

Exceeding the Ethical Limits In Conducting a Litigation

BY MARY C. DALY

When does a lawyer's trial conduct exceed ethical limits? Is it unethical to raise your voice to the judge or to opposing counsel? Must you disclose adverse authority if it is certain to sink a client's claim? Can you withhold your client's identity? Nowhere is the scope of a lawyer's duty of zealous representation more hotly debated than in the context of litigation practice and trial conduct. At one end of the debate's spectrum are those who argue that a lawyer as "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client," a rallying cry borrowed from Lord Brougham's famous defense of Queen Caroline. 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1820-21). In their iconography, the lawyer is depicted as a gladiator, relentlessly championing her client's cause in a hostile arena. At the spectrum's other end are those who argue that a lawyer, as a citizen of the legal profession and the body politic, has an ethical obligation to observe the common norms of civility, courtesy, decorum and fair play, even if that requires tempering the vigor of the representation.

The debate is more than a matter of academic interest for most litigators. After all, they are the ones on the front line. Their daily activities regularly require them to interpret and apply the meaning of Canon 7's uncertain caption in the New York Lawyer's Code of Professional Responsibility (Code), "[a] lawyer should represent a client zealously within the bounds of the law."

Labeled "Trial Conduct," DR 7-106 consists of three subsections. The topics the subsections address are unrelated to one another, and each sets separate boundaries on a lawyer's duty of zealous representation. Subsection (C) is the most important of the three. It specifically prohibits seven different kinds of conduct. Among the most problematic is Subsection (C)(6)'s prohibition on "engag[ing] in undignified or discourteous conduct which is degrading to a tribunal." It is hard to quarrel with most of the reported decisions disciplining lawyers for violating this provision. In *In re Dinhofer*, 690 N.Y.S.2d 245 (1st Dep't 1999), for example, the lawyer lambasted the judge: "I'm rude to you, because I think you deserve it. You are corrupt and you stink." See also, *United States v. Daidone*, 796 F. Supp. 715 (E.D.N.Y. 1992) (sanctioning defense counsel in a criminal case for numerous, separate acts of insubordination and/or disruption). Undignified or discourteous conduct aimed at opposing counsel also violates Subsection (C)(6). E.g., *Matter of Pollack*, 664 N.Y.S.2d 772 (1st Dep't 1997) (calling opposing counsel "a pimp"); *Matter of Kavanagh*, 597 N.Y.S.2d 24 (1st Dep't 1993) (accusing opposing counsel of having ties to organized crime).

On the other hand, not all the conduct condemned as a violation of Subsection (C)(6) rises to such extreme levels, as the recent, highly publicized decision in *Smith v. Au* (Bronx Co.) illustrates. See N.Y.L.J., Sept. 22, 2003, at 22. In *Au*, the court set aside the verdict in a medical malpractice case and ordered a new trial on liability and damages, criticizing the plaintiff's lawyer for having a "hostile attitude" to the court and making "unnecessary, mocking comments to his questions and the witness' responses." While this conduct, if correctly described by the court, is certainly not to be applauded, it would seem to fall far short of the conduct condemned in previous cases as a violation of Subsection

(C)(6). And the court's decision imposes a harsh penalty not only on the lawyer, but also on the lawyer's client.

Subsection (C)(6)'s prohibition on "engag[ing] in undignified or discourteous conduct which is degrading to a tribunal" establishes a minimal level of conduct. The legal profession expects more of its trial attorneys, however. The profession's aspirations are reflected in the Standards of Civility, Appendix A to 22 NYCRR Part 1200. While the Standards are not binding, they serve as "guidelines intended to encourage lawyers, judges and court personnel to observe the principles of civility and decorum, and to conform [sic] the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." Rather than condemn undignified or discourteous conduct, the guidelines exhort lawyers "to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court." *See, generally, Roy Simon, To Hell With Standards of Civility - Wait, Not So Fast!*, New York Prof. Res. Rep., June 1998, at 1.

Other Limits in DR 7-106

While Subsection C is the heart of DR 7-106, trial lawyers who ignore Subsections A and B of the Rule do so at their peril. Subsection A prohibits a lawyer from disregarding, or advising a client to disregard, "a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding."

However, it also permits a lawyer to "take appropriate steps in good faith to test the validity of such rule or ruling." Thus, for example, a lawyer in a hotly contested custody action may not counsel his client to disobey an order permitting visitation by the client's former spouse; but the lawyer may pursue all available procedures to obtain an immediate stay.

Subsection B consists of two parts. The first requires a lawyer to disclose "controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel." This mandate should not in theory be a source of concern for a trial lawyer. Only on rare occasions is the lawyer likely to encounter a statute or decision of a higher court that unequivocally determines an issue being litigated. *But, see, Time Warner Entertainment Co., L.P. v. Does*, 876 F. Supp. 407 (E.D.N.Y. 1994). Furthermore, this part of the disciplinary rule clearly contains some wiggle room. The "directly adverse" requirement is an open invitation for clever arguments by an imaginative lawyer.

A lawyer should not be too clever, however. Some courts interpret Subsection (B)(1) more broadly than others, and their interpretation can trip up a lawyer who reads it literally. *E.g., In re La Cucina Mary Ann, Inc. v. State Liquor Authority*, 541 N.Y.S.2d 220 (2d Dep't 1989). In a close situation, the lawyer should err on the side of disclosure. Not only will this prevent a charge of ethical violation against the lawyer, (*e.g., Cicio v. City of New York*, 469 N.Y.S.2d 484 (2d Dep't 1983)), but it will also conform the lawyer's conduct to the unwritten rule, "Thou shall not embarrass the trial judge." If the lawyer fails to disclose and an appellate court subsequently reverses the judge's decision in reliance on the undisclosed authority, the trial judge may be hostile to the lawyer and her client on remand. As experienced trial lawyers know only too well, the harm suffered may far outweigh any immediate setbacks flowing from the early disclosure.

The second part of Subsection B is deceptively simple: "In presenting a matter to a tribunal, a lawyer shall disclose . . . [u]nless privileged or irrelevant, the identities of the clients that the lawyer represents and of the persons who employed the lawyer." The identity of a lawyer's client will be a matter of public record in most cases. However, a client may want to preserve anonymity in a rare instance. The courts generally reject these requests in reliance on a long line of cases in other contexts holding that the identity of a client is not privileged. See, *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991). They will not require identification, however, if the disclosure would provide a last link to a crime. *D' Alessio v. Gilberg*, 617 N.Y.S.2d 484 (2d Dep't 1994).

Finally, it should be noted that the courts in sanctioning a lawyer for trial conduct may invoke other separate Code provisions, such as DR 1-102's prohibition against conduct "prejudicial to the administration of justice." E.g., *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 994 F. Supp. 447 (S.D.N.Y. 1997), aff'd, 138 F.3d 33 (2d Cir.), cert. denied, 525 U.S. 874 (1998). From time to time, the courts will also rely on Section 130-1.1, 2.2 NYCRR. Authorizing a court to impose financial sanctions for frivolous conduct in civil litigation. E.g., *Candolfi v. New York City Transit Authority*, 595 N.Y.S.2d 656 (Civil Ct., Kings Co. 1992).

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