time we become dead.'" He misuses the suit to serve his needs, not the client's. Whatever the jury decides is irrelevant. The "verdict" is a judgment upon him. He fails.

Some lawyers become Galvins. One day they are upholding their oaths as professionals, and the next they are trashing them. (Side note: The word "professional" is from the Latin, "to profess." In ancient times a doctor or an advocate "professed" in public that he placed the needs of others above his needs. Let's consider a revival.)

Ideal vs. Real

Why do lawyers lose their way? Because, I think, many attorneys are idealists. There is a moment, a turning point, when we actually see the disconnect between the world as we imagine it and the world as it is. We either accept the unbridgeable gap and survive, or we don't and perish.

Attorneys who need a refresher in this truth should pop in a DVD of Woody Allen's greatest, "Crimes and Misdemeanors." I watch it once a year as sort of an inoculation, like the yearly flu shot.

A married, privileged eye doctor arranges for the murder of his troublesome lover. The audience expects the police to catch him. No, that's not quite right. Allen manipulates viewers into thinking the doctor will be caught. The signs are all there: As if in a trance, the doctor blurts out a cryptic confession to his family. He returns to the place of the murder. The police interview him. Surely, the audience comes to believe, the wheel of justice will turn. But the joke is on the viewers. The doctor's conscience proves negotiable. Proportionality between crime and punishment is never achieved.

At film's end, the doctor meets a stranger at a wedding. He tells him obliquely of a man who did wrong: Yes, at first the man was troubled, but now he is in fine fettle. The terrible act is no more real to him than a plot in a novel he read years ago. The doctor tells the man that, without rationalizations for what we do, we could not function. The doctor walks off, arm-in-arm with his adoring and none-the-wiser wife.

If movies teach us about this disconnect, can they also teach us about managing it? Watch "Paths of Glory," Stanley Kubrick, 1957. It is World War I. A company of French soldiers fails in their assault on the Ant Hill, a fortified German position. Their mission was impossible. Three soldiers are randomly chosen to serve as examples and face courts martial.

Kirk Douglas plays Major Dax, a combat officer in war, a lawyer in peace. He defends them, but the result is predetermined. "There are times I am ashamed to be a member of the

human race and this is one such occasion," Dax thunders at the court martial board and begs for mercy. None is forthcoming. He tries everything but fails. He can't save the soldiers. Knowing he will lose, he lawyers on.

Galvin and Dax — one a hard-eyed idealist, the other a starry-eyed one. One's idealism ruins him, the other's elevates him. One's core holds, the other's crumbles. If lawyers once lose their core, can they ever find it again? Sure they can. My all-time favorite movie illuminating this pervasive truth: "Wall Street."

Lowly stockbroker Bud Fox, played by Charlie Sheen, lusts to become his idol, corporate raider Gordon Gekko. He gets a meeting with Gekko, who sucks in the willing Fox. Fox's downward spiral begins when he blabs insider information to Gekko. Fox then justifies that wrong by committing another and yet another. Everything unravels. Gekko betrays Fox, who then turns on Gekko and gets wired by the feds.

He and Gekko meet in Central Park. It starts to rain, the sky soon to rumble. Gekko smacks him in the mouth. Fox collapses, bleeding. Gekko throws him a handkerchief from his \$1,000 suit. Fox staggers up. It is riveting:


Gekko: "I gave you Darien [Fox's girlfriend and Gekko's former lover]. I gave you your manhood! I gave you everything! You could have been one of the great ones, Buddy. I looked at you, and I saw myself. Why?"

Fox: "I don't know. I guess I realized I am just Bud Fox. As much as I wanted to be Gordon Gekko, I'll always be Bud Fox."

Fox was lost but now is found. But being found is not easy. Driving to the federal courthouse, Fox tells his father, "Let's face it, dad, I'm going to jail." Fox doesn't blink at the truth. He doesn't seek rationalizations or offer equivocations. He accepts the truth.

These movies tell hard truths. Justice is seldom done. The bad prevail, the good suffer. Authority betrays us. Greed and envy rule our lives. In my heart, I know all this.

Yet, in my heart, I know this as well: For every hard truth, there is a saving grace — the redemptive force of second chances, the nobility of fighting for what's right, rediscovering our true colors and the beauty that karma brings.

"Hard Truths, Saving Graces" — now, there's a movie idea if I ever saw one. Lights! Camera! Action! 

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